GENERAL STATUTES
OF NORTH CAROLINA

ANNOTATED RULES OF NORTH CAROLINA

2009 EDITION

NORTH CAROLINA RULES ANNOTATED

2009 EDITION

For additional copies,
please visit our online bookstore at
www.lexisnexis.com/bookstore

or call customer service at

800-533-1637

Item # 46405

LexisNexis®

LexisNexis and the Knowledge Burst logo are registered trademarks
of Reed Elsevier Properties Inc., used under license.
© 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

CONVENIENT,
AFFORDABLE,
IN ONE VOLUME!

FEDERAL RULES OF COURT

2008 EDITION

The perfect complement to your state court rules set, Federal Rules of Court gives you the complete, current civil and criminal federal court rules in one convenient and affordable softbound volume.

UPDATED FOR 2008!

Summary Table of Contents:

- Constitution of the United States
- Federal Rules of Civil Procedure
- Supplemental Rules for Certain Admiralty and Maritime Claims
- Rules of Procedure of the Judicial Panel on Multidistrict Litigation
- Federal Rules of Criminal Procedure
- Federal Rules of Evidence
- Supreme Court Rules
- Federal Rules of Appellate Procedure
- Federal Bankruptcy Rules
- And much more...

$32

41150

978-1-4224-50413

ORDER TODAY!
Phone: **800-833-9844**
Fax: **800-643-1280**
Publication Number: 41150

LexisNexis®

State Library Of North Carolina
Raleigh, N.C.

GENERAL STATUTES
OF NORTH CAROLINA

ANNOTATED RULES
OF NORTH CAROLINA

2009 Edition

Prepared under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of
The Department of Justice,
by the Editorial Staff of the Publishers
under the Direction of
J.T. ANDERSON AND W.D. GIBSON

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For EDITORIAL QUESTIONS concerning this publication, or REPRINT PERMISSION, please call:
800-833-9844

For CUSTOMER SERVICE ASSISTANCE concerning replacement pages, shipments, billing or other matters, please call:

Customer Service Department at	800-833-9844
Outside the United States and Canada	518-487-3000
FAX	518-487-3584

For INFORMATION ON OTHER MATTHEW BENDER PUBLICATIONS, please call:

Your account manager or	800-223-1940
Outside the United States and Canada	518-487-3000

Copyright © 2008
by
Matthew Bender & Company, Inc.,
a member of the LexisNexis Group

All rights reserved.

LexisNexis and the knowledge burst logo are registered trademarks, and Michie is a trademark of Reed Elsevier Properties, Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties, Inc.

4648826

ISBN 978-1-4224-5027-7

LexisNexis

Matthew Bender & Company, Inc.
P.O. Box 7587, Charlottesville, VA 22906-7587

www.lexisnexis.com

(Pub.46405)

Preface

This is the 2009 Edition of the Annotated Rules of North Carolina. It contains rules and amendments thereto received by the publisher through October 20, 2008.

The volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

Roy Cooper
Attorney General

November 2008

Digitized by the Internet Archive
in 2026 with funding from
State Library of North Carolina

https://archive.org/details/generalstatuteso00nort_98

Scope of Volume

Statutes:

Federal statutes relating to authentication of records and removal of causes.

Rules:

- General Rules of Practice for the Superior and District Courts
- Custody and Visitation Mediation in North Carolina
- North Carolina Child Support Guidelines
- Rules for Court-Ordered Arbitration in North Carolina
- Canons of Ethics for Arbitrators
- Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions
- Rules Implementing Mediation in matters before the Clerk of Superior Court
- Rules of the North Carolina Supreme Court Implementing the Electric Supplier Territorial Dispute Mediation Program
- Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases
- Standards of Professional Conduct for Mediators
- Prelitigation Farm Nuisance Mediation Program
- Year 2000 Prelitigation Mediation Program
- North Carolina Rules of Appellate Procedure
  - Appendix A: Timetables for Appeals
  - Appendix B: Format and Style
  - Appendix C: Arrangement of Record on Appeal
  - Appendix D: Forms
  - Appendix E: Content of Briefs
  - Appendix F: Fees and Costs
  - Appendix G: Death Penalty Representation
- Rules of the Judicial Standards Commission
- Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission
- Code of Judicial Conduct
- Rules of Continuing Judicial Education
- Rules and Regulations of the North Carolina State Bar
- The Revised Rules of Professional Conduct of the North Carolina State Bar
- Order Establishing Client Security Fund
- Rules Governing Admission to Practice of Law
- Regulations Governing Continuing Legal Education
- Indigent Defense Services
- Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases
- North Carolina Supreme Court Library Rules
- Workers' Compensation Rules of the North Carolina Industrial Commission
- Rules for Mediated Settlement and Neutral Evaluation Conferences of the North Carolina Industrial Commission
- Rules of the Industrial Commission Relating to the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act
- Rules for Managed Care Organizations
- Medico-Legal Guidelines
- Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims
- Tort Claims Rules of the North Carolina Industrial Commission
- Rules of the Industrial Commission North Carolina Childhood Vaccine-Related Injury
- Rules for the Dispute Resolution Commission
- Local Rules of the United States Court of Appeals for the Fourth Circuit

Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit
  Appendix A. Resolution Respecting Bar Membership in the Judicial Conference of the Circuit
  Appendix B. Guidelines for Preparation of Appellate Transcripts in the Fourth Circuit
  Appendix C. Plan of the United States Court of Appeals for the Fourth Circuit in Implementation of the Criminal Justice Act
  Appendix D. Docketing Statement — Instructions
  Appendix E. Docketing Statement — Agency — Instructions
  Appendix F. Docketing Statement — Tax Court
Rules of the Judicial Council of the Fourth Circuit Governing Complaints of Judicial Misconduct and Disability
Rules of the United States District Court for the Eastern District of North Carolina
Rules of the United States Bankruptcy Court for the Eastern District of North Carolina
Local Rules of Civil, Criminal, and Bankruptcy Practice of the United States District Court for the Middle District of North Carolina
Rules of the United States District Court for the Western District of North Carolina
Western District Civil Justice Expense Plan
Rules of the United States Bankruptcy Court for the Western District of North Carolina
Rules Governing Section 2254 Cases in the United States District Courts
Rules Governing Section 2255 Proceedings for the United States District Courts
Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates [Abrogated]
Removal of Causes
Authentication of Records
Extradition

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted on LEXIS as of September 21, 2007. These cases will be printed in the following reports:

  South Eastern Reporter 2nd Series
  Federal Reporter 3rd Series
  Federal Supplement
  Federal Rules Decisions
  Bankruptcy Reports
  Supreme Court Reporter

Additionally, annotations have been taken from the following sources:

  North Carolina Law Review
  Wake Forest Law Review
  Campbell Law Review
  Duke Law Journal
  North Carolina Central Law Journal
  Opinions of the Attorney General

Table of Contents

State Rules

Page
General Rules of Practice for the Superior and District Courts 1
Index.. 29
Custody and Visitation Mediation in North Carolina 31
Index.. 39
North Carolina Child Support Guidelines 41
Rules for Court-Ordered Arbitration in North Carolina 69
Index.. 79
Canons of Ethics for Arbitrators 81
Index.. 89
Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions 91
Index.. 111
Rules Implementing Mediation in Matters before the Clerk of Superior Court 115
Index.. 123
Rules Implementing Mediation in Matters Pending in District Criminal Court 125
Index.. 133
Rules of the North Carolina Supreme Court Implementing the Electric Supplier Territorial Dispute Mediation Program........................ 137
Index.. 143
Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases 145
Index.. 161
Standards of Professional Conduct for Mediators 167
Index.. 171
Prelitigation Farm Nuisance Mediation Program.............................. 173
Index.. 179
Year 2000 Prelitigation Mediation Program 181
Index.. 187
North Carolina Rules of Appellate Procedure.................................... 189
Appendix A: Timetables for Appeals 380
Appendix B: Format and Style.. 383
Appendix C: Arrangement of Record on Appeal 387
Appendix D: Forms... 390
Appendix E: Content of Briefs 396
Appendix F: Fees and Costs.. 400
Appendix G: Style Manual.. 401
Index.. 461
Rules of the Judicial Standards Commission 469
Index.. 479
Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.. 483
Index.. 487
Code of Judicial Conduct 489
Index.. 503
Rules of Continuing Judicial Education.. 505
Index.. 509
Rules and Regulations of the North Carolina State Bar 511

Rules Page
Index........ 717
The Revised Rules of Professional Conduct of the North Carolina State Bar 729
Index........ 857
Order Establishing Client Security Fund........ 865
Rules Governing Admission to Practice of Law........ 867
Index........ 885
Regulations Governing Continuing Legal Education........ 887
Index........ 893
Indigent Defense Services........ 895
Index........ 959
Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases........ 963
Index........ 975
North Carolina Supreme Court Library Rules........ 977
Appendix I........ 981
Index........ 983
Workers' Compensation Rules of the North Carolina Industrial Commission........ 985
Index........ 1017
Rules for Mediated Settlement and Neutral Evaluation Conferences of the North Carolina Industrial Commission........ 1021
Index........ 1033
Rules of the Industrial Commission Relating to the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act........ 1037
Index........ 1041
Rules for Managed Care Organizations........ 1043
Index........ 1047
Medico-Legal Guidelines........ 1049
Index........ 1091
Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims........ 1095
Index........ 1103
Tort Claims Rules of the North Carolina Industrial Commission........ 1105
Index........ 1111
Childhood Vaccine-Related Injury Rules of the North Carolina Industrial Commission........ 1113
Index........ 1115
Rules for the Dispute Resolution Commission........ 1117
Index........ 1129

Federal Rules

Local Rules of the United States Court of Appeals for the Fourth Circuit 1131
Index........ 1193
Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit........ 1201
Appendix A. Resolution Respecting Bar Membership in the Judicial Conference of the Circuit........ 1206
Appendix B. Guidelines for Preparation of Appellate Transcripts in the Fourth Circuit........ 1207
Appendix C. Plan of the United States Court of Appeals for the Fourth Circuit in Implementation of the Criminal Justice Act........ 1217
Appendix D. Docketing Statement — Instructions........ 1223
Appendix E. Docketing Statement — Agency — Instructions........ 1227
Appendix F. Docketing Statement — Tax Court........ 1230

Rules Page
Appendix G. Death Penalty Representation 1233
Index 1237
Rules for Judicial-Conduct and Judicial-Disability Proceedings 1239
Index 1269
Rules of the United States District Court for the Eastern District of North Carolina 1275
Index 1355
Rules of the United States Bankruptcy Court for the Eastern District of North Carolina 1365
Index 1491
Local Rules of Civil, Criminal, and Bankruptcy Practice of the United States District Court for the Middle District of North Carolina 1499
Index 1567
Rules of the United States District Court for the Western District of North Carolina 1577
Index 1615
Rules of the United States Bankruptcy Court for the Western District of North Carolina 1623
Index 1699
Rules Governing Section 2254 Cases in the United States District Courts 1705
Index 1725
Rules Governing Section 2255 Proceedings for the United States District Courts 1727
Index 1745
Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates [Abrogated] 1747

Miscellaneous

Removal of Cases 1749
Index 1755
Authentication of Records 1757
Index 1761
Extradition Manual 1763
Index 1811

[illegible] Rules of Professional Conduct of the North Carolina State Bar [illegible]
[illegible] Client Security Fund [illegible]
Rules Governing [illegible]
[illegible] Continuing Legal Education [illegible]
Index [illegible]
Children's Vaccine-Related Injury Rules of the North Carolina Industrial Commission [illegible]
Index [illegible]
Rules for the Dispute Resolution Commission [illegible]
Index [illegible]

Federal Rules

Local Rules of the United States Court of Appeals for the Fourth Circuit 1181
Index [illegible]
Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit 1201
Appendix A. Resolution Respecting Bar Membership in the Judicial Conference of the Circuit [illegible]
Appendix B. Guidelines for Preparation of Appellate Transcripts for Fourth Circuit [illegible]
Appendix C. Plan of the United States Court of Appeals for the Fourth Circuit in Implementation of the Criminal Justice Act [illegible]
Appendix D. Docketing Statement — Civil Cases [illegible]
Appendix E. Docketing Statement — Agency — Instructions [illegible]
Appendix F. Docketing Statement — Tax Court [illegible]

GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Adopted Pursuant to G.S. 7A-34
Effective July 1, 1970,
with amendments received effective March 1, 2004.

Rule
1. Philosophy of general rules of practice.
2. Calendaring of civil cases.
2.1. Designation of exceptional civil cases and complex business cases.
2.2. Designation of special superior court judge for complex business cases.
3. Continuances.
3.1. Guidelines for resolving scheduling conflicts.
4. Enlargement of time.
5. Form of pleadings.
6. Motions in civil actions.
7. Pre-trial procedure (see Rule 16).
7.1. Appointment of guardian ad litem for minors.
8. Discovery.
9. Opening statements.
10. Opening and concluding arguments.
11. Examination of witnesses.
12. Courtroom decorum.
13. Presence of counsel during jury deliberation.
14. Custody and disposition of evidence at trial.

Rule
15. Electronic media and still photography coverage of public judicial proceedings.
16. Withdrawal of appearance.
17. Entries on records.
18. Custody of appellate reports.
19. Recordari; supersedeas; certiorari.
20. Sureties.
21. Jury instruction conference.
22. Local court rules.
23. Summary jury trial.
23.1. Summary procedure for significant commercial disputes.
24. Pretrial conference in capital cases.
25. Motions for appropriate relief and habeas corpus applications in capital cases.
26. Secure leave periods for attorneys.
Forms.
Index follows Rules.

Rule 1. Philosophy of general rules of practice.

These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them.

Editor's note. — For North Carolina court system website, see www.nccourts.org.

CASE NOTES

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983).

Rule 2. Calendaring of civil cases.

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The effective date of the plan and any amendments thereto shall be either January 1 or July 1. The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record within the judicial district. In order to provide for statewide dissemination, copies of plans effective January 1 shall be filed with the Administrative Office of the Courts on or before October 31 and on or before April 30 for plans effective July 1.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and first full week following the 4th of July or such other weeks as the Senior Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) within twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.* (Amended July 1, 1980; May 16, 1988, effective July 1, 1988.)

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Failure to Timely Calendar Motion. — Since civil cases in this State are ordinarily deemed ready for trial five months after filing, and motion for removal could have been calendared for hearing at many earlier court sessions, defendant's failure to put its motion on a hearing calendar until eight months after the case was filed, the hearing date being two months later, was unreasonable and thus a waiver of its right to have the case removed to a different county. Johnson v. Hampton Indus., Inc., 83 N.C. App. 157, 349 S.E.2d 332 (1986).

Notice of Hearing on Motion. — Plaintiff's counsel was entitled to rely upon the Trial Court Administrator's final calendar in the absence of any further direction from the court; an order dismissing a case based on the injured person's failure to appear at a hearing on the motion to dismiss was reversed where the first notice of hearing indicated that the motion was to have been heard on a specific date, but a later final calendar received by the injured person's counsel from the Trial Court Administrator indicated that the motion to dismiss was scheduled for a different, later day. Scruggs v. Chavis, 160 N.C. App. 246, 584 S.E.2d 879, 2003 N.C. App. LEXIS 1734 (2003).

Notice of Trial Date. — While no formal trial date was set under a local rule until the day of the calendar call, this does not alter the requirement that a party receive notice that a trial on the merits has been set for a particular session of court. A calendar request received four days before the start of the session is not sufficient. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

The law imposes certain affirmative duties

on parties to a lawsuit to keep abreast of the proceedings in that suit. — A party once served with a summons has a duty to give the matter the attention a person of ordinary prudence would give to important business. This duty does not negate the notice requirements of this rule, however. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

Notice to Party Not Represented by Counsel. — Although rule formerly specified that the calendar be sent to each attorney of record and that the copy of the certificate of readiness be sent to opposing counsel, it was implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444, cert. denied, 300 N.C. 558, 270 S.E.2d 109 (1980).

Continuance Not Granted to Unprepared Co-Counsel. — Where co-counsel of record appeared on behalf of defendant and moved for a continuance solely on the grounds that he was not prepared to try the case, under subdivision (e) of this rule co-counsel was not entitled to a continuance. Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

Applied in Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984).

Cited in Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973); Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984).

Rule 2.1. Designation of exceptional civil cases and complex business cases.

(a) The Chief Justice may designate any case or group of cases as (a) "exceptional" or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

(b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designations include: the number and diverse interest of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases. (Adopted January 5, 1988; amended August 28, 1995.)

CASE NOTES

Applied in Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Cited in In re North Carolina Hazardous Waste Mgt. Comm'n, 327 N.C. 632, 397 S.E.2d 76 (1990); Watkins v. North Carolina Hazardous Waste Mgt. Comm'n, 397 S.E.2d 78 (N.C. 1990); Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994); North Carolina Trust Co. v. Taylor, 131 N.C. App. 690, 508 S.E.2d 809 (1998); Long v. Hammond, 164 N.C. App. 486, 596 S.E.2d 839, 2004 N.C. App. LEXIS 1040 (2004); In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005); Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007); Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007).

Rule 2.2. Designation of special superior court judge for complex business cases.

The Chief Justice shall designate one or more superior court judges as special judges to hear and decide complex business cases as provided in Rule 2.1. Any judge so designated shall be known as a Special Superior Court Judge for Complex Business Cases. (Adopted August 28, 1995.)

COMMENT

The portion of this rule providing for the designation of a case as "exceptional" has been in effect in North Carolina since January 5, 1988, and has been utilized numerous times in various situations. The portion of this rule providing for the designation of a "complex business case" was adopted by the North Carolina Supreme Court on August 28, 1995, as a result of a recommendation in the January 1995 Annual Report of THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECON-

OMY chaired by the North Carolina Attorney General.

The North Carolina Commission on Business Laws and the Economy was established by an executive order of the Governor on April 19, 1994, to recommend "any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina, particularly Chapter 55 of the North Carolina General Statutes ... and to recommend any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in this state and which will attract them to locate and incorporate here."

The Commission's report noted that many national corporations incorporate in the state of Delaware because of that state's Chancery Court which provides a high level of judicial expertise on corporate law issues. It also observed the desirability of a state having a substantial body of corporate law that provides predictability for business decision making. Also, it is essential that corporations litigating complex business issues receive timely and well reasoned written decisions from an expert judge.

Accordingly, the Commission recommended that the North Carolina Supreme Court amend Rule 2.1 to allow the Chief Justice to designate certain cases as complex business cases. The Commission also recommended that the Governor appoint at least one expert in corporate law matters as a Special Judge to hear cases designated by the Chief Justice pursuant to Rule 2.2.

The term "complex business case" is purposely not defined in order to give litigants the flexibility to seek a designation as such with respect to any business issue that they believe requires special judicial expertise. It is anticipated that any case involving significant issues arising under Chapters 55, 55B, 57C, 59, 78A, 78B and 78C of the General Statutes of North Carolina would be designated a complex business case.

Rule 3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared. (Amended February 13, 1973; amended August 15, 2002.)

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

The granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Error and Prejudice Must Be Shown. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Denial of Continuance Motion Affirmed. — Trial court did not abuse its discretion in denying a county's motion for a continuance, the basis for which was its counsel's attendance of a mandatory training session in order to file documents in other court cases. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

Applied in Lee v. Jenkins, 57 N.C. App. 522, 291 S.E.2d 797 (1982); Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132, 310 S.E.2d 406 (1984).

Rule 3.1. Guidelines for resolving scheduling conflicts.

(a) In resolving scheduling conflicts when an attorney has conflicting engagements in different courts, the following priorities should ordinarily prevail:

1. Appellate courts should prevail over trial courts.

2. Any of the trial court matters listed in this subdivision, regardless of trial division, should prevail over any trial court matter not listed in this subdivision, regardless of trial division; there is no priority among the matters listed in this subdivision:

— any trial or hearing in a capital case;
— the trial in any case designated pursuant to Rule 2.1 of these Rules;

— the trial in a civil action that has been peremptorily set as the first case for trial at a session of superior court;
— the trial of a criminal case in superior court, when the defendant is in jail or when the defendant is charged with a Class A through E felony and the trial is reasonably expected to last for more than one week;
— the trial in an action or proceeding in district court in which any of the following is contested:
  — termination of parental rights,
  — child custody,
  — adjudication of abuse, neglect or dependency or disposition following adjudication,
  — interim or final equitable distribution,
  — alimony or post-separation support.

3. When none of the above priorities applies, priority shall be as follows: superior court, district court, magistrate's court.

(b) When an attorney learns of a scheduling conflict between matters in the same priority category, the attorney shall promptly give written notice to opposing counsel, the clerk of all courts and the appropriate judges in all cases, stating therein the circumstances relevant to resolution of the conflict under these guidelines. When the attorney learns of the conflict before the date on which the matters are scheduled to be heard, the appropriate judges are Senior Resident Superior Court Judges for matters pending in the Superior Court Division and Chief District Court Judges for matters pending in the District Court Division; otherwise the appropriate judges are the judges presiding over those matters. The appropriate judges should promptly confer, resolve the conflict, and notify counsel of the resolution.

(c) In resolving scheduling conflicts between court proceedings in the same priority category, the presiding judges should give consideration to the following:

— the comparative age of the cases;
— the order in which the trial dates were set by published calendar, order or notice;
— the complexity of the cases;
— the estimated trial time;
— the number of attorneys and parties involved;
— whether the trial involves a jury;
— the difficulty or ease of rescheduling;
— the availability of witnesses, especially a child witness, an expert witness or a witness who must travel a long distance;
— whether the trial in one of the cases had already started when the other was scheduled to begin.

(d) When settlement proceedings have been ordered in superior or district court cases, only trials, hearings upon dispositive motions, and hearings upon motions scheduled for counties with less than one court session per month shall have precedence over settlement proceedings.

(e) When a mediator, other neutral, or attorney learns of a scheduling conflict between a court proceeding and a settlement proceeding, the mediator, other neutral, unrepresented parties or attorneys shall promptly give written notice to the appropriate judges and request them to resolve the conflict; stating therein the circumstances relevant to a determination under (d) above.

(f) Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts. (Adopted August 15, 2002; amended March 4, 2004.)

Rule 4. Enlargement of time.

The judge or clerk of the court in which the action is pending may by order extend the time for filing answer.

When counsel, by consent under Rule 6 (b), agree upon an enlargement of time, the agreement shall be reduced to writing and filed with the clerk.

Rule 5. Form of pleadings.

(a) If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound. All papers presented to the court for filing shall be letter size (8½″ x 11″), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size. This subsection of this rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(b) All papers filed in civil actions, special proceedings and estates shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts. The Clerk of Superior Court shall not reject the filing of any paper that does not include the required cover sheet. Instead, the clerk shall file the paper, notify the filing party of the omission and grant the filing party a reasonable time not to exceed five (5) days within which to file the required cover sheet. Until such time as the party files the required cover sheet, the court shall take no further action other than dismissal in the case. (Amended July 1, 1982; further amended September 5, 1996, effective October 1, 1996; further amended June 25, 1997, effective August 1, 1997.)

Rule 6. Motions in civil actions.

All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)

Motions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge.

Every motion shall be signed by at least one attorney of record in his individual name. He shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay. (See Rule 7 (b) (2); also Rule 11.)

The court in civil matters, on its motion or upon motion by a party, may in its discretion order that argument of any motion be accomplished by means of a telephone conference without requiring counsel to appear in court in person. Upon motion of any party, the court may order such argument to be recorded in such manner as the court shall direct. The court may direct which party shall pay the costs of the telephone calls. Conduct of counsel during such arguments may be subject to punishment as for direct criminal contempt of court. (Amended January 1, 1985.)

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Rule Number Necessary. — The trial judge should decline to rule upon motions which did not contain the rule number under which the movant is proceeding. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Except When Defense of Insufficiency of Service of Process Asserted in Responsive Pleading. — Although worded as a motion, the defense of insufficiency of service of process was asserted in defendant's responsive pleading; therefore, the rule requiring that a movant state the rule number under which he is proceeding was inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

A motion which did not comply with the first paragraph of this rule was not totally defective since the directive of this rule of practice has the salutary purpose of ensuring that the court and the parties are aware of the grounds upon which the movant is relying, the court's order in the case indicated that the judge was fully aware of the basis for the motion. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

In a child custody proceeding where the defendant filed a motion for modification of a child visitation order, the plaintiff was not prejudiced by failure of the defendant to state the number of the rule under which he was proceeding as required by this rule since the written motion fully informed the plaintiff of the relief he was seeking and his reasons therefor. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Where there is an awareness by the trial judge of the grounds, the motion is adequately stated for the purposes of this rule. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Notice of Hearing. — Plaintiff's counsel was entitled to rely upon the Trial Court Administrator's final calendar in the absence of any further direction from the court; an order dismissing a case based on the injured person's failure to appear at a hearing on the motion to dismiss was reversed where the first notice of hearing indicated that the motion was to have been heard on a specific date, but a later final calendar received by the injured person's counsel from the Trial Court Administrator indicated that the motion to dismiss was scheduled for a different, later day. Scruggs v. Chavis, 160 N.C. App. 246, 584 S.E.2d 879, 2003 N.C. App. LEXIS 1734 (2003).

Applied in Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

Stated in Don's Plumbing Co. v. Union Supply Co., 11 N.C. App. 662, 182 S.E.2d 219 (1971); Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972)

Cited in Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981); Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577 (1981); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Hill v. Williams, 144 N.C. App. 45, 547 S.E.2d 472, 2001 N.C. App. LEXIS 331 (2001).

Rule 7. Pre-trial procedure (see Rule 16).

There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the stipulation. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order.

In uncontested divorce, default, and magistrate cases and magistrate appeals, a pre-trial conference or order is not required.

A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held.

At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys.

If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney.

The pre-trial order shall be in substance as shown on the attached sample form.

Editor's note. — The form referred to in this rule is set out following Rule 26.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Rule 7.1. Appointment of guardian ad litem for minors.

When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of pro bono attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness. (Adopted July 26, 1990, effective October 1, 1990.)

Rule 8. Discovery.

Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery. (Amended May 16, 1988, effective July 1, 1988.)

Cross References. — As to sequence and timing of discovery, see G.S. 1A-1, Rule 26(d).

CASE NOTES

Applied in Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Stated in Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983)

Cited in Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

Rule 9. Opening statements.

At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.

The parties may elect to waive opening statements.

Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

CASE NOTES

This rule limits the purpose of the statement to that of setting forth the grounds of a claim or defense, which means stating the evidence upon which the claim or defense is based. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Defendant May Not Make Opening Statement Personally. — The defendant, while retaining the services of his court-appointed counsel was not entitled to make an opening statement in propria persona. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

Limitations on Defendant's Opening Statement Not Reversible Error. — While the trial judge may have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice the defendant's case to require reversal of his conviction. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Quoted in Keene v. Wake County Hosp. Sys., 74 N.C. App. 523, 328 S.E.2d 883 (1985).

Cited in State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989).

Rule 10. Opening and concluding arguments.

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor.

In a civil case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.

Legal Periodicals. — For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

Trial Judge Controls Sequence of Argument. — The time and sequence of argument of a case to the jury is controlled by the trial judge under the authority of this rule. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 404 U.S. 1041, 92 S. Ct. 726, 30 L. Ed. 2d 734, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972); State v. Parker, 66 N.C. App. 293, 311 S.E.2d 321 (1984).

And He May Rule at Close of Evidence. — The trial judge is not required to rule upon the sequence of the argument prior to the closing of the evidence. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 404 U.S. 1041, 92 S. Ct. 726, 30 L. Ed. 2d 734, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972).

The right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where a defendant offers evidence at trial, the prosecution has a right to make the opening and closing argument to the jury. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Where the defendant in a capital case presented evidence, the State had the right to give the final closing argument pursuant to this rule. G.S. 84-14 did not give defendant the right to respond to the State's argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Where defendant introduced evidence, the state had the right to the opening and closing arguments. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

When, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of G.S. 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant in a capital case presented no evidence during the guilt-innocence phase of the trial, he was entitled to present both the opening and final arguments to the jury during the closing arguments for that phase. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

If in a non-capital case defendant elects to present evidence, he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by G.S. 84-14. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If defendant in a non-capital case does not present evidence, he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant by stipulation waived her opening argument, failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error on the non-capital as well as the capital charges against her. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

When there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

The trial court properly allowed the State to close the argument where defendant called a witness and examined him but did not glean helpful information from the witness because the witness refused to incriminate himself. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

Proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence. State v. Hall, 57 N.C. App. 561, 291 S.E.2d 812 (1982).

The trial court did not err by granting defendant the right to open and close the final jury arguments where defendant offered no evidence of his own, but was called to testify by plaintiff as an adverse witness. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

Loss of Right to Open or Close. — Where defendant offered the photograph into evidence because the witness said it would help him illustrate his testimony, the photograph was then shown to the jury while the witness answered questions posed by defendant and defendant used the photograph to impeach the witness, defendant lost his right to open and close jury argument. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, 513 U.S. 1134, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995), cert. dismissed, 342 N.C. 417, 465 S.E.2d 547 (1995).

Closing Argument Improperly Denied. — Where defendant in embezzlement case did not introduce any evidence within the meaning of this rule, she was improperly deprived of her right to the closing argument to the jury and entitled to a new trial. State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585, 1999 N.C. App. LEXIS 1144 (1999).

Defendant was entitled to a new trial because the trial court erred in depriving defendant of the right to the closing argument to the jury where defendant did not introduce any evidence within the meaning of N.C. Gen. R. Prac. Super. & Dist. Ct. 10 during defendant's cross-examination of a witness about inconsistencies between two statements the witness gave about the shooting. State v. Wells, 171 N.C. App. 136, 613 S.E.2d 705, 2005 N.C. App. LEXIS 1167 (2005).

Cross-examination of the state's chemist was related to the witness's testimony regarding the method and instruments used to determine the nature of substance seized from defendant, did not amount to introduction of new evidence, and the denial of defendant's right to close argument to the jury was error under N.C. Gen. R. Prac. Super. & Dist. Ct. 10. State v. Bell, 179 N.C. App. 430, 633 S.E.2d 712, 2006 N.C. App. LEXIS 1903 (2006).

Although defendant used two exhibits during his cross-examination of a detective, he did not offer such exhibits into evidence and therefore did not lose his right to open and close the argument to the jury under N.C. Gen. R. Prac. Super. & Dist. Ct. 10; the exhibits were not used as substantive evidence, but rather to illustrate the detective's prior testimony. State v. Hennis, 184 N.C. App. 536, 646 S.E.2d 398, 2007 N.C. App. LEXIS 1457 (2007).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980); State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760 (1986); Mutual Benefit Life Ins. Co. v. City of Winston-Salem, 100 N.C. App. 300, 395 S.E.2d 705 (1990).

Quoted in State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

Stated in State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990); State v. Oxendine, 112 N.C. App. 731, 436 S.E.2d 906 (1993)

Cited in Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984).

Rule 11. Examination of witnesses.

When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

CASE NOTES

Discretion of Trial Judge as to Change of Counsel. — This rule clearly leaves it to the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

Rule 12. Courtroom decorum.

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court [see S. vs. Bass, 5 N.C. App. 431 (1969)]. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators. (See Rule 22, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 273.)

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court. (See Rule 1, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 269.)

Editor's note. — The Revised Rules of Professional Conduct may be found in this Rules Volume.

Legal Periodicals. — For article discussing the mechanics of objecting, see 4 Campbell L. Rev. 339 (1982).

CASE NOTES

Prosecutor's Closing Argument Did Not Violate Due Process. — While the defendant contended that the prosecutor improperly referred to matters outside the record, appealed to the jury's passion and prejudice, inserted his personal opinion into the argument, and engaged in name-calling and other improper theatrics, the defendant failed to carry the burden of establishing that any impropriety due to the prosecutor's statements and physical conduct during closing argument resulted in prejudice to the defendant such that the defendant's conviction was a denial of due process. State v. Nance, 157 N.C. App. 434, 579 S.E.2d 456, 2003 N.C. App. LEXIS 750 (2003).

Defendant's objection to a prosecutor's closing argument, in which the prosecutor stated that defense counsel's job was "to defend [and] not to explain, not to be even, not to be fair," was properly overruled, as: (1) the prosecutor neither used abusive, vituperative, and opprobrious language, nor did the prosecutor's comments amount to an offensive personal reference about defense counsel; (2) the prosecutor's statements attempted to explain the role of defense counsel, but did not attack defense counsel; (3) when considered within the context of the prosecutor's entire closing argument, the statements did not violate G.S. 15A-1230(a) or defendant's due process rights under the Fourteenth Amendment and N.C. Const., Art. I, § 19; and (4) defendant failed to show how the prosecutor's statements prejudiced defendant. State v. Brown, 182 N.C. App. 277, 641 S.E.2d 850, 2007 N.C. App. LEXIS 574 (2007).

Applied in State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982); State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

Quoted in Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Cited in State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Rule 13. Presence of counsel during jury deliberation.

The right to be present during the trial of civil cases shall be deemed to be waived by a party or his counsel by voluntary absence from the courtroom at a time when it is known that proceedings are being conducted, or are about to be conducted. In such event the proceedings, including the giving of additional instructions to the jury after they have once retired, or receiving the verdict, may go forward without waiting for the arrival or return of counsel or a party.

After the jury has retired to deliberate upon a verdict in a criminal case, at least one attorney representing the defendant shall remain in the immediate area of the courtroom so as to be available at all times during the deliberation of the jury and when the verdict is received.

Rule 14. Custody and disposition of evidence at trial.

Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.

After being marked for identification, all exhibits offered or admitted in evidence in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Whenever any models, diagrams, exhibits, or materials have been offered into evidence and received by the clerk, they shall be removed by the party offering them, except as otherwise directed by the court, within 30 days after final judgment in the trial court if no appeal is taken; if the case is appealed, within 60 days after certification of a final decision from the appellate division. At the time of removal a detailed receipt shall be given to the clerk and filed in the case file.

If the party offering an exhibit which has been placed in the custody of the clerk fails to remove such article as provided herein, the clerk shall write the attorney of record (or the party offering the evidence if he has no counsel) calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be disposed of by the clerk.

Rule 15. Electronic media and still photography coverage of public judicial proceedings.

(a) *Definition.*

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

(b) *Coverage allowed.*

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(1) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

(2) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody pro-

ceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.

(3) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(4) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated (b)(4).

(c) *Location of equipment and personnel.*

(1) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(2) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(3) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still photography coverage without booths or other restrictions set out in Rule 15(c)(1) and (c)(2) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

(4) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(5) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(6) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) prior to the convening of proceedings;

(ii) during the luncheon recess;

(iii) during any court recess with the permission of the presiding justice or judge; and

(iv) after adjournment for the day of the proceedings.

(7) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of Rule 15(c)(1) and (2) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

(d) *Official representatives of the media.*

(1) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter these persons shall conduct all negotiations with the appropriate officials

concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(2) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

(e) *Equipment and personnel.*

(1) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(3) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(5) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

(f) *Sound and light criteria.*

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

(g) *Courtroom light sources.*

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

(h) *Conferences of counsel.*

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

(i) *Impermissible use of media material.*

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings. (Amended June 13, 1990.)

CASE NOTES

Cited in State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Williams, 565 S.E.2d 609, 355 N.C. 501, 2002 N.C. Lexis 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Rule 16. Withdrawal of appearance.

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. (See Smith vs. Bryant, 264 N.C. 208. See also Rule 43 of Rules of the N.C. State Bar, Volume 4(a) of General Statutes of North Carolina, page 278, entitled “Withdrawal from employment as attorney or counsel.”)

Editor's note. — The Rules of the North Carolina State Bar, referred to above, are now found in this Rules Volume.

CASE NOTES

This rule is expressly based on Smith v. Bryant, 264 N.C. 208, 141 S.E.2d 303 (1965). Underwood v. Williams, 69 N.C. App. 171, 316 S.E.2d 342 (1984).

Attorney-Client Relationship Dissolved at Any Time. — As between the attorney and his client, the relationship may, in good faith, be dissolved at any time. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

But Withdrawal from Litigation Must Be Justified. — The attorney may not be released from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

Notice Required. — Where plaintiff's counsel had entered a formal appearance, he was obligated to provide plaintiff with reasonable notice of his intention to withdraw, and where the record failed to show any such facts, on the record plaintiff was entitled to reversal of the summary judgment entered against him immediately upon the withdrawal of his attorney despite plaintiff's request for an opportunity to obtain new counsel. Underwood v. Williams, 69 N.C. App. 171, 316 S.E.2d 342 (1984).

No more than adequate or reasonable notice is required for an attorney to withdraw as attorney of record. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

Where attorney provided reasonable notice to his client by filing a motion to withdraw some five months prior to trial, which motion the defendant received, and filed with the superior court and sent to the defendant notice of the hearing to determine the motion to withdraw about three weeks prior to the hearing, and where the trial court granted attorney's motion for withdrawal and ordered said withdrawal, attorney completely complied with the requirements of this rule in withdrawing from representation of defendant. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

Where the defendant told his attorney that he did not require his services any longer, there was just cause for the attorney's withdrawal within the meaning of this rule. County of Wayne ex rel. Scanes v. Jones, 79 N.C. App. 474, 339 S.E.2d 435 (1986).

The defendant received reasonable notice of his attorney's withdrawal within the meaning of this rule, as evidenced by the defendant's statement in court that he did not want a lawyer. County of Wayne ex rel. Scanes v. Jones, 79 N.C. App. 474, 339 S.E.2d 435 (1986).

Trial court did not abuse its discretion in allowing attorney to withdraw as counsel on the day of trial; the dissolution of the attorney/client relationship, as well as the defendant's reputed unwillingness to pay surveyors hired pursuant to litigation preparation, constituted justifiable cause for attorney's withdrawal. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

Cited in Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992); Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

Rule 17. Entries on records.

No entry shall be made on the records of the Superior or District Court by any person except the clerk, his regular deputy, a person specifically directed by the presiding judge, or the judge himself.

CASE NOTES

Entry of Magistrate's Judgment. — Entry of the magistrate's judgment for purposes of G.S. 1A-1, Rule 58 was not less automatic simply because the magistrate himself (rather than a clerk) noted the judgment in the court minutes. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Cited in State v. Mead, 362 N.C. 218, 657 S.E.2d 367, 2008 N.C. LEXIS 147 (2008).

Rule 18. Custody of appellate reports.

The clerks of the Superior Court shall be officially responsible for the care and preservation of the volumes of the Appellate Division Reports furnished by the State pursuant to G.S. 147-45, and for the General Statutes of North Carolina furnished by the Administrative Office of the Courts under G.S. 7A-300(9).

Each clerk of the Superior Court shall report to the presiding judge of the Superior Court at the first session of court held in January and July each year what volumes, if any, of said reports are missing or have been lost since the last report to the end that the judge may enter an appropriate order for replacement of same pursuant to G.S. 147-51.

Rule 19. Recordari; supersedeas; certiorari.

The Superior Court shall grant the writ of recordari only upon petition specifying the grounds of the application. The petition shall be verified and the writ may be granted with or without notice. When notice is given the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties. The decision thereupon shall be final, subject to appeal as in other cases. If the petition is granted without notice, the petitioner shall give an undertaking for costs and for the writ of supersedeas, if prayed for. In such case the writ of recordari shall be made returnable to the session of the Superior Court of the county in which the judgment or proceeding complained of was granted, and ten days' written notice shall be given to the adverse party before the session of the court to which the writ is returnable. At that session the respondent may move to dismiss, or may answer the writ, and the answer shall be verified. After hearing the application upon the petition, answer, affidavits, and evidence offered, the court shall dismiss it or order it placed on the trial docket.

In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause.

CASE NOTES

Comparison to Power of Court of Appeals to Issue Writ Under G.S. 7A-32. — The authority of a superior court to grant a writ of certiorari pursuant to this rule in appropriate cases is analogous to the power of the Court of Appeals to issue a writ of certiorari pursuant to G.S. 7A-32(c). State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993), appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

Cited in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); Hemphill-Nolan v. Town of Weddington, 153 N.C. App. 144, 568 S.E.2d 887, 2002 N.C. App. LEXIS 1075 (2002); Harper v. City of Asheville, 160 N.C. App. 209, 585 S.E.2d 240, 2003 N.C. App. LEXIS 1760 (2003).

Rule 20. Sureties.

No member of the bar, in any case, suit, action or proceeding in which he appears as counsel, and no employee of the General Court of Justice, employee of the Sheriff's Department, or other law enforcement officer, shall act as a surety in any suit, action or proceeding pending in any division of the General Court of Justice.

CASE NOTES

Cited in State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984).

Rule 21. Jury instruction conference.

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.[1]

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted. (Added September 15, 1981.)

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage; The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

N.C.R.A.P., Rule 10(b)(2) and this rule were designed to prevent unnecessary new trials caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. This policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Conference Need Not Be Recorded. — The rule does not require that the conference be on the record. State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982), appeal dismissed and cert. denied, 307 N.C. 582, 299 S.E.2d 650 (1983).

This rule does not require that the instruction conference be recorded or that the judge's proposed charge be reduced to writing and submitted to counsel. By the very wording of the rule itself, it is clear that the instruction conference contemplated by this rule shall be held "for the purpose of discussing the proposed instructions" and providing an opportunity for counsel to object to any of the instructions proposed by the judge or to request additional instructions. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

Conference Not Recorded Absent Request. — Where either party to the trial desires a recorded instruction conference, G.S. 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, G.S. 15A-1231(b) is silent and this rule supplements the statute (pursuant to G.S. 7A-34) by requiring the trial court to hold an unrecorded conference. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

G.S. 15A-1231 and this rule require the trial court to hold an unrecorded conference in every case and a recorded conference when requested by either party. State v. Clark, 71 N.C. App. 55, 322 S.E.2d 176 (1984), overruled on other grounds, State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

No Conflict with G.S. 15A-1231(b). — Since this rule requires a conference without regard to whether it is requested by a party and G.S. 15A-1231(b) requires a recorded conference only at the request of either party, there is no conflict between the two provisions. Both may be given full effect. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

Failure to Request Conference. — Where defendant did not request an instruction conference, he cannot assert as error the trial court's failure to conduct one. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Subsection (b) of G.S. 15A-1231 clearly contemplates that a defendant is required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of G.S. 7A-34, the provision of this rule which requires the trial judge to conduct a jury instruction conference conflicts with subsection (b) of G.S. 15A-1231 and must give way to the provisions of the statute. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Failure to Object After Charge Not Fatal to

---

[1] In criminal cases, the provisions of G.S. 15A-1231 are also applicable.

State Library Of North Carolina
Raleigh, N.C.

Reviewability. — Where defendant made objections and requests regarding jury instructions at the charge conference, alleged errors were preserved for review despite counsel's failure to object to the charge after it was given; the transcript revealed that the trial court did not provide counsel with an opportunity to object. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

Failure to Request Further Jury Instructions. — Where trial court submitted two mitigating circumstances instructions (one for mental or emotional disturbance and one for inability to conform conduct to law), at the defendant's request, and defendant failed to request further instructions concerning his organic brain damage, he failed to preserve an objection for review. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Failure to Request Special Instructions in Writing. — Trial court properly refused to give defendant's requested special instruction on the defense of justification of possession of a firearm by a felon because the request was not in writing. State v. Craig, 167 N.C. App. 793, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005).

Where record is silent as to whether a jury instruction conference was held, the defendant must hold himself accountable. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Where no instruction conference is held, the defendant should seek a stipulation from the State pursuant to N.C.R.A.P., Rule 11(a) acknowledging the trial court's failure in this regard. Where the State refuses to agree to the stipulation, and objects to such a notation in the record, the defendant should request that trial judge settle the record on appeal pursuant to N.C.R.A.P., Rule 11(c). Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Where defense counsel submitted a written request for particular instructions prior to the jury arguments, which the court denied, defendant was not required by either N.C.R.A.P., Rule 10(b)(2) or this rule to repeat his objection to the jury instructions in order to properly preserve his exception for appellate review. State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984).

Applied in Radford v. Norris, 63 N.C. App. 501, 305 S.E.2d 64 (1983); Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695 (1985); State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991).

Stated in Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985); Lumley v. Capoferi, 120 N.C. App. 578, 463 S.E.2d 264 (1995)

Cited in State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

Rule 22. Local court rules.

In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge assigned to hold a session of court in his district is furnished with a copy of the local court rules at or before the commencement of his assignment. (Added September 21, 1981.)

Rule 23. Summary jury trial.

The senior resident superior court judge of any superior court district or a presiding judge unless prohibited by local rule may upon joint motion or consent of all parties order the use of a summary jury upon good cause shown and upon such terms and conditions as justice may require. The order shall describe the terms and conditions proposed for the summary jury proceeding. Such terms and conditions may include: (1) a provision as to the binding or non-binding nature of the summary jury proceeding; (2) variations in the method for selecting jurors; (3) limitations on the amount of time provided for argument and the presentation of witnesses; (4) limitations on the method or manner of presentation of evidence; (5) appointment of a referee to preside over the summary jury trial; (6) setting the date for conducting the summary jury trial; (7) approval of a settlement agreement contingent upon the outcome of the summary jury proceeding; or (8) such other matters as would in the opinion of the court contribute to the fair and efficient resolution of the dispute. The court shall maintain jurisdiction over the case, and may, where appropriate, rule on pending motions. (Added August 14, 1991.)

COMMENT

The summary jury trial is a dispute resolution technique pioneered in the federal courts in the early 1980s. Pursuant to reports of its success as a settlement tool, the North Carolina Supreme Court in 1987 authorized the use of summary jury trials in three judicial districts on an experimental basis. Since that time, a number of summary jury trials have been conducted.

In May, 1991, a report prepared by the Private Adjudication Center detailed the North Carolina state courts' experience with the summary jury trial. That report noted that a number of variations in the summary jury trial process had been used successfully. The report concluded with a number of recommendations subsequently endorsed by the Dispute Resolution Committee of the North Carolina Bar Association. One of the recommendations was that the North Carolina Supreme Court adopt a General Rule of Practice authorizing the use of summary jury trials throughout the state.

Pursuant to that recommendation, this General Rule provides for the use of summary jury trials based upon the voluntary agreement of the parties, manifested by way of a joint motion to the court. The rule further provides that the authority to approve the request lies with the senior resident superior court judge for the county or judicial district in which the action is pending (or a presiding judge unless prohibited by local rule). The request shall be approved if the court finds that it is in the interest of justice for good cause shown. In this context, good cause relates to a judicial determination that the use of a summary jury trial represents a fair and efficient method for pursuing settlement of the dispute.

The Rule does *not* authorize a court to mandate the use of a summary jury trial. Nothing in the rule, however, prohibits a judge or other court administrator from raising the possibility of using a summary jury trial with the parties during a pre-trial conference or other event and explaining the possible benefits of the process.

The summary jury trials conducted to date in North Carolina have employed a number of innovative techniques. These variations, many of which are detailed in the above-referenced report, have ranged from variations on the methods used to select a jury to limitations on the manner in which evidence is presented. In other cases, the parties have requested that the court appoint a referee to preside over the summary jury proceeding. In addition, the parties in several summary jury trials have agreed that the results would be binding, sometimes pursuant to a "high/low agreement" that limits both parties' risk of an aberrant result. The Rule specifically provides that the court has the power to authorize these practices in appropriate cases.

Rule 23.1. Summary procedure for significant commercial disputes.

(a) The senior resident superior court judge of any superior court district, or a presiding judge unless prohibited by local rule may, upon joint motion or consent of all parties, order Summary Procedures For A Significant Commercial Dispute ("Summary Procedures") in any case within the subject matter jurisdiction of the superior court that does not include a claim for personal, physical or mental injury where: (1) the amount in controversy exceeds $500,000; (2) at least one party is a North Carolina citizen, corporation or business entity (or a subsidiary of such corporation or business entity) or has its principal place of business in North Carolina; and (3) all parties agree to forego any claim of punitive damages and waive the right to a jury trial. The joint motion or consent for summary procedures must be filed with the court on or before the time the answer or other responsive pleading is due.

(b) To the extent they are not inconsistent with these Rules, the North Carolina Rules of Civil Procedure shall apply to Summary Proceedings.

(c) Summary Proceedings are commenced by filing with the court and serving a complaint.

(d) The complaint and any accompanying documents shall be sent, via next-day delivery, to either a person identified in the agreement between the, parties to receive notice of Summary Proceedings or, absent such specification, to each defendant's principal place of business or residence.

(e) The complaint must state prominently on the first page that Summary Proceedings are requested. The complaint also must contain a statement of the amount in controversy exclusive of interest and costs, a statement that one of the parties is a North Carolina citizen, corporation or other business entity, or a subsidiary of such corporation or business entity, or that such citizen, corporation or business entity has its principal place of business in North Carolina, and a statement that the defendant has agreed to submit to the court's jurisdiction for Summary Proceedings.

(f) Any action pending in any other jurisdiction which could have been brought initially as a Summary Proceeding in this state may, subject to the procedures of the court of the other jurisdiction, be transferred to the superior courts of this state and converted to a Summary Proceeding. Any pending action in this state may be converted to a Summary Proceeding subject to the provisions of this Rule 23.1. Within 15 days of transfer or conversion, the court shall hold a conference at which time a schedule for the remainder of the action shall be established that will conform as closely as feasible to these Rules. Unless cause not to do so is shown, the record from any prior proceedings shall be incorporated into the record of the Summary Proceedings.

(g) A defendant shall serve an answer together with any compulsory counterclaims within thirty days after service of the complaint.

(h) A plaintiff shall serve a reply to any counterclaim within twenty days after service of the counterclaim. Any answer or reply to a counterclaim shall be accompanied by a list of persons consulted, or relied upon, in connection with preparation of the answer or reply. Crossclaims, permissive counterclaims and third-party claims are not permitted absent agreement of all parties. Crossclaims, counterclaims and third-party claims, if any, are subject to the provisions of this Rule 23.1.

(i) A party may, in lieu of an answer, respond to a complaint or counterclaim by moving to dismiss. A motion to dismiss and accompanying brief must be served within thirty days after service of the complaint upon the defendant. A motion to dismiss a counterclaim and accompanying brief must be served within twenty days after service of the counterclaim. An answering brief in opposition to a motion to dismiss is due within fifteen days after service of the motion and accompanying brief. A reply brief in support of the motion to dismiss is due within ten days after service of the answering brief. The opening and answering briefs shall be limited to twenty-five pages, and the reply brief shall be limited to ten pages. Within thirty days after the filing of the final reply brief on all motions to dismiss, if no oral argument occurs, or within thirty days of oral argument if oral argument occurs, the court will either render to the parties its decision on such motions or will provide to the parties an estimate of when such decision will be rendered. Such additional time shall not normally exceed an additional thirty days. If a motion to dismiss a claim is denied, an answer to that claim shall be filed within ten days of such denial.

(j) Within seven days of filing of the answer, a plaintiff shall serve upon the answering defendant a copy of each document in the possession of plaintiff that plaintiff intends to rely upon at trial, a list of witnesses that plaintiff intends to call at trial and a list of all persons consulted or relied upon in connection with preparation of the complaint. Within thirty days of the filing of the answer, the answering defendant shall provide to all other parties a list of witnesses it intends to call at trial and all documents in its possession that it intends to rely upon at trial. A plaintiff against whom a counterclaim has been asserted shall serve upon the defendant asserting the counterclaim, within thirty days after such plaintiff receives from the defendant asserting the counterclaim the materials referred to in the preceding sentence, a list of witnesses it intends to call at trial in opposition to the counterclaim, all documents in its possession that it intends to rely upon at trial in opposition to the counterclaim and all persons consulted or relied upon in connection with preparation of the reply to the counterclaim.

(k) Any party may serve upon any other party up to ten written interrogatories (with any sub-part to be counted as a separate interrogatory) within thirty days after the filing of the last answer. Responses are due within twenty days after service of the interrogatories.

(*l*) Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents, said request to be served within thirty days after filing of the last answer. The response to a document request is due within thirty days after service of the document request and must include production of the documents at that time for inspection and copying.

(m) Any party may serve on any other party a notice of up to four depositions to begin no sooner than seven days from service of the deposition notice and subsequent to the filing of all answers. A party may also take the deposition of any person on the other party's witness list, as well as the deposition of all affiants designated under Section (s) of this Rule. The first deposition notice by a party shall be served not later than sixty days after the filing of the last answer. All depositions to be taken by a party are to be scheduled and completed within 120 days of the filing of the last answer.

(n) Any party may serve upon any other party up to ten requests for admission (with any sub-part to be counted as a separate request for admission) within thirty days of the filing of the last answer. Responses are due within twenty days after service.

(o) Parties are obligated to supplement promptly their witness list, the documents they intend to rely upon at trial and their discovery responses under this Rule.

(p) Discovery disputes, at the court's option, may be addressed by a referee at the expense of the parties or by the court.

(q) Unless otherwise ordered by the court, all discovery, except for discovery contemplated by Section (s) of this Rule, shall be completed within 180 days after the filing of the last answer.

(r) There shall be no motions for summary judgment in Summary Proceedings.

(s) If the parties notify the court within seven days after the close of discovery that the parties have agreed to forego witnesses at the trial of the case, the parties may submit briefs and appendices in support of their cause as follows:

(1) Plaintiff's Brief — thirty days following close of discovery;

(2) Defendant's Answering Brief — within thirty days after service of plaintiff's brief; and

(3) Plaintiff's Reply Brief — within fifteen days of service after Defendant's Answering Brief.

(t) The briefs must cite to the applicable portions of the record. Affidavits may be used but all affiants must be identified prior to the close of discovery and must, at the option of any other party, be produced for deposition within two weeks from the date discovery would otherwise close. The court shall make factual findings based upon the record presented by the parties.

(u) If the parties elect to forego witnesses at trial and submit briefs pursuant to Section (s) of this Rule, trial shall consist of oral argument, or submission on briefs if oral argument is waived by the parties with the consent of the court, to be scheduled and held by the court within one week of the close of briefing pursuant to Section (s).

(v) If the parties elect to present live witnesses at trial, the trial shall be scheduled to begin between thirty and sixty days after the close of discovery. Within thirty days after the close of discovery, the parties shall provide the court with an agreed upon pre-trial order. The pre-trial order shall include a summary of the claims or defenses of each party, a list of the witnesses each party expects to introduce at trial, a description of any evidentiary disputes, a statement of facts not in dispute and a statement of disputed issues of fact. Absent contrary court order, the trial shall be limited to five days, which shall be allocated equitably between the parties. Within ten days of the close of trial, each party shall file a post-trial brief including proposed findings of fact and conclusions of law. Each brief shall not exceed fifty pages.

(w) Within thirty days after the filing of the final brief, if no oral argument occurs, or within thirty days of argument if oral argument occurs, the court will either render to the parties its decision after trial or will provide the parties an estimate of when the decision will be rendered. Such additional time shall not normally exceed an additional thirty days.

(x) The schedule for trial or decision after trial or on motion to dismiss shall not be extended unless the assigned judge certifies that:

(1) the demands of the case and its complexity make the schedule under this Rule incompatible with serving the ends of justice; or

(2) the trial cannot reasonably be held or the decision rendered within such time because of the complexity of the case or the number of complexity of pending criminal cases. (Adopted August 28, 1995.)

COMMENT

This rule was adopted by the North Carolina Supreme Court on June 1995 as a result of a recommendation in the January 1995 Annual Report of THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

In its report, the Commission observed that, historically, North Carolina has enjoyed a high quality, efficient civil justice system. In recent years, however, civil litigation (and in particular, complex commercial litigation) has become protracted and costly. This is the result of many factors, including more complex laws and regulations, legal tactics and increased caseload.

The North Carolina court system has responded by instituting a number of innovative programs designed to resolve civil disputed more efficiently. These include court-ordered arbitration and a pilot mediation program. Despite the success of these programs, resolution of complex business and commercial disputes in North Carolina can be slow and costly.

The Commission noted that a state court system that offers alternatives to the normal litigation process which can expedite the resolution of significant commercial and business disputes is an important element of a progressive, efficient business environment. States that can offer alternatives are more likely to attract new business organizations and incorporations as well as business expansions.

Accordingly, the Commission recommended that the State establish a summary procedure through which North Carolina citizens and business entities and their subsidiaries, and businesses which are headquartered in the State can more efficiently resolve significant commercial civil disputes. The Commission recommended that the availability of such a summary procedure be limited to civil actions in superior court where 1) at least $500,000 is in controversy, 2) at least one party is a North Carolina citizen or corporation, and 3) all parties consent to the summary proceeding. As part of that agreement, the parties to the summary proceeding must agree to waive punitive damages and a jury trial.

The summary procedure provided for in this Rule can be utilized only with consent of all parties. It does not restrict any parties' rights and is supplementary to, and not inconsistent with, the General Statutes. (See G.S. 7A-34.) Its purpose is to provide an alternative procedure for significant commercial disputes and thereby improve the overall efficiency of the court system.

Rule 24. Pretrial conference in capital cases.

There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death. No later than ten days after the superior court obtains jurisdiction in such a case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference. Upon request of either party at the pretrial conference the judge may for good cause shown continue the pretrial conference for a reasonable time.

At the pretrial conference, the court and the parties shall consider:

(1) simplification and formulation of the issues, including, but not limited to, the nature of the charges against the defendant, and the existence of evidence of aggravating circumstances;

(2) timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty; and

(3) such other matters as may aid in the disposition of the action.

The judge shall enter an order that recites that the pretrial conference took place, and any other actions taken at the pretrial conference.

This rule does not affect the rights of the defense or the prosecution to request, or the court's authority to grant, any relief authorized by law, including but not limited to appointment of assistant counsel, in advance of the pretrial conference. (Adopted April 7, 1994, effective June 1, 1994.)

CASE NOTES

Right to Be Present Not Implicated. — The pretrial conference required in capital cases by this Rule takes place before the jury panel is selected and sworn and is not a stage of the trial; thus, defendant's right to be present at every stage of his trial was not implicated by Rule 24 pretrial conference. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Aggravating Circumstances. — While this rule requires the trial court and the parties to consider the existence of evidence of aggravating circumstances, nothing in the rule intimates that the prosecution must enumerate with finality all aggravating circumstances it will pursue at trial, nor can a trial court require the prosecution to declare which aggravating circumstances it will rely upon at the punishment phase. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

The pretrial conference is an administrative device intended to clarify the charges against the defendant and assist the prosecutor in determining whether any aggravating circumstances exist which justify seeking the death penalty. Capital defendants do not stand to lose or gain any rights at the conference. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Failure of District Attorney to Apply for Conference. — As a sanction for the district attorney's failure to timely file a petition for a pretrial conference, the trial court exceeded its authority by prohibiting the state from seeking the death penalty where defendant was charged with first-degree murder. State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998).

Prosecutor violated N.C. Gen. R. Prac. Super. & Dist. Ct. 24, 2001 Ann. R. N.C. 74. by failing to hold a special pre-trial conference where defendant had been charged with first degree murder. State v. Matthews, 358 N.C. 102, 591 S.E.2d 535, 2004 N.C. LEXIS 15 (2004).

Trial Court Exceeded Its Authority. — Trial court exceeded its authority under N.C. Gen. R. Prac. Super. & Dist. Ct. 24 by declaring a case noncapital based upon the court's view of the insufficiency of the evidence of defendant's guilt regarding the underlying charge of first-degree murder. State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

Cited in State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Rule 25. Motions for appropriate relief and habeas corpus applications in capital cases.

When considering motions for appropriate relief and/or applications for writs of habeas corpus in capital cases, the following procedures shall be followed:

(1) All appointments of defense counsel shall be in accordance with G.S. 7A-451(c), (d), and (e) and rules adopted by the Office of Indigent Defense Services;

(2) All requests for appointment of experts made prior to the filing of a motion for appropriate relief and subsequent to a denial by the Director of Indigent Defense Services shall be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee in accordance with rules adopted by the Office of Indigent Defense Services;

(3) All requests for other *ex parte* and similar matters arising prior to the filing of a motion for appropriate relief shall be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee in accordance with rules adopted by the Office of Indigent Defense Services;

(4) All motions for appropriate relief, when filed, shall be referred to the senior resident superior court judge or the senior resident superior court judge's designee for that judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions;

(5) Subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for appeal and/or a motion for appropriate relief and is not available as a means of reviewing and correcting non-jurisdictional legal error. If the applicant has been sentenced pursuant to a final judgment issued by a competent tribunal of criminal jurisdiction (*i.e.*, by a trial court having subject matter jurisdiction to enter the sentence), the application for writ of habeas corpus shall be denied. In the event the application for writ of habeas corpus raises a meritorious challenge to the original jurisdiction of the sentencing court, and the writ is granted, the judge shall make the writ returnable before the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee. In the event the application for writ of habeas corpus raises a meritorious non-jurisdictional challenge to the applicant's conviction and sentence, the judge shall immediately refer the matter to the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee for disposition as a motion for appropriate relief; and

(6) All requests for and awards of attorney fees and other expenses of representation shall be made in accordance with rules adopted by the Office of Indigent Defense Services. (Adopted May 7, 1998, effective June 1, 1998; Amended effective December 19, 2002; Amended effective May 1, 2003.)

CASE NOTES

Ineffective Assistance of Counsel: Duty to Investigate. — Applying the Wiggins test, North Carolina Supreme Court found that counsel for a death-sentenced defendant was not shown to be ineffective because counsel (1) was not under a mandate to second-guess two mental health experts that opined that certain tests were not necessary to determine whether the defendant had brain damage that would have indicated a murder was not intentional or indicated a mitigator, (2) had interviewed other persons regarding the defendant's behavior patterns to assist in formulating his own opinion, and (3) took into consideration that that particular brain injury defense was not proven to be effective based on the result of the first trial in which the defendant also received a death sentence; the highest court concluded that the counsel did not prematurely abandon a defense based on organic brain damage and that their election to pursue a defense/mitigation strategy predicated on other grounds constituted a reasonable professional judgment. State v. Frogge, 359 N.C. 228, 607 S.E.2d 627, 2005 N.C. LEXIS 29 (2005).

Cited in State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003).

Rule 26. Secure leave periods for attorneys.

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending;

(2) if the attorney has entered an appearance in any civil action, either

(a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or,

(b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district,

(c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district;

(3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending;

(4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.

(G) *Procedure When Court Proceeding Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.

(H) *Procedure When Deposition Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.

(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave. (Adopted May 6, 1999, effective January 1, 2000.)

Editor's note. — This rule is effective January 1, 2000, and applies to all actions and proceedings pending in the Superior and District Courts on and after that date.

FORMS

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
.... COUNTY .... COURT DIVISION
FILE #: ....
PLAINTIFF FILM #: ....
-v-
DEFENDANT

CERTIFICATE OF READINESS

As counsel of record for .... (name the party you represent) who is a plaintiff, defendant, third party, (underline one) hereby certify that:

A. I know of no procedural matters which would delay the trial of the case when called for jury trial;

B. All motions existing of record this date have been heard or otherwise disposed of;

C. I know of no parties or witnesses desired that will not be available on the trial date;

D. I know of no current reason that would cause me to move for a continuance:

E. I am ready for trial.

This the .... day of ....

....
Attorney

IN THE GENERAL COURT OF JUSTICE
.... COURT DIVISION

Plaintiff(s)
-v- FILE #: ....
Defendant(s) FILM #: ....

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pre-trial conference was held in the above-entitled cause on the ...... day of ... ., ..., ..., Esquire, appeared as counsel for the plaintiff(s); .... Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.

Note: If the facts are otherwise, they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoiner of parties.

Note: If the facts are otherwise, they should be accurately stated.

(3) If any of the parties is appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).

(5) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

Note: Here set out all facts not in genuine dispute.*

---

* IN CONTRACT CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties

(6) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:
(a)
(b)

Note: Here list the pre-trial identification numbers and a brief description of each exhibit.

(7) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

Note: Here set out with particularity the basis of objection to specific exhibits.

It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(8) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

(9) The following is a list of all known exhibits the defendant(s) may offer at the trial:
(a)
(b)

Note: Here list the pre-trial identification and a brief description of each exhibit.

(10) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(11) It is stipulated and agreed that each of the exhibits identified by the defendant(s) is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except:

---

thereto; (c) the substance of the contract, if oral; (d) the terms of the contract which are relied upon and the portions in controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

IN MOTOR VEHICLE NEGLIGENCE CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHOULD, NEVERTHELESS, SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE.

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(12) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(13) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial:

Note: If either plaintiff or defendant's attorney discover additional witnesses after this listing, attention is called to obligation to notify opposing counsel. There shall be no requirement that all witnesses listed by a party be used, and the court may after satisfactory explanation, in his discretion, permit the use of a witness not listed.

The trial judge may, for good cause made known to him, relieve a party of the requirement of disclosing the name of any witness.

(14) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial:

(15) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s). Counsel shall immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(16) There are no pending motions, and neither party desires further amendments to the pleadings, except:

Note: Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pre-trial conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(17) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

(18) The plaintiff(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(19) The defendant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(20) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

Note: In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(21) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be .... days.

(22) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

Note: Counsel shall be required to conduct a frank discussion concerning settlement possibilities at the time of the conference of attorneys, and clients shall either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of trial as to whether this requirement was strictly observed.

....
Counsel for Plaintiff(s)

....
Counsel for Defendant(s)

Date: .... Approved and Ordered Filed.

....
Judge Presiding

Index to General Rules of Practice for the Superior and District Courts

A

APPELLATE DIVISION.
Custody of appellate reports, SuperCt Rule 18.

APPOINTMENT OF COUNSEL.
Capital cases, SuperCt Rule 25.

ARGUMENTS.
Opening and concluding arguments, SuperCt Rule 10.

ATTORNEYS AT LAW.
Appointment of defense counsel.
  Capital cases, SuperCt Rule 25.
Conflicting engagements in different courts.
  Guidelines for resolving, SuperCt Rule 3.1.
Presence during jury deliberation, SuperCt Rule 13.
Scheduling conflicts.
  Guidelines for resolving, SuperCt Rule 3.1.
Secure leave periods, SuperCt Rule 26.
Withdrawal of appearance, SuperCt Rule 16.

ATTORNEYS' FEES.
Capital cases.
  Motions for appropriate relief and habeas corpus.
    Request for and award, SuperCt Rule 25.

B

BONDS, SURETY.
Restrictions on sureties, SuperCt Rule 20.

BUSINESS CASES.
Complex business cases, SuperCt Rule 23.1.
  Designation, SuperCt Rule 2.1.
  Special superior court judge.
    Designation of, SuperCt Rule 2.2.

C

CALENDARING OF CIVIL CASES, SuperCt Rule 2.

CAPITAL CASES.
Habeas corpus applications, SuperCt Rule 25.
Motions for appropriate relief, SuperCt Rule 25.
Pretrial conferences, SuperCt Rule 24.

CERTIORARI, SuperCt Rule 19.

CIVIL CASES.
Calendaring, SuperCt Rule 2.
Complex business cases.
  Designation, SuperCt Rule 2.1.
  Special superior court judge.
    Designation of, SuperCt Rule 2.2.
  Summary procedure, SuperCt Rule 23.1.
Exceptional civil case.
  Designation, SuperCt Rules 2, 2.1.

CIVIL CASES —Cont'd
Motions, SuperCt Rule 6.

COMMERCIAL DISPUTES.
Complex business cases, SuperCt Rules 2.1, 2.2, 23.1.

COMPLEX BUSINESS CASES.
Designation, SuperCt Rule 2.1.
Special superior court judge.
  Designation of, SuperCt Rule 2.2.
Summary procedure, SuperCt Rule 23.1.

CONCLUDING ARGUMENTS, SuperCt Rule 10.

CONFERENCES.
Capital cases.
  Pretrial conference, SuperCt Rule 24.
Pre-trial procedure, SuperCt Rule 7.

CONFLICTING ENGAGEMENTS IN DIFFERENT COURTS.
Guidelines for resolving scheduling conflicts, SuperCt Rule 3.

CONTINUANCES, SuperCt Rule 3.

COURTROOM DECORUM, SuperCt Rule 12.

CUSTODY AND DISPOSITION OF EVIDENCE AT TRIAL, SuperCt Rule 14.

CUSTODY OF APPELLATE DIVISION REPORTS, SuperCt Rule 18.

D

DECORUM, SuperCt Rule 12.

DELIBERATION OF JURY.
Presence of counsel, SuperCt Rule 13.

DISCOVERY, SuperCt Rule 8.

E

ELECTRONIC MEDIA COVERAGE.
Public judicial proceedings, SuperCt Rule 15.

ENTRIES ON RECORDS, SuperCt Rule 17.

EVIDENCE.
Custody and disposition of evidence at trial, SuperCt Rule 14.

EXAMINATION OF WITNESSES, SuperCt Rule 11.

EXCEPTIONAL CIVIL CASE.
Designation, SuperCt Rules 2, 2.1.

G

GUARDIAN AD LITEM.
Minors.
  Appointment for, SuperCt Rule 7.1.

H

HABEAS CORPUS.
Capital cases, applications in, SuperCt Rule 25.

J

JURY.
Deliberation.
Presence of counsel, SuperCt Rule 13.
Summary jury trial, SuperCt Rule 23.

L

LOCAL COURT RULES, SuperCt Rule 22.

M

MINORS.
Guardian ad litem.
Appointment for, SuperCt Rule 7.1.

MOTIONS.
Appropriate relief in capital cases, SuperCt Rule 25.
Civil cases, SuperCt Rule 6.

O

OPENING ARGUMENTS, SuperCt Rule 10.

OPENING STATEMENTS, SuperCt Rule 9.

P

PHILOSOPHY OF GENERAL RULES OF PRACTICE, SuperCt Rule 1.

PHOTOGRAPHS OF COURT PROCEEDINGS, SuperCt Rule 15.

PLEADINGS.
Form, SuperCt Rule 5.

PRE-TRIAL CONFERENCES.
Capital cases, SuperCt Rule 24.

PRE-TRIAL PROCEDURE, SuperCt Rule 7.

R

RECORDARI.
Granting writ, SuperCt Rule 19.

RECORDS.
Entries on records, SuperCt Rule 17.

REPRODUCTION OF COURT PROCEEDINGS, SuperCt Rule 15.

S

SCHEDULING CONFLICTS.
Guidelines for resolving, SuperCt Rule 3.1.

SETTLEMENT PROCEEDINGS.
Scheduling conflict, precedence, SuperCt Rule 3.1.

SPECIAL SUPERIOR COURT JUDGE.
Complex business cases, SuperCt Rule 2.2.

STATEMENTS.
Opening statements, SuperCt Rule 9.

SUPERSEDEAS.
Granting writ, SuperCt Rule 19.

T

TIME.
Enlargement, SuperCt Rule 4.

V

VICTIMS.
Minors.
Appointment of guardian ad litem, SuperCt Rule 7.1.

W

WITHDRAWAL OF APPEARANCE, SuperCt Rule 16.

WITNESSES.
Examination of witnesses, SuperCt Rule 11.
Minors.
Appointment of guardian ad litem, SuperCt Rule 7.1.

UNIFORM RULES REGULATING MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES UNDER THE NORTH CAROLINA CUSTODY AND VISITATION MEDIATION PROGRAM

Adopted Effective December 19, 2002

Rule
1. Goals of mediation.
2. Purpose of program.
3. Definitions.
3.01. Mediation.
3.02. Mediator.
3.03. Parenting agreement.
4. Administration of program.
4.01. Employment of mediators.
4.02. In-house contracts permitted.
4.03. Administration of funds.
4.04. Multi-district programs.
4.05. Advisory committee established.
5. Local district programs.
6. Qualifications of mediators.
6.01. Initial training period.
6.02. Continuing education.
6.03. Continuing evaluation.
6.04. Mediator ethics.
7. [Referrals].
Rule
7.01. Referral to mediation (Chapter 50 cases).
7.02. Referral of placement issues in juvenile cases.
8. Waiver of mediation.
9. Orientation.
10. Attendance at mediation sessions.
11. Neutral stance of mediator.
12. The mediation process.
12.01. Authority of mediator.
12.02. Location.
12.03. Confidentiality.
12.04. Parenting plan.
12.05. Plan incorporated in court order.
12.06. Termination of mediation.
12.07. Return to mediation.
12.08. Other participants.
12.09. Caucus with parties.
12.10. Evaluation of program.
12.11. Complaint procedure.

Index follows Rules.

COMMENT

Legislation establishing a statewide Custody and Visitation Program in North Carolina required that the Administrative Office of the Courts "promulgate rules and regulations necessary and appropriate for the administration of the program" and that services provided be "uniform." G.S. 7A-494. Uniform rules will protect families receiving such services, will allow meaningful statistical comparisons to be made, and allow both mediators and the mediation program to be periodically reevaluated. The Program is to be established in phases throughout North Carolina, beginning on July 1, 1989.

Rule 1. Goals of mediation.

The goals of custody and visitation dispute mediation are centered in the reduction of the stress and anxiety experienced by children in separation and divorce, by furnishing an alternative way for the parties to settle custody and visitation disputes. A trained mediator helps the parties reorganize the family, continue parenting their children despite separation, and begins an educational process which will allow parties to recognize and meet the needs of their children. Mediation provides a structured, confidential, nonadversarial setting which will help the parties make informed choices about matters involving their children, with the hope that such cooperative resolution will alleviate the acrimony between the parties, reducing attendant stress on both the parties and the child. A successful mediation will help the parties put a parenting plan in writing, will teach them to solve future problems without recourse to the courts, and thus reduce the stress of relitigation of custody and visitation disputes.

Rule 2. Purpose of program.

The Custody and Visitation Mediation Program is to provide the services of skilled mediators to further the goals set out above.

Rule 3. Definitions.

Rule 3.01. Mediation.

A process whereby a trained, neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

Rule 3.02. Mediator.

A trained, neutral third party who acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

Rule 3.03. Parenting agreement.

A written agreement reached by the parties with the assistance of the mediator, which may be presented to the court for approval and adoption as an order of the court.

Rule 4. Administration of program.

The Administrative Office of the Courts (AOC) is responsible for establishing the Program in the several judicial districts of the State, and is to promulgate rules and regulations for the administration of the program. The Director of the AOC shall appoint necessary staff to plan, organize, and administer the program on a statewide basis. The AOC is to cooperate with each Chief District Court Judge and other district personnel in implementation and administration of the program.

Rule 4.01. Employment of mediators.

Mediators are to be employed by the Chief District Court Judge of the judicial district, and are to be full or part-time employees.

Rule 4.02. In-house contracts permitted.

When deemed appropriate by the AOC, the Chief District Court Judge may contract for delivery of mediation services, such contract to be approved by the Director. Such contracts are exempt from competitive bidding procedures under Chapter 143 of the General Statutes.

Rule 4.03. Administration of funds.

Funds appropriated by the General Assembly for the establishment and maintenance of mediation programs are to be administered by the AOC.

Rule 4.04. Multi-district programs.

The AOC may authorize all or part of a program in one district to be operated in conjunction with that of another district or districts.

Rule 4.05. Advisory committee established.

The Director of the AOC shall appoint a Custody Mediation Advisory Committee of at least five members to advise the Custody Mediation Program. Members of the Committee are to receive the same per diem and travel expenses as members of State boards and commissions generally.

Rule 5. Local district programs.

Each local district program is to consist of a qualified mediator, or mediators, and such clerical staff as the AOC in consultation with the local program deems necessary.

Rule 6. Qualifications of mediators.

A person desiring to furnish mediation services must demonstrate that he or she:

1) Has at least a master's degree in psychology, social work, family counseling, or a comparable human relations discipline; and

2) Has completed at least 40 hours of training in mediation techniques by an instructor deemed qualified by the AOC; and

3) Has had professional training and experience relating to child development, family dynamics, or comparable areas; and

4) Meets such other criteria as specified by the AOC.

Rule 6.01. Initial training period.

A person just beginning to furnish mediation services in the North Carolina Custody and Visitation Mediation Program shall satisfy the following requirements during an initial training period of 18-24 months following employment, unless some or all of the requirements are waived by the Director of the AOC or his designee:

Level I:
A. 18 Hours of Court Observations (Note: Suggest that Band C occur prior to D)
B. 18 Hours of Custody Mediation Observation
C. 40 Hours of Divorce Mediation Training
D. 24 Hours of Co-Mediation
(Note: E and F begin simultaneously)
E. Minimum of 2 consecutive weeks/maximum of 4 consecutive weeks of internship in one district
F. 150 Mediation Sessions
G. Meetings/Additional Training: (As designated by the AOC)
    Regional Meetings
    Annual Training Meeting(s)
    Trainee Progression Meetings
Level II:
A. 18 Hours of Co-Mediation (Note: To Be Completed Within 1st Quarter of Level II)
B. 150 Mediation Sessions
C. Meetings/Additional Training: (As designated by the AOC)
    Regional Meetings
    Annual Training Meeting(s)
    Trainee Progression Meetings

Documentation is to be provided to the Chief District Court Judge and the AOC at the conclusion of each level of the Training Progression. (See Appendix B, Mediator Training Progression.)

Rule 6.02. Continuing education.

A mediator is to keep abreast of developments in the field through such professional journals and bulletins as are available; further, a mediator is to participate in at least 20 hours of continuing education each two years, in a program approved by the Director of the AOC or his designee. A mediator should also regularly participate as a co-mediator, preferably with mediators outside the mediator's judicial district.

Rule 6.03. Continuing evaluation.

The performance of a mediator should be regularly evaluated by the AOC. Results of such mediation performance evaluation will be shared with the Chief District Court Judge. Methods of evaluation may include:

◇ Observation through a one-way mirror;
◇ Videotaped sessions (with permission of the parties);
◇ Audio tape-recorded sessions (with permission of the parties);
◇ Co-mediations of the mediator and the evaluator;
◇ Review of written agreements for completeness and specificity.

Rule 6.04. Mediator ethics.

See Appendix B, Standards of Practice for Mediators in the North Carolina Mandatory Custody Mediation Program.

Rule 7. [Referrals].

Editor's note. — The rules, as adopted, contained no heading for Rule 7. The bracketed heading has been added by the publisher.

Rule 7.01. Referral to mediation (Chapter 50 cases).

All actions involving unresolved issues as to the custody or visitation of a minor child shall be ordered to mediation on such issues prior to the trial of the matter, unless the court waives mediation. Such actions include an action for custody or visitation in which no order has been previously entered, motions to modify orders previously entered, and actions to enforce custody and visitation orders. This mandatory referral procedure does not limit the right of the court to enter temporary and *ex parte* orders under the applicable statutory provisions, or to immediately enforce existing orders. The order of referral shall advise the parties that a show cause order may be issued, or other sanctions imposed, if they fail to appear at the orientation session, or the first mediation session. (See Appendix B, Brochure and form AOC-CV-632, Motion and Order to waive Custody Mediation.)

Comment:

In the opinion of the Advisory Committee, the mandatory provisions of G.S. 50-13.1(b), the statutory authority for this section, apply only to actions brought under the provisions of Chapter 50 of the General Statutes. Actions instituted under the provisions of the Juvenile Code, as found in Chapter 7B of the General Statutes, often include issues of placement and visitation at the dispositional stage; such issues may, in appropriate cases, be referred for mediation by a district court judge pursuant to rule 7.02. Actions brought under the provisions of Chapter 50B of the General Statutes (Domestic Violence) are often inappropriate for mediation because the necessarily involve allegations of spousal abuse. If, however,the court finds the custody or visitation aspect of a domestic violence case to be appropriate for mediation, due consideration should be given to safety issues in the case. (See Appendix B, Domestic Violence Policy.)

Rule 7.02. Referral of placement issues in juvenile cases.

In a judicial district in which the custody mediation program is in operation, cases in which juvenile(s) have been adjudicated to be abused, neglected, dependent, delinquent or undisciplined, may be referred to the program for mediation of any dispute over placement of the juvenile(s), provided the Chief District Court Judge in the district has determined that such referrals are appropriate and that available resources allow mediation of such cases.

The Chief District Court Judge shall regularly monitor the number of cases referred to the program to ensure that resources allow continued referral of such cases.

In Districts where the Chief Judge has authorized referrals of such cases to mediation, a referral may be made upon the motion of the Court or upon the motion of any party. In the discretion of the Presiding Judge, an order of referral to mediation may be made. The Order of referral should identify the persons who are to participate in the mediation and shall designate the persons who are entitled to receive a copy of any agreement that is reached.

If an agreement is reached in mediation regarding the placement of the juvenile(s) in question, the mediator shall assist the participants in reducing the agreement to writing and shall ensure that each participant understands the written document. The mediator shall encourage each participant to review the agreement with their attorney prior to signing the same and shall afford them a reasonable opportunity to do so. After the agreement is signed by all participants, the mediator shall promptly furnish a copy to each party, attorney, and persons designated in the referral order for review prior to the dispositional hearing. After a hearing at which all parties have a right to be heard, the court may incorporate the terms of said agreement in its dispositional order, provided it finds the same to be in the best interests of the juvenile(s).

Rule 8. Waiver of mediation.

On its own motion, or that of either party, the court may waive the setting of a contested custody or visitation matter for mediation. Good cause includes, but is not limited to, a showing of undue hardship to a party, an agreement between the parties for private mediation, allegations of abuse or neglect of the minor child, allegations of alcoholism, drug abuse, or spouse abuse, or allegations of severe psychological, psychiatric, or emotional problems. Where a party resides more than 50 miles from court, such distance shall be considered good cause. (See Appendix B, AOC-CV-632 Motion and Order to Waive Custody Mediation.)

Rule 9. Orientation.

Prior to mediation, an orientation session shall be held at which the goals and procedures of the mediation process shall be explained to the parties to reduce apprehension and avoidance of the process. An intake form shall be completed. (See Appendix B, Sample Mediation Intake Form.) The parties shall be advised that if they fail to appear for the initial mediation session, an order to show cause might be issued and the non-appearing party could be found in contempt of the court.

Rule 10. Attendance at mediation sessions.

The mediation process shall consist of no more than three sessions, each of which shall not exceed two hours in length. A party must attend the orientation and first mediation session before deciding to withdraw from the process. The number of sessions may be extended by agreement of the parties with the permission of the Chief District Court Judge.

Rule 11. Neutral stance of mediator.

While a mediator is to be a neutral in promoting an agreement between the parties, the mediator is to be aware of the best interests of the children involved in the case. During the mediation process, the mediator is to help the parties avoid agreements which do not promote the best interests of the child.

Rule 12. The mediation process.

The mediator should assist the parties in focusing on the needs of their child, the need to reorganize the family and use its strengths, the need to maintain continuity of relationships and stability in the child's life, and the options available to the parties which would accomplish those goals. The mediator should help the parties select from the range of options those which are sound and workable, in an effort to reach an agreement which will reduce the conflict in the family, benefiting both the parties and child.

Rule 12.01. Authority of mediator.

The mediator shall be in control at all times of the mediation process and the procedures to be followed in the mediation. The mediator may suspend the mediation session if it becomes unsafe for any of the participants, including the mediator.

Rule 12.02. Location.

The mediation proceeding shall be held in a private and safe location.

Rule 12.03. Confidentiality.

The mediation proceeding shall be confidential. Neither the mediator nor any party or other person involved in mediation sessions shall be competent to testify as to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. An individual shall not, however, obtain thereby immunity from prosecution for criminal conduct or be excused from the reporting requirement of G.S. 7A-543 or G.S. 108A-102.

Rule 12.04. Parenting plan.

A detailed and clearly written parenting agreement, or parenting plan, is the desired end-product of the mediation process. (See Appendix B, Sample Parenting Agreement). The parenting plan may include a designation of the party having legal or physical custody, and what duties and responsibilities such designation includes. The plan should also include a complete schedule of the child's time with each party, including holidays, vacation time, and special events. Arrangements may be made for special day observance, such as birthdays. The need of the child to maintain relationships with persons with whom the child has a substantial relationship may be addressed.

The mediator should help the parties reduce their agreement to writing and ensure that each party understands the written document. *Before the parties sign the proposed agreement,* the mediator shall mail a copy of the proposed agreement to parties and counsel, encourage each parties to have their attorneys review the agreement with them prior to their signing the plan, and afford them a reasonable opportunity to do so. The mediator shall promptly submit the initial signed agreement, or any signed modification agreement to the court. An Order Approving Parenting Agreement (Appendix B, AOC-CV-631) is to be attached for the judge's signature. Signed copies will be provided to both parties and their attorneys. Some of the procedures set forth in this rule may not be applicable to mediation of placement issues in Juvenile cases. Refer to Rule 7.02 for procedures in mediation of placement issues in Juvenile cases.

Rule 12.05. Plan incorporated in court order.

Where an initial signed agreement or a signed modification of that agreement is submitted to the court, it shall be incorporated in a court order unless the court finds good reason not to do so. (See Appendix B, AOC-CV-631, Order Approving Parenting Agreement.) When incorporated, the agreement is enforceable as is any other court order. Even though designated "parenting agreement," or some similar name, the incorporated agreement shall be considered a custody order or child custody determination within the meaning of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 1 10-139.1, or other places where those terms appear. Some of the procedures set forth in this rule may not be applicable to mediation of placement issues in Juvenile cases. Refer to Rule 7.02 for procedures in mediation of placement issues in Juvenile cases.

Rule 12.06. Termination of mediation.

After the parties have attended at least the orientation and first mediation session, either or both of the parties may decide not to participate further in the mediation process, and the mediator shall report to the court that no agreement was reached.

Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias, undue familiarity with a party, or other prejudicial ground. Further, if the mediator determines that the case is not suitable for mediation due to a power imbalance between the parties, the presence of child abuse or neglect, or other reason, the mediator may report to the court that the case was not resolved. (See Appendix B, AOC-CV-914M, Order to Calendar Custody or Visitation Dispute.)

Where an agreement is not reached, the custody mediation office may make available information on community resources for families and children involved in a family reorganization.

Rule 12.07. Return to mediation.

The mediator shall explain to the parties that the needs of their children change over time, and encourage them to return to mediation if they are unable to resolve any problems caused by that factor, or other changes in circumstances. (See Appendix B, Motion and Order to Return to Custody Mediation, AOC-CV-634.)

Rule 12.08. Other participants.

With the consent of all parties, the mediator may speak with the child, in an effort to assist the parties to assess the needs and interests of the child. Refer to Rule 7.02 for special rules regarding participants in mediation of placement issues in Juvenile cases.

Rule 12.09. Caucus with parties.

Although it is generally desirable for the mediator to talk with the parties together, if there is no objection by either party, the mediator may caucus with each party.

Rule 12.10. Evaluation of program.

The Administrative Office of the Courts shall evaluate the program from time to time, and *shall* prepare a summary of the program activities to be included in the North Carolina Courts Annual Report of the Administrative Office of the Courts.

Comment:

In addition to evaluation of the statistics compiled and submitted by the various programs (See Appendix B, AOC-A-91OM, Custody Mediation Monthly Report), user satisfaction might be monitored by the use of exit interviews, and follow-up questionnaires and telephone interviews in a sampling of cases at some time after the completion of the process.

Rule 12.11. Complaint procedure.

The written orientation materials provided to the parties shall advise them how a complaint about the mediator, or mediation process, can be filed with the Chief District Court Judge of the judicial district. (See Appendix B, Brochure.)

Rule 12.10. Evaluation of program.

The Administrative Office of the Courts shall evaluate the program from time to time, and shall prepare summaries of the program's activities to be included in the North Carolina Courts Annual Report of the Administrative Office of the Courts.

COMMENT

In addition to evaluation of the statewide required [illegible] and conducted [illegible] [illegible] and follow-up questionnaires [illegible] process.

Rule 12.11. Complaint procedure.

The written orientation materials provided to the parties shall advise them how a complaint about the mediator or mediation process may be filed with the Chief District Court Judge of the judicial district. (See Appendix B, Brochure.)

Index to Rules of Child Custody and Visitation Disputes

A

ABUSED, NEGLECTED OR DEPENDENT JUVENILES.
Placement issues.
Referral to mediation, CustodyVisit Rule 7.02.

ADMINISTRATION OF PROGRAM, CustodyVisit Rule 4.

ATTENDANCE AT MEDIATION SESSION, CustodyVisit Rule 10.

B

BEST INTEREST OF CHILD.
Mediator to be aware of, CustodyVisit Rule 11.

C

CAUCUS WITH PARTIES, CustodyVisit Rule 12.09.

COMPLAINTS ABOUT MEDIATORS OR PROGRAM, CustodyVisit Rule 12.11.

CONFIDENTIALITY OF MEDIATION, CustodyVisit Rule 12.03.

CONTINUING EDUCATION.
Mediators, CustodyVisit Rule 6.02.

CUSTODY MEDIATION ADVISORY COMMITTEE, CustodyVisit Rule 4.05.

D

DEFINITIONS.
Mediation, CustodyVisit Rule 3.01.
Mediator, CustodyVisit Rule 3.02.
Parenting agreement, CustodyVisit Rule 3.03.

DELINQUENTS.
Placement issues.
Referral to mediation, CustodyVisit Rule 7.02.

DISMISSAL OF MEDIATION, CustodyVisit Rule 12.06.

E

EVALUATION OF PROGRAM, CustodyVisit Rule 12.10.

F

FUNDS APPROPRIATED BY GENERAL ASSEMBLY.
Administration, CustodyVisit Rule 4.03.

G

GOALS OF MEDIATION, CustodyVisit Rule 1.

J

JUVENILE PLACEMENT ISSUES.
Referral, CustodyVisit Rule 7.02.

L

LENGTH OF MEDIATION SESSION, CustodyVisit Rule 10.

LOCAL DISTRICT PROGRAMS, CustodyVisit Rule 5.

LOCATION OF MEDIATION, CustodyVisit Rule 12.02.

M

MANDATORY REFERRAL PROCEDURE, CustodyVisit Rule 7.01.

MEDIATORS.
Authority, CustodyVisit Rule 12.01.
Best interest of child.
Mediator to be aware of, CustodyVisit Rule 11.
Caucus with parties, CustodyVisit Rule 12.09.
Complaints about, CustodyVisit Rule 12.11.
Continuing education, CustodyVisit Rule 6.02.
Defined, CustodyVisit Rule 3.02.
Duties in mediation process, CustodyVisit Rule 12.
Employment, CustodyVisit Rule 4.01.
Ethics, CustodyVisit Rule 6.04.
In-house contracts for delivery of services, CustodyVisit Rule 4.02.
Initial training period, CustodyVisit Rule 6.01.
Neutral stance, CustodyVisit Rule 11.
Performance evaluation, CustodyVisit Rule 6.03.
Qualification, CustodyVisit Rule 6.
Speaking with child, CustodyVisit Rule 12.08.

MULTI-DISTRICT PROGRAMS, CustodyVisit Rule 4.04.

N

NUMBER OF MEDIATION SESSIONS, CustodyVisit Rule 10.

O

ORDER TO MEDIATION, CustodyVisit Rule 7.01.

ORIENTATION SESSION.
Prior to mediation, CustodyVisit Rule 9.

P

PARENTING PLAN, CustodyVisit Rule 12.04.
Defined, CustodyVisit Rule 3.03.

PARENTING PLAN —Cont'd
Incorporation into court order, CustodyVisit Rule 12.05.

PERFORMANCE EVALUATION.
Mediators, CustodyVisit Rule 6.03.

PLACEMENT OF JUVENILES.
Referral of placement issues, CustodyVisit Rule 7.02.

PROCESS OF MEDIATION, CustodyVisit Rule 12.

PURPOSE OF PROGRAM, CustodyVisit Rule 2.

R

REFERRAL OF PLACEMENT ISSUES, CustodyVisit Rule 7.02.

REFERRAL TO MEDIATION, CustodyVisit Rule 7.01.

RETURN TO MEDIATION.
Unable to resolve problems, change in circumstances, CustodyVisit Rule 12.07.

T

TERMINATION OF MEDIATION, CustodyVisit Rule 12.06.

U

UNDISCIPLINED JUVENILES.
Placement issues.
Referral to mediation, CustodyVisit Rule 7.02.

W

WAIVER OF MEDIATION, CustodyVisit Rule 8.

North Carolina
Child Support Guidelines

Effective October 1, 2006

Introduction

Section 50-13.4 of the North Carolina General Statutes requires the Conference of Chief District Judges to prescribe uniform statewide presumptive guidelines for determining the child support obligations of parents, and to review the guidelines periodically (at least once every four years) to determine whether their application results in appropriate child support orders.

These revised guidelines are the product of the ongoing review process conducted by the Conference of Chief District Judges. The Conference conducted a public hearing to provide interested citizens an opportunity to comment on the guidelines and also considered written comments from agencies, attorneys, judges and members of the public.

Applicability and Deviation

These revised guidelines are effective October 1, 2006, and apply to cases heard and decided on or after that date.

North Carolina's child support guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent (including orders entered in criminal and juvenile proceedings, orders entered in UIFSA proceedings, and voluntary support agreements and consent orders approved by the court). The guidelines do not apply to child support orders entered against stepparents or other persons or agencies who are secondarily liable for child support. If a child's parents have executed a valid, unincorporated separation agreement that determines a parent's child support obligations and an action for child support is subsequently brought against the parent, the court must base the parent's child support obligation on the amount of support provided under the separation agreement rather than the amount of support payable under the child support guidelines unless the court determines, by the greater weight of the evidence taking into account the child's needs and the factors enumerated in the first sentence of G.S. 50-13.4(c), that the amount of support under the separation agreement is unreasonable. In cases involving a parent's obligation to support his or her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) pursuant to the child support guidelines, or (b) based on the parent's fair share of actual expenditures for the child's care.

The guidelines must be used when the court enters a temporary or permanent child support order in a non-contested case or a contested hearing.

The court upon its own motion or upon motion of a party may deviate from the guidelines if, after hearing evidence and making findings regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, it finds by the greater weight of the evidence that application of the guidelines would not meet, or would exceed, the reasonable needs of the child considering the relative ability of each parent to provide support, or would otherwise be unjust or inappropriate. If the court deviates from the guidelines, the court must make written findings (1) stating the amount of the supporting parent's presumptive child support obligation determined pursuant to these guidelines; (2) determining the reasonable needs of the child and the relative ability of each parent to provide support; (3) supporting the court's conclusion that the presumptive amount of child support determined under the guidelines is inadequate or excessive or that application of the guidelines is otherwise unjust or inappropriate; and (4) stating the basis on which the court determined the amount of child support ordered. (One example of a reason to deviate may be when one parent pays 100% of the child support obligation and 100% of the insurance premium.)

The guidelines are intended to provide adequate awards of child support that are equitable to the child and both of the child's parents. When the court does not deviate from the guidelines, an order for child support in an amount determined pursuant to the guidelines is conclusively presumed to meet the reasonable needs of a child

© 2006 Administrative Office of the Courts

considering the relative ability of each parent to provide support, and specific findings regarding a child's reasonable needs or the relative ability of each parent to provide support are therefore not required.

Regardless of whether the court deviates from the guidelines or enters a child support order pursuant to the guidelines, the court should consider incorporating in, or attaching to, its order, or including in the case file, the child support worksheet it uses to determine the supporting parent's presumptive child support obligation under the guidelines.

Self-Support Reserve; Supporting Parents With Low Incomes

The Guidelines include a self-support reserve that ensures that obligors have sufficient income to maintain a minimum standard of living based on the 2006 federal poverty level for one person ($816.00 per month). For obligors with an adjusted gross income of less than $950, the Guidelines require, absent a deviation, the establishment of a minimum support order ($50). For obligors with adjusted gross incomes above $950, the Schedule of Basic Support Obligations incorporates a further adjustment to maintain the self-support reserve for the obligor.

If the obligor's adjusted gross income falls within the shaded area of the Schedule and Worksheet A is used, the basic child support obligation and the obligor's total child support obligation are computed using only the obligor's income. In these cases, childcare and health insurance premiums should not be used to calculate the child support obligation. However, payment of these costs by either parent may be a basis for deviation. This approach prevents disproportionate increases in the child support obligation with moderate increases in income and protects the integrity of the self-support reserve. In all other cases, the basic child support obligation is computed using the combined adjusted gross incomes of both parents.

Determination Of Support In Cases Involving High Combined Income

In cases in which the parents' combined adjusted gross income is more than $25,000 per month ($300,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule.

In cases in which the parents' combined income is above $25,000 per month, the court should, on a case by case basis, consider the reasonable needs of the child(ren) and the relative ability of each parent to provide support. The schedule of basic child support may be of assistance to the court in determining a minimal level of child support.

Assumptions And Expenses Included In Schedule Of Basic Child Support Obligations

North Carolina's child support guidelines are based on the "income shares" model, which was developed under the Child Support Guidelines Project funded by the U.S. Office of Child Support Enforcement and administered by the National Center for State Courts. The income shares model is based on the concept that child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the child's parents lived together. The schedule of basic child support obligations is based primarily on an analysis by Policy Studies, Inc. of economic research regarding family expenditures for children.

The child support schedule that is a part of the guidelines is based on economic data which represent adjusted estimates of average total household spending for children between birth and age 18, excluding child care, health insurance, and health care costs in excess of $250 per year. Expenses incurred in the exercise of visitation are not factored into the schedule.

The schedule assumes that the parent who receives child support claims the tax exemptions for the child. If the parent who receives child support has minimal or no income tax liability, the court may consider requiring the custodial parent to assign the exemption to the supporting parent and deviate from the guidelines.

Income

The Schedule of Basic Child Support Obligations is based upon net income converted to gross annual income by incorporating the federal tax rates, North Carolina tax rates and FICA. Gross income is income before deductions for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from income.

© 2006 Administrative Office of the Courts

(1) Gross Income. "Income" means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental of property, retirement or pensions, interest, trusts, annuities, capital gains, social security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Food Stamps and General Assistance.

Social security benefits received for the benefit of a child as a result of the disability or retirement of either parent are included as income attributed to the parent on whose earnings record the benefits are paid, but are deductible from that parent's child support obligation.

Except as otherwise provided, income does not include the income of a person who is not a parent of a child for whom support is being determined regardless of whether that person is married to or lives with the child's parent or has physical custody of the child.

(2) Income from self-employment or operation of a business. Gross income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Ordinary and necessary business expenses do not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate for determining gross income. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

Expense reimbursements or in-kind payments (for example, use of a company car, free housing, or reimbursed meals) received by a parent in the course of employment, self-employment, or operation of a business are counted as income if they are significant and reduce personal living expenses.

(3) Potential or Imputed Income. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. Potential income may not be imputed to a parent who is physically or mentally incapacitated or is caring for a child who is under the age of three years and for whom child support is being determined.

The amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.

(4) Income Verification. Child support calculations under the guidelines are based on the parents' current incomes at the time the order is entered. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. Sanctions may be imposed for failure to comply with this provision on the motion of a party or by the court on its own motion.

Pre-Existing Support Obligations And Responsibility For Other Children

Child support payments actually made by a parent under any pre-existing court order, separation agreement or voluntary support arrangement are deducted from the parent's gross income. The court may consider a voluntary support arrangement as a pre-existing child support obligation when the supporting parent has consistently paid child support for

© 2006 Administrative Office of the Courts

a reasonable and extended period of time. A pre-existing support order is one that is in effect at the time a child support order in the pending action is entered or modified, regardless of whether the child or children for whom support is being paid were born before or after the child or children for whom support is being determined. The fact that a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support arrangements may be considered as a factor warranting deviation from the child support guidelines.

Actual payments of alimony are not deducted from gross income but may be considered as a factor to vary from the final presumptive child support obligation.

A parent's financial responsibility (as determined below) for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is deducted from the parent's gross income. Use of this deduction is appropriate when a child support order is entered or modified, but may not be the sole basis for modifying an existing order.

A parent's financial responsibility for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is (a) equal to the basic child support obligation for these children based on the parent's income if the other parent of these children does not live with the parent and children; or (b) one-half of the basic child support obligation for these children based on the combined incomes of both of the parents of these children if the other parent of these children lives with the parent and children.

Basic Child Support Obligation

The basic child support obligation is determined using the attached schedule of basic child support obligations. For combined monthly adjusted gross income amounts falling between amounts shown in the schedule the basic child support obligation should be interpolated.

The number of children refers to children for whom the parents share joint legal responsibility and for whom support is being sought.

Child Care Costs

Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes.

When the gross monthly income of the parent paying child care costs falls below the amounts indicated below, 100% of child care costs are added.

1 child = $1,100
2 children = $1,500
3 children = $1,700
4 children = $1,900
5 children = $2,100
6 children = $2,300

At these income levels, the parent who pays child care costs does not benefit from the tax credit for child care. When the income of the parent who pays child care costs exceeds the amounts indicated above, only 75% of actual child care costs are added (because the parent is entitled to the income tax credit for child care expenses).

Health Insurance and Health Care Costs

The amount that is, or will be, paid by a parent (or a parent's spouse) for health (medical, or medical and dental) insurance for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes. Payments that are made by a parent's (or stepparent's) employer for health insurance and are not deducted from the parent's (or stepparent's) wages are not included. When a child for whom support is being determined is covered by a family policy, only the health insurance premium actually attributable to that child is added. If this amount is not available or cannot be verified, the total cost of the premium is divided by the total number of persons covered by the policy and then multiplied by the number of covered children for whom support is being determined.

The court may order that uninsured medical or dental expenses in excess of $250 per year or other uninsured health care costs (including reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) be paid by either parent or both parents in such proportion as the court deems appropriate.

The court may order either parent to obtain and maintain health (medical or medical and dental) insurance coverage for a child if it is actually and currently available to the parent at a reasonable cost. Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of delivery mechanism. If health insurance is not actually and currently available to a parent at a reasonable cost at the time the court orders child support, the court may enter an order requiring the parent to obtain and maintain health insurance for a child if and when the parent has access to reasonably-priced health insurance for the child.

Other Extraordinary Expenses

Other extraordinary child-related expenses (including 1. expenses related to special or private elementary or secondary schools to meet a child's particular educational needs, and 2. expenses for transporting the child between the parents' homes) may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.

Child Support Worksheets

A parent's presumptive child support obligation under the guidelines must be determined using one of the attached child support worksheets.

The child support worksheets must include the incomes of both parents, regardless of whether one parent is seeking child support from the other parent or a third party is seeking child support from one or both parents. The child support worksheets may not be used to calculate the child support obligation of a stepparent or other party who is secondarily liable for child support. Do not include the income of an individual who is not the parent of a child for whom support is being determined on the worksheets.

Use Worksheet A when one parent (or a third party) has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for at least 243 nights during the year. Primary physical custody is determined without regard to whether a parent has primary, shared, or joint legal custody of a child. Do not use Worksheet A when (a) a parent has primary custody of one or more children and the parents share custody of one or more children [instead, use Worksheet B] or (b) when primary custody of two or more children is split between the parents [instead, use Worksheet C]. In child support cases involving primary physical custody, a child support obligation is calculated for both parents but the court enters an order requiring the parent who does not have primary physical custody of the child to pay child support to the parent or other party who has primary physical custody of the child.

Use Worksheet B when (a) the parents share custody of all of the children for whom support is being determined, or (b) when one parent has primary physical custody of one or more of the children and the parents share custody of another child. Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. Shared custody is determined without regard to whether a parent has primary, shared, or joint legal custody of a child. Do not apply the self-sufficiency reserve incorporated into the shaded area of the schedule when using Worksheet B.

In cases involving shared custody, the parents' combined basic support obligation is increased by 50% (multiplied by 1.5) and is allocated between the parents based on their respective incomes and the amount of time the children live with the other parent. The adjustment based on the amount of time the children live with the other parent is calculated for all of the children regardless of whether a parent has primary, shared, or split custody of a child. After child support obligations are calculated for both parents, the parent with the higher child support obligation is ordered to pay the difference between his or her presumptive child support obligation and the other parent's presumptive child support obligation.

Use Worksheet C when primary physical custody of two or more children is split between the parents. Split custody refers to cases in which one parent has primary custody of at least one of the children for whom support is being determined and the other parent has primary custody of the other child or children. Do not use Worksheet C when the parents share custody of one or more of the children and have primary physical custody or split custody of another child

© 2006 Administrative Office of the Courts

[instead, use Worksheet B]. The parents' combined basic support obligation is allocated between the parents based on their respective incomes and the number of children living with each parent. After child support obligations are calculated for both parents, the parent with the higher child support obligation is ordered to pay the difference between his or her presumptive child support obligation and the other parent's presumptive child support obligation. Do not apply the self-sufficiency reserve incorporated into the shaded area of the schedule when using Worksheet C.

Modification

In a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances shall be presumed to constitute a substantial change of circumstances warranting modification of the existing child support order.

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
0-950	50	50	50	50	50	50
1000	57	58	59	59	60	60
1050	92	93	94	95	96	97
1100	126	127	129	130	132	133
1150	160	162	164	166	167	169
1200	195	197	199	201	203	205
1250	229	232	234	237	239	242
1300	263	266	269	272	275	278
1350	290	301	304	308	311	314
1400	299	335	339	342	346	350
1450	308	367	372	376	380	384
1500	316	400	404	409	413	418
1550	325	432	437	442	447	451
1600	334	465	470	475	480	485
1650	342	497	503	508	514	519
1700	351	511	536	541	547	553
1750	360	523	568	574	581	587
1800	369	536	601	607	614	620
1850	377	548	633	640	647	654
1900	386	560	661	673	680	687
1950	394	572	675	705	713	720
2000	402	584	689	738	746	754
2050	411	596	704	771	779	787
2100	419	608	718	802	812	821
2150	428	620	732	817	845	854
2200	436	632	746	833	878	888
2250	444	644	760	849	911	921
2300	453	656	774	864	944	954
2350	461	668	788	880	968	988
2400	469	680	802	896	985	1021
2450	478	692	816	911	1002	1055
2500	486	704	830	927	1020	1088
2550	495	716	844	943	1037	1121

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
2600	503	729	858	958	1054	1146
2650	511	741	872	974	1071	1165
2700	520	753	886	990	1089	1183
2750	528	765	900	1005	1106	1202
2800	537	777	914	1021	1124	1221
2850	545	789	929	1038	1142	1241
2900	554	802	944	1054	1160	1260
2950	562	814	958	1070	1178	1280
3000	571	826	973	1087	1196	1300
3050	579	839	988	1103	1214	1319
3100	588	851	1002	1120	1232	1339
3150	596	863	1017	1136	1250	1358
3200	605	876	1032	1152	1268	1378
3250	613	888	1046	1168	1285	1397
3300	620	898	1058	1182	1300	1414
3350	628	909	1071	1196	1316	1430
3400	635	920	1084	1210	1331	1447
3450	642	930	1096	1224	1347	1464
3500	650	941	1109	1238	1362	1481
3550	657	951	1121	1252	1378	1498
3600	664	962	1134	1266	1393	1514
3650	672	973	1146	1281	1409	1531
3700	679	983	1159	1295	1424	1548
3750	686	994	1172	1309	1439	1565
3800	693	1003	1182	1321	1453	1579
3850	698	1011	1191	1330	1463	1590
3900	704	1019	1199	1340	1474	1602
3950	710	1026	1208	1349	1484	1613
4000	715	1034	1216	1359	1494	1624
4050	721	1042	1225	1368	1505	1636
4100	726	1049	1233	1378	1515	1647
4150	732	1057	1242	1387	1526	1659

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
4200	738	1065	1250	1397	1536	1670
4250	743	1072	1259	1406	1547	1681
4300	749	1080	1267	1416	1557	1693
4350	754	1088	1276	1425	1568	1704
4400	760	1095	1284	1435	1578	1715
4450	766	1103	1293	1444	1589	1727
4500	771	1110	1301	1453	1599	1738
4550	774	1115	1307	1460	1606	1746
4600	778	1121	1313	1467	1614	1754
4650	781	1126	1320	1474	1621	1762
4700	785	1131	1326	1481	1629	1771
4750	788	1136	1332	1488	1636	1779
4800	791	1141	1338	1494	1644	1787
4850	795	1146	1344	1501	1651	1795
4900	798	1151	1350	1508	1659	1803
4950	802	1156	1356	1515	1667	1812
5000	804	1160	1361	1521	1673	1818
5050	808	1165	1367	1527	1680	1826
5100	811	1170	1374	1534	1688	1835
5150	815	1175	1380	1541	1695	1843
5200	818	1181	1386	1548	1703	1851
5250	822	1186	1392	1555	1710	1859
5300	825	1191	1398	1561	1717	1867
5350	829	1196	1403	1568	1724	1874
5400	833	1201	1409	1574	1731	1882
5450	837	1206	1415	1580	1739	1890
5500	840	1211	1421	1587	1746	1898
5550	844	1216	1427	1593	1753	1905
5600	848	1222	1432	1600	1760	1913
5650	851	1227	1438	1606	1767	1921
5700	855	1232	1444	1613	1774	1928
5750	859	1237	1449	1619	1781	1936

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
5800	862	1242	1455	1625	1788	1944
5850	866	1247	1461	1632	1795	1951
5900	870	1252	1467	1638	1802	1959
5950	873	1256	1472	1644	1808	1965
6000	875	1259	1474	1646	1811	1969
6050	877	1261	1476	1649	1814	1972
6100	879	1264	1479	1652	1817	1975
6150	881	1267	1481	1654	1820	1978
6200	884	1269	1484	1657	1823	1981
6250	886	1272	1486	1660	1826	1985
6300	888	1274	1488	1663	1829	1988
6350	890	1277	1491	1665	1832	1991
6400	892	1279	1493	1668	1835	1994
6450	894	1282	1496	1671	1838	1998
6500	896	1285	1498	1673	1841	2001
6550	898	1287	1500	1676	1844	2004
6600	900	1290	1503	1679	1846	2007
6650	903	1292	1505	1681	1849	2010
6700	905	1296	1509	1685	1854	2015
6750	908	1299	1513	1690	1859	2021
6800	910	1303	1517	1695	1864	2026
6850	913	1306	1521	1699	1869	2032
6900	915	1310	1525	1704	1874	2037
6950	918	1314	1529	1708	1879	2043
7000	921	1317	1534	1713	1884	2048
7050	923	1321	1538	1718	1889	2054
7100	926	1324	1542	1722	1894	2059
7150	928	1328	1546	1727	1899	2065
7200	931	1332	1550	1731	1904	2070
7250	934	1335	1554	1736	1910	2076
7300	936	1339	1558	1741	1915	2081
7350	939	1343	1562	1745	1920	2087

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
7400	941	1346	1566	1750	1925	2092
7450	944	1350	1571	1754	1930	2098
7500	947	1353	1575	1759	1935	2103
7550	949	1357	1579	1763	1940	2109
7600	952	1361	1583	1768	1945	2114
7650	954	1364	1587	1773	1950	2120
7700	957	1368	1591	1777	1955	2125
7750	960	1371	1595	1782	1960	2131
7800	962	1375	1599	1786	1965	2136
7850	965	1379	1604	1791	1971	2142
7900	968	1384	1609	1797	1977	2149
7950	972	1388	1614	1803	1983	2156
8000	975	1393	1619	1809	1989	2162
8050	978	1397	1624	1814	1996	2169
8100	982	1402	1629	1820	2002	2176
8150	985	1407	1634	1826	2008	2183
8200	988	1411	1639	1831	2014	2190
8250	992	1416	1645	1837	2021	2196
8300	995	1420	1650	1843	2027	2203
8350	998	1425	1655	1848	2033	2210
8400	1002	1429	1660	1854	2039	2217
8450	1005	1434	1665	1860	2046	2224
8500	1009	1439	1670	1865	2052	2230
8550	1012	1443	1675	1871	2058	2237
8600	1015	1448	1680	1877	2064	2244
8650	1019	1452	1685	1882	2071	2251
8700	1022	1457	1690	1888	2077	2258
8750	1025	1461	1695	1894	2083	2264
8800	1029	1466	1700	1899	2089	2271
8850	1032	1471	1706	1905	2096	2278
8900	1035	1475	1711	1911	2102	2285
8950	1038	1480	1716	1917	2109	2292

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
9000	1042	1484	1721	1923	2115	2299
9050	1045	1489	1727	1929	2122	2306
9100	1048	1493	1732	1935	2128	2313
9150	1051	1498	1737	1941	2135	2320
9200	1054	1502	1743	1947	2141	2328
9250	1058	1507	1748	1953	2148	2335
9300	1061	1512	1753	1958	2154	2342
9350	1064	1516	1759	1964	2161	2349
9400	1067	1521	1764	1970	2167	2356
9450	1070	1525	1769	1976	2174	2363
9500	1074	1530	1775	1982	2180	2370
9550	1077	1534	1780	1988	2187	2377
9600	1080	1539	1785	1994	2193	2384
9650	1083	1543	1791	2000	2200	2391
9700	1086	1548	1796	2006	2207	2398
9750	1090	1553	1801	2012	2213	2406
9800	1093	1557	1806	2018	2220	2413
9850	1096	1562	1812	2024	2226	2420
9900	1099	1566	1817	2029	2232	2427
9950	1102	1571	1822	2035	2238	2433
10000	1105	1575	1827	2040	2244	2440
10050	1109	1579	1831	2046	2250	2446
10100	1112	1584	1836	2051	2256	2453
10150	1115	1588	1841	2057	2262	2459
10200	1118	1592	1846	2062	2268	2466
10250	1121	1597	1851	2068	2274	2472
10300	1124	1601	1856	2073	2280	2479
10350	1128	1605	1861	2078	2286	2485
10400	1131	1610	1866	2084	2292	2492
10450	1134	1614	1870	2089	2298	2498
10500	1137	1618	1875	2095	2304	2505
10550	1140	1623	1880	2100	2310	2511

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
10600	1143	1627	1885	2106	2316	2518
10650	1146	1631	1890	2111	2322	2524
10700	1150	1636	1895	2116	2328	2531
10750	1153	1640	1900	2122	2334	2537
10800	1156	1644	1904	2127	2340	2544
10850	1159	1649	1909	2133	2346	2550
10900	1162	1653	1914	2138	2352	2556
10950	1165	1657	1919	2143	2358	2563
11000	1168	1662	1924	2149	2364	2569
11050	1172	1666	1929	2154	2370	2576
11100	1175	1670	1933	2160	2376	2582
11150	1178	1675	1938	2165	2382	2589
11200	1181	1679	1943	2170	2387	2595
11250	1184	1683	1948	2176	2393	2602
11300	1187	1688	1953	2182	2400	2609
11350	1190	1692	1959	2188	2407	2616
11400	1194	1697	1964	2194	2413	2623
11450	1197	1702	1970	2200	2420	2631
11500	1200	1706	1975	2206	2427	2638
11550	1203	1711	1981	2212	2434	2645
11600	1206	1715	1986	2218	2440	2653
11650	1209	1720	1992	2225	2447	2660
11700	1213	1725	1997	2231	2454	2667
11750	1216	1729	2002	2237	2460	2674
11800	1219	1734	2008	2243	2467	2682
11850	1222	1738	2013	2249	2474	2689
11900	1225	1743	2019	2255	2480	2696
11950	1228	1748	2024	2261	2487	2704
12000	1232	1752	2030	2267	2494	2711
12050	1235	1757	2035	2273	2501	2718
12100	1238	1761	2041	2279	2507	2725
12150	1241	1766	2046	2285	2514	2733

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
12200	1244	1771	2052	2292	2521	2740
12250	1247	1775	2057	2298	2527	2747
12300	1251	1780	2062	2304	2534	2755
12350	1254	1784	2068	2310	2541	2762
12400	1257	1789	2073	2316	2548	2769
12450	1260	1794	2079	2322	2554	2776
12500	1263	1798	2084	2328	2561	2784
12550	1266	1803	2090	2334	2568	2791
12600	1270	1807	2095	2340	2574	2798
12650	1272	1812	2100	2346	2580	2805
12700	1274	1814	2103	2349	2583	2808
12750	1276	1816	2105	2351	2587	2812
12800	1277	1818	2108	2354	2590	2815
12850	1279	1821	2110	2357	2593	2818
12900	1281	1823	2113	2360	2596	2822
12950	1282	1825	2115	2363	2599	2825
13000	1284	1827	2118	2365	2602	2828
13050	1285	1829	2120	2368	2605	2832
13100	1287	1832	2123	2371	2608	2835
13150	1289	1834	2125	2374	2611	2838
13200	1290	1836	2128	2377	2614	2842
13250	1292	1838	2130	2379	2617	2845
13300	1293	1841	2133	2382	2620	2848
13350	1295	1843	2135	2385	2624	2852
13400	1297	1845	2138	2388	2627	2855
13450	1298	1847	2140	2391	2630	2858
13500	1300	1850	2143	2393	2633	2862
13550	1301	1852	2145	2396	2636	2865
13600	1303	1854	2148	2399	2639	2868
13650	1305	1856	2150	2402	2642	2872
13700	1306	1858	2152	2404	2645	2875
13750	1308	1860	2155	2407	2647	2878

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
13800	1309	1862	2157	2409	2650	2881
13850	1310	1864	2159	2412	2653	2884
13900	1312	1867	2162	2414	2656	2887
13950	1313	1869	2164	2417	2659	2890
14000	1315	1871	2166	2420	2662	2893
14050	1316	1873	2168	2422	2664	2896
14100	1319	1876	2172	2426	2668	2901
14150	1321	1879	2175	2430	2673	2906
14200	1324	1882	2179	2434	2678	2911
14250	1326	1887	2183	2438	2682	2915
14300	1328	1889	2187	2442	2687	2920
14350	1331	1892	2190	2447	2691	2925
14400	1333	1896	2194	2451	2696	2930
14450	1336	1899	2198	2455	2700	2935
14500	1338	1902	2201	2459	2705	2940
14550	1341	1906	2205	2463	2709	2945
14600	1343	1909	2209	2467	2714	2950
14650	1346	1912	2212	2471	2718	2955
14700	1348	1916	2216	2475	2723	2960
14750	1351	1919	2220	2479	2727	2965
14800	1353	1922	2223	2484	2732	2970
14850	1356	1926	2227	2488	2736	2975
14900	1358	1929	2231	2492	2741	2979
14950	1360	1932	2235	2496	2746	2984
15000	1363	1936	2238	2500	2750	2989
15050	1365	1939	2242	2504	2755	2994
15100	1368	1942	2246	2508	2759	2999
15150	1370	1945	2249	2512	2764	3004
15200	1373	1949	2253	2517	2768	3009
15250	1375	1952	2257	2521	2773	3014
15300	1378	1955	2260	2525	2777	3019
15350	1380	1959	2264	2529	2782	3024

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
15400	1383	1962	2268	2533	2786	3029
15450	1385	1965	2271	2537	2791	3034
15500	1388	1969	2275	2541	2795	3039
15550	1390	1972	2279	2545	2800	3044
15600	1392	1975	2282	2550	2805	3048
15650	1395	1979	2286	2254	2809	3053
15700	1397	1982	2290	2558	2814	3058
15750	1400	1985	2294	2562	2818	3063
15800	1402	1989	2297	2566	2823	3068
15850	1405	1992	2301	2570	2827	3073
15900	1407	1995	2305	2574	2832	3078
15950	1410	1999	2308	2578	2836	3083
16000	1412	2003	2313	2583	2842	3089
16050	1415	2006	2317	2588	2847	3095
16100	1418	2010	2322	2593	2853	3101
16150	1421	2014	2326	2598	2858	3107
16200	1423	2018	2331	2603	2864	3113
16250	1426	2022	2335	2608	2869	3119
16300	1429	2026	2340	2613	2875	3125
16350	1431	2030	2344	2618	2880	3131
16400	1434	2034	2349	2623	2886	3137
16450	1437	2037	2353	2628	2891	3143
16500	1440	2041	2358	2633	2897	3149
16550	1442	2045	2362	2638	2902	3155
16600	1445	2049	2366	2643	2908	3161
16650	1448	2053	2371	2648	2913	3167
16700	1450	2057	2375	2653	2919	3173
16750	1453	2061	2380	2658	2924	3179
16800	1456	2064	2384	2663	2930	3185
16850	1459	2068	2389	2668	2935	3191
16900	1461	2072	2393	2673	2941	3197
16950	1464	2076	2398	2678	2946	3203

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
17000	1467	2080	2402	2683	2952	3208
17050	1470	2084	2407	2688	2957	3214
17100	1472	2088	2411	2693	2963	3220
17150	1475	2092	2416	2698	2968	3226
17200	1478	2095	2420	2703	2974	3232
17250	1480	2099	2425	2708	2979	3238
17300	1483	2103	2429	2713	2985	3244
17350	1486	2107	2434	2718	2990	3250
17400	1489	2111	2438	2723	2996	3256
17450	1491	2115	2443	2728	3001	3262
17500	1494	2119	2447	2733	3007	3268
17550	1497	2123	2451	2738	3012	3274
17600	1499	2126	2456	2743	3018	3280
17650	1502	2130	2460	2748	3023	3286
17700	1505	2134	2465	2753	3029	3292
17750	1508	2138	2469	2758	3034	3298
17800	1510	2142	2474	2763	3040	3304
17850	1513	2146	2478	2768	3045	3310
17900	1516	2150	2483	2773	3051	3316
17950	1518	2153	2487	2778	3056	3322
18000	1521	2157	2492	2783	3062	3328
18050	1524	2161	2496	2788	3067	3334
18100	1527	2165	2501	2793	3073	3340
18150	1529	2169	2505	2798	3078	3346
18200	1532	2173	2510	2803	3084	3352
18250	1535	2177	2514	2808	3089	3358
18300	1538	2181	2519	2813	3095	3364
18350	1540	2184	2523	2818	3100	3370
18400	1543	2188	2528	2823	3106	3376
18450	1546	2192	2532	2828	3111	3382
18500	1548	2196	2536	2833	3117	3388
18550	1551	2200	2541	2838	3122	3394

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
18600	1554	2204	2545	2843	3128	3400
18650	1557	2208	2550	2848	3133	3406
18700	1559	2212	2554	2853	3139	3412
18750	1562	2215	2559	2858	3144	3418
18800	1565	2219	2563	2863	3150	3424
18850	1567	2223	2568	2868	3155	3429
18900	1570	2227	2572	2873	3160	3435
18950	1573	2231	2577	2878	3166	3441
19000	1575	2234	2580	2882	3170	3446
19050	1577	2237	2583	2886	3174	3450
19100	1579	2240	2587	2889	3178	3455
19150	1581	2242	2590	2893	3182	3459
19200	1583	2245	2593	2896	3186	3463
19250	1585	2248	2596	2900	3190	3467
19300	1587	2251	2599	2903	3194	3471
19350	1589	2254	2602	2907	3197	3476
19400	1591	2256	2605	2910	3201	3480
19450	1593	2259	2609	2914	3205	3484
19500	1595	2262	2612	2917	3209	3488
19550	1597	2265	2615	2921	3213	3492
19600	1600	2268	2618	2924	3217	3497
19650	1602	2270	2621	2928	3221	3501
19700	1604	2273	2624	2931	3225	3505
19750	1606	2276	2628	2935	3228	3509
19800	1608	2279	2631	2939	3232	3514
19850	1610	2282	2634	2942	3236	3518
19900	1612	2285	2637	2946	3240	3522
19950	1614	2287	2640	2949	3244	3526
20000	1616	2290	2643	2953	3248	3530
20050	1618	2293	2647	2956	3252	3535
20100	1620	2296	2650	2960	3256	3539
20150	1622	2299	2653	2963	3260	3543

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Effective October 1, 2006

Combined Gross Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
20200	1624	2301	2656	2967	3263	3547
20250	1626	2304	2659	2970	3267	3552
20300	1628	2307	2662	2974	3271	3556
20350	1630	2310	2665	2977	3275	3560
20400	1632	2313	2669	2981	3279	3564
20450	1634	2315	2672	2984	3283	3568
20500	1636	2318	2675	2988	3287	3573
20550	1638	2321	2678	2991	3291	3577
20600	1640	2324	2681	2995	3294	3581
20650	1642	2327	2684	2998	3298	3585
20700	1644	2329	2688	3002	3302	3590
20750	1646	2332	2691	3006	3306	3594
20800	1648	2335	2694	3009	3310	3598
20850	1650	2338	2697	3013	3314	3602
20900	1652	2341	2700	3016	3318	3606
20950	1654	2344	2703	3020	3322	3611
21000	1656	2346	2707	3023	3326	3615
21050	1659	2349	2710	3027	3329	3619
21100	1661	2352	2713	3030	3333	3623
21150	1663	2355	2716	3034	3337	3627
21200	1665	2358	2719	3037	3341	3632
21250	1667	2360	2722	3041	3345	3636
21300	1669	2363	2725	3044	3349	3640
21350	1671	2366	2729	3048	3353	3644
21400	1673	2369	2732	3051	3357	3649
21450	1675	2372	2735	3055	3360	3653
21500	1677	2374	2738	3058	3364	3657
21550	1679	2377	2741	3062	3368	3661
21600	1681	2380	2744	3066	3372	3665
21650	1683	2383	2748	3069	3376	3670
21700	1685	2386	2751	3073	3380	3674
21750	1687	2388	2754	3076	3384	3678

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Combined Gross Monthly Income	Effective October 1, 2006					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
21800	1689	2391	2757	3080	3388	3682
21850	1691	2394	2760	3083	3391	3687
21900	1693	2397	2763	3087	3395	3691
21950	1695	2400	2767	3090	3399	3695
22000	1697	2403	2770	3094	3403	3699
22050	1699	2405	2773	3097	3407	3703
22100	1701	2408	2776	3101	3411	3708
22150	1703	2411	2779	3104	3415	3712
22200	1705	2414	2782	3108	3419	3716
22250	1707	2417	2785	3111	3423	3720
22300	1709	2419	2789	3115	3426	3724
22350	1711	2422	2792	3118	3430	3729
22400	1713	2425	2795	3122	3434	3733
22450	1715	2428	2798	3125	3438	3737
22500	1718	2431	2801	3129	3442	3741
22550	1720	2433	2804	3133	3446	3746
22600	1722	2436	2808	3136	3450	3750
22650	1724	2439	2811	3140	3454	3754
22700	1726	2442	2814	3143	3457	3758
22750	1728	2445	2817	3147	3461	3762
22800	1730	2448	2820	3150	3465	3767
22850	1732	2450	2823	3154	3469	3771
22900	1734	2453	2827	3157	3473	3775
22950	1736	2456	2830	3161	3477	3779
23000	1738	2459	2833	3164	3481	3784
23050	1740	2462	2836	3168	3485	3788
23100	1742	2464	2839	3171	3488	3792
23150	1744	2467	2842	3175	3492	3796
23200	1746	2470	2845	3178	3496	3800
23250	1748	2473	2849	3182	3500	3805
23300	1750	2476	2852	3185	3504	3809
23350	1752	2478	2855	3189	3508	3813

© 2006 Administrative Office of the Courts

North Carolina

Proposed Schedule of Basic Child Support Obligations

Effective October 1, 2006

Combined Gross Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
23400	1754	2481	2858	3193	3512	3817
23450	1756	2484	2861	3196	3516	3822
23500	1758	2487	2864	3200	3520	3826
23550	1760	2490	2868	3203	3523	3830
23600	1762	2492	2871	3207	3527	3834
23650	1764	2495	2874	3210	3531	3838
23700	1766	2498	2877	3214	3535	3843
23750	1768	2501	2880	3217	3539	3847
23800	1770	2504	2883	3221	3543	3851
23850	1772	2507	2887	3224	3547	3855
23900	1775	2509	2890	3228	3551	3859
23950	1777	2512	2893	3231	3554	3864
24000	1779	2515	2896	3235	3558	3868
24050	1781	2518	2899	3238	3562	3872
24100	1783	2521	2902	3242	3566	3876
24150	1785	2523	2905	3245	3570	3881
24200	1787	2526	2909	3249	3574	3885
24250	1789	2529	2912	3252	3578	3889
24300	1791	2532	2915	3256	3582	3893
24350	1793	2535	2918	3260	3586	3897
24400	1795	2537	2921	3263	3589	3902
24450	1797	2540	2924	3267	3593	3906
24500	1799	2543	2928	3270	3597	3910
24550	1801	2546	2931	3274	3601	3914
24600	1803	2549	2934	3277	3605	3919
24650	1805	2551	2937	3281	3609	3923
24700	1807	2554	2940	3284	3613	3927
24750	1809	2557	2943	3288	3617	3931
24800	1811	2560	2947	3291	3620	3935
24850	1813	2563	2950	3295	3624	3940
24900	1815	2566	2953	3298	3628	3944
24950	1817	2568	2956	3302	3632	3948
25000	1819	2571	2959	3305	3636	3952

© 2006 Administrative Office of the Courts

STATE OF NORTH CAROLINA

_______________ County

File No.	IV-D Case No.
Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: *Plaintiff*
☐ Criminal: **STATE**

VERSUS

Name Of Defendant

WORKSHEET A
CHILD SUPPORT OBLIGATION
PRIMARY CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$	$	
a. Minus pre-existing child support payment	_	_	
b. Minus responsibility for other children	_	_	
2. MONTHLY ADJUSTED GROSS INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by Combined Income)*	%	%	
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 to Combined Child Support Schedule. see AOC-A-162, Rev. 10/06)*			$
5. ADJUSTMENTS *(expenses paid by each parent)* a. Work-related child care costs *(see instructions)*	$	$	
b. Health Insurance premium costs-child(ren) portion only *(total premium + # of persons covered x # of children subject to order = children's portion)*	$	$	
c. Extraordinary expense *(note duration at bottom if time for adjustment differs from duration of child support obligation)*	$	$	
d. Total Adjustments *(add two totals for combined amount)*	$	$	$
6. TOTAL CHILD SUPPORT OBLIGATION *(add lines 4 and 5d combined)*			$
7. EACH PARENT'S CHILD SUPPORT OBLIGATION *(line 3 X line 6 for each parent)*	$	$	
8. NON-CUSTODIAL PARENT ADJUSTMENT *(enter non-custodial parent's line 5d)*	$	$	
9. RECOMMENDED CHILD SUPPORT ORDER *(subtract line 8 from line 7 for the non-custodial parent only. Leave custodial parent column blank)*	$	$	

Date	Prepared By (Type Or Print)

(**NOTE:** *This form may be used in both civil and criminal cases.*)

AOC-CV-627, Rev. 10/06
© 2006 Administrative Office of the Courts

(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET A
OBLIGEE WITH SOLE CUSTODY OF CHILD(REN)

Worksheet A should be used when the obligee has physical custody of the child(ren) who are involved in the pending action for a period of time that is more than two-thirds of the year (more than 243 days per year). However, if the non-custodial parent's income falls within the shaded area of the Schedule, determine the basic child support obligation based on the non-custodial parent's monthly adjusted gross income, rather than the combined income of both parents, and do not proceed further on the worksheet.

On line 1, enter the monthly gross incomes of both parties in the appropriate column, subtract the payments made by each parent under previous child support orders for other children of that parent and the amount of the parent's financial responsibility for other children living with that parent, and enter the difference (monthly adjusted gross income) for each parent on line 2. Add the monthly adjusted gross incomes of both parents and enter the result in the third column (Combined) on line 2. Divide each parent's monthly adjusted gross income by the combined monthly adjusted income and enter each parent's percentage share of the combined income on line 3.

On line 4, enter the amount of the basic child support obligation for the child(ren) for whom support is sought by using the Schedule of Basic Child Support Obligations based on the combined income of both parents (line 3) and the number of children involved in the pending action.

On lines 5a through 5c, enter the amount of work-related child care costs, health insurance premiums for the child(ren), and extraordinary child-related expenses that are paid by either parent under the column for that parent. On line 5d, enter the sum of lines 5a through 5c for each parent, and in the third column (Combined) enter the total expenses paid by both parents. Add line 4 and line 5d (Combined) and enter the result on line 6 (total child support obligation).

On line 7, multiply line 6 by line 3 (percentage share of income) and enter the result in the appropriate column for each parent. On line 8, enter the amount of expenses paid directly by the non-custodial parent (line 5d) under the appropriate column; leave the custodial parent's column blank and do not enter any amount paid by the custodial parent. Subtract line 8 from line 7 for the non-custodial parent only and enter the difference on line 9 (recommended child support order) under the column for the non-custodial parent. Leave the column for the custodial parent blank.

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the court so that the court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county*

© 2006 Administrative Office of the Courts

File No.	IV-D Case No.
Case No. (Code)	UIFSA Case No.

STATE OF NORTH CAROLINA

_____________ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: Plaintiff _______________
☐ Criminal: STATE
VERSUS

Name Of Defendant

WORKSHEET B
CHILD SUPPORT OBLIGATION
JOINT OR SHARED PHYSICAL CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth

STOP **STOP HERE IF** *the number of overnights with either parent is less than 123, shared physical custody does not apply (see Worksheet A).*	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$	$	▨
a. Minus pre-existing child support payment	–	–	▨
b. Minus responsibility for other children	–	–	▨
2. MONTHLY ADJUSTED GROSS INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by combined income)*	%	%	▨
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 to Combined Child Support Schedule, see AOC-A-162, Rev. 10/06)*	▨	▨	$
5. SHARED CUSTODY BASIC OBLIGATION *(multiply line 4 x 1.5)*	▨	▨	$
6. EACH PARENT'S PORTION OF SHARED CUSTODY SUPPORT OBLIGATION *(line 3 x line 5 for each parent)*	$	$	▨
7. OVERNIGHTS with each parent *(must total 365 x total number of children))*			
8. PERCENTAGE WITH EACH PARENT *[line 7 divided by (365 X total number of children)]*	%	%	▨
9. SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT *(line 6 x other parent's line 8)*	$	$	▨
10. ADJUSTMENTS *(expenses paid directly by each parent)* a. Work-related child care costs	$	$	▨
b. Health Insurance premium costs - children's portion only	$	$	▨
c. Extraordinary expenses	$	$	▨
d. Total Adjustments *(For each col., add 10a, 10b, and 10c. Add two totals for combined amount.)*	$	$	$
11. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS (line 10d combined x line 3 for each parent)	$	$	▨
12. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(Line 10d minus line 11. If negative number, enter zero.)*	$	$	▨
13. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(Line 9 minus line 12.)*	$	$	▨
14. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount in line 13 and enter result under greater amount.)*	$	$	▨

Date	Prepared By (Type Or Print)

(NOTE: *This form may be used in both civil and criminal cases.)*

AOC-CV-628, Rev. 10/06
© 2006 Administrative Office of the Courts
(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET B PARENTS WITH JOINT OR SHARED CUSTODY

Worksheet B should be used when the parents share joint physical custody of at least one of the child(ren) for whom support is sought. Legal custody of the child(ren) is not relevant with respect to this determination. Worksheet B should be used if one parent has sole legal custody but, in fact, the parents exercise joint physical custody of the child(ren) as defined below. On the other hand, the worksheet should not be used simply because the parents share joint legal custody of the child(ren).

Joint physical custody is defined as custody for at least one-third of the year (more than 122 overnights per year) - not one-third of a shorter period of time, e.g. one-third of a particular month. For example, child support would not be abated merely because the child spends an entire month with one parent during the summer. **Worksheet B should be used only if both parents have custody of the child(ren) for at least one-third of the year and the situation involves a true sharing of expenses, rather than extended visitation with one parent that exceeds 122 overnights.** Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. Split custody refers to cases in which one parent has primary custody of the other child or children. Child support computations for shared and split custody are determined without regard to whether a parent has primary, shared, or joint legal custody of a child.

In cases involving joint or shared physical custody, the basic child support obligation is multiplied by 1.5 to take into account the increased cost of maintaining two primary homes for the child(ren). Each parent's child support obligation is calculated based on the percentage of time that the child(ren) spends with the other parent. The support obligations of both parents are then offset against each other, and the parent with the higher support obligation pays the difference between the two amounts.

Lines 1 through 4 of Worksheet B are calculated in the same manner as lines 1 through 4 of Worksheet A. Multiply line 4 by 1.5 and enter the result on line 5. On line 6, multiply line 5 by each parent's percentage share of income (line 3) and enter the result under the appropriate column for each parent.

On lines 7 and 8, enter the number of nights the child(ren) spend with each parent during the year and calculate the percentage of total overnights spent with each parent. If at least one of the children does not spend at least 123 overnights with each parent, Worksheet B should not be used. The total number of nights should equal 365 times the total number of children. On line 9, multiply plaintiff's line 6 by defendant's line 8 and enter the result under the column for plaintiff, then multiply defendant's line 6 by plaintiff's line 8 and enter the result under the column for defendant.

Lines 10a through 10d of Worksheet B are calculated in the same manner as lines 5a through 5d of Worksheet A. On line 11, multiply line 10d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 11 from line 10d for each parent and enter the result on line 12 (if negative, enter zero).

Subtract line 12 from line 9 for each parent and enter the result on line 13 under the appropriate column. In some cases, the result may be a negative number. If the result is negative, enter it as a negative number on line 13, not as a positive number or as a zero. If plaintiff's line 13 is greater than defendant's line 13, enter the difference between these two amounts on line 14 under plaintiff's column and leave defendant's column blank. If defendant's line 13 is greater than plaintiff's line 13, enter the difference between these two amounts on line 14 under defendant's column and leave plaintiff's column blank. [Note that if either of the number on line 13 is a negative number, you must change the signs when you subtract. For example, $100 minus negative $50 equals $150.]

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

AOC-CV-628, Side Two, Rev. 10/06

© 2006 Administrative Office of the Courts

STATE OF NORTH CAROLINA _______________ County	File No.	IV-D Case No.
	Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: *Plaintiff* _______________

☐ Criminal: **STATE**

VERSUS

Name Of Defendant

WORKSHEET C
CHILD SUPPORT OBLIGATION
SPLIT CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$	$	
a. Minus pre-existing child support payment	–	–	
b. Minus responsibility for other children	–	–	
2. MONTHLY ADJUSTED GROSS INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by Combined Income)*	%	%	
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 to Combined Child Support Schedule, see AOC-A-162, Rev. 10/06)*			$
5a. SPLIT CUSTODY ADJUSTMENT *(enter number of children living with each parent & total number of children)*			
5b. Number of children with each parent divided by total number of children			
5c. Multiply line 4 x line 5b for each parent	$	$	
6a. PLAINTIFF'S SUPPORT FOR CHILDREN WITH DEFENDANT (multiply defendant's line 5c x plaintiff's line 3)	$		
6b. DEFENDANT'S SUPPORT FOR CHILDREN WITH PLAINTIFF (multiply plaintiff's line 5c x defendant's line 3)		$	
7a. Work-Related Child Care Costs Adjustments (expenses paid directly by each parent)	$	$	
7b. Health Insurance Premium Costs - Children's Portion	$	$	
7c. Extraordinary expenses	$	$	
7d. TOTAL ADJUSTMENTS *(for each column add 7a, 7b, and 7c. Add two totals for combined amount.)*	$	$	$
8. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS *(line 7d combined x line 3 for each parent)*	$	$	
9. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(Line 7d minus line 8. If negative number, enter zero.)*	$	$	
10. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(line 6a or 6b minus line 9 for each parent)*	$	$	
11. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount on line 10 and enter result under greater amount)*	$	$	

Date	Prepared By (Type Or Print)

(NOTE: *This form may be used in both civil and criminal cases.)*

AOC-CV-629, Rev. 10/06

© 2006 Administrative Office of the Courts

(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET C
SPLIT CUSTODY OF CHILD(REN)

Worksheet C is used when there is more than one child involved in the pending action and each parent has physical custody of at least one of the children.

Lines 1 through 4 of Worksheet C are calculated in the same manner as lines 1 through 4 of Worksheet A. On line 5a, enter the number of children living with each parent and the total number of children for whom support is sought. Divide the number of children living with each parent by the total number of children and enter the result in the appropriate column for each parent on line 5b. (For example, if there are three children of the parties and one child lives with the plaintiff, divide one by three and enter 33.33% in plaintiff's column, then divide two by three and enter 66.67% in defendant's column on line 5b.) Multiply line 4 by line 5b for each parent and enter the results on line 5c.

On line 6a, multiply defendant's line 5c by plaintiff's line 3 (plaintiff's percentage share of income) and enter the result in the column for plaintiff. Multiply plaintiff's line 5c by defendant's line 3 and enter the result on line 6b.

Lines 7a through 7d of Worksheet C are calculated in the same manner as lines 5a through 5d of Worksheet A. On line 8, multiply line 7d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 8 from line 7d for each parent and enter the result on line 9 (if negative, enter zero).

Subtract line 9 from line 6a or 6b for each parent and enter the result on line 10 under the appropriate column. In some cases, the result may be a negative number. If the result is negative, enter it as a negative number on line 10, not as a positive number or as a zero. If plaintiff's line 10 is greater than defendant's line 10, enter the difference between these two amounts on line 11 under plaintiff's column and leave defendant's column blank. If defendant's line 10 is greater than plaintiff's line 10, enter the difference between these two amounts on line 11 under defendant's column and leave plaintiff's column blank. [Note that if either of the numbers on line 10 is a negative number, you must change the signs when you subtract. For example, $100 minus negative $50 equals $150.]

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

AOC-CV-629, Side Two, Rev. 10/06

© 2006 Administrative Office of the Courts

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Adopted August 28, 1986.
Effective January 1, 1987,
with amendments received effective through January 1, 2005.

Rule
1. Actions subject to arbitration.
2. Arbitrators.
3. Arbitration hearings.
4. The award.
5. Trial de novo.

Rule
6. The court's judgment.
7. Costs.
8. Administration.
9. Application of rules.

Index follows Rules.

Editor's note. — The Rules for Court-Ordered Arbitration were initially adopted as a pilot program applicable to the Third, Fourteenth and Twenty-Ninth Judicial Districts by order of the Supreme Court on August 28, 1986. The order of the court provided:

"The North Carolina General Assembly authorized the Supreme Court of North Carolina 'by such rules as it shall determine appropriate' to 'provide for an experimental, pilot program in three judicial districts selected by the Court, of mandatory, nonbinding arbitration of all claims for money damages of $15,000 or less ... provided ... that no state funds shall be used to implement the pilot program,' 1985 Sess. Laws ch. 698, § 23 [See G.S. § 7A-37]. The Court has determined that such a pilot program should be instituted in this state on an experimental basis provided funds can be obtained to conduct the program.

Now, therefore, provided sufficient funds can be obtained to conduct the program, the Court orders:

(1) An experimental, pilot program of mandatory, nonbinding arbitration shall be operated for two years in the Third, Fourteenth, and Twenty-Ninth Judicial Districts;

(2) The program shall operate pursuant to the attached 'Rules for Court-Ordered Arbitration';

(3) These rules shall become effective on 1 January 1987;

(4) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina."

By order dated May 5, 1988, the expiration date of this pilot program was extended from December 31, 1988, to October 1, 1989.

Subsequently, by order dated September 14, 1989, the Supreme Court provided for the operation of these rules on a permanent basis in the Third, Fourteenth and Twenty-Ninth Judicial Districts, and in other judicial districts designated by the Administrative Office of the Courts, subject to the availability of funds. The order of the court provides:

"WHEREAS, the North Carolina General Assembly, by Ch. 301 of the 1989 Session Laws [see G.S. § 7A-37.1], authorized statewide court-ordered, nonbinding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Court orders:

(1) The program shall operate on a permanent basis in the Third, Fourteenth, and Twenty-Ninth Judicial Districts, and in all other judicial districts designated by the Administrative Office of the Courts, in consultation with local court officials, subject to the availability of funds appropriated for this purpose;

(2) Effective immediately, the program shall operate pursuant to the attached 'Rules for Court-Ordered Arbitration in North Carolina';

(3) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina."

Rule 1. Actions subject to arbitration.

(a) *By order of the court.*

(1) *District Court.* All civil actions filed in the District Court Division are subject to court-ordered arbitration under these rules, except actions:

(i) Which are assigned to a magistrate, provided that appeals from judgments of magistrates are subject to court-ordered arbitration under these rules except appeals from summary ejectment actions and actions in which the sole claim is an action on an account;

(ii) In which class certification is sought;

(iii) In which a request has been made for a preliminary injunction or a temporary restraining order;

(iv) Involving family law matters including claims filed under N.C. Gen. Stat. chapters 50, 50A, 50B, 51, 52, 52B and 52C;

(v) Involving title to real estate;

(vi) Which are special proceedings; or

(vii) In which the sole claim is an action on an account.

(2) *Superior Court.* The Senior Resident Superior Court Judge may order any civil Superior Court action to arbitration, where the amount in controversy does not exceed $15,000, under these rules after the Court confers with the parties at a scheduling conference. The judge shall enter a written order, which finds that the action is appropriate for arbitration and that the amount in controversy does not exceed $15,000.

(b) *Arbitration by agreement.*

(1) *District Court.* The parties in any other civil action pending in the District Court Division may, upon joint written motion, request to submit the action to arbitration under these rules. The Court may approve the motion if it finds that arbitration under these rules is appropriate, and the amount in controversy does not exceed $15,000. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(2) *Superior Court.* The parties in any civil action pending in the Superior Court Division where the amount in controversy does not exceed $15,000 may, upon joint written motion, request to submit the action to arbitration under these rules. The Court may approve the motion if it finds that arbitration under these rules is appropriate, and the amount in controversy does not exceed $15,000. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(c) *Exemption and withdrawal from arbitration.* The Court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the action is excepted from arbitration under Arb. Rule 1(a)(1) or (ii) there is a compelling reason to do so.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (a) and (d).
Amended:	19 December 2002 — (a) and (d).

COMMENT

The purpose of these rules is to create an efficient economical alternative to traditional litigation for prompt resolution of disputes in District Court Subject to the opt-in of Superior Court cases under Arb. Rule 1(b), the rules provide for court-ordered arbitration of District Court actions because District Court actions are typically suitable for consideration in the manner provided in these rules and Superior Court actions are covered by another dispute resolution program. The $15,000 jurisdictional limit by statute and Arb. Rule 1 applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, e.g. N.C. Gen. Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without Court involvement.

"Family law issues" in Arb. Rule 1(a)(1)(iv) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. "Summary ejectments" and "special proceedings", referred to in Arb. Rule 1(a)(vi), are actions so designated by the General Statutes.

Cross References. — As to court ordered mediated settlement conferences in superior court civil actions, see G.S. 7A-38. See also, Rules Implementing Court Ordered Mediated Settlement Conferences, in this volume.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Legal Periodicals. — For article, "Court-Ordered Arbitration Comes to North Carolina and the Nation," see 21 Wake Forest L. Rev. 901 (1986).

For note, "No Frills Justice: North Carolina Experiments with Court-Ordered Arbitration," see 66 N.C.L. Rev. 395 (1988).

For article, "American Law Institute Study on Paths to a 'Better Way': Litigation, Alternatives, and Accommodation," see 1989 Duke L.J. 808.

For article, "Arbitration and Constitutional

Rights," see 71 N.C.L. Rev. 81 (1992).

For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

Objection to Arbitration. — When an injured party did not timely object, pursuant to N.C. R. Arb. 1, to civil arbitration of her personal injury claim, or avail herself of numerous opportunities to withdraw her case from civil arbitration, the trial court subsequently had jurisdiction to enter a judgment approving the arbitrator's award dismissing her case. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Rule 2. Arbitrators.

(a) *Selection.*

(1) The Court shall approve and maintain a list of qualified arbitrators, which shall be a public record. The parties may stipulate to an arbitrator on the Court's list within the first 20 days after the 60-day period fixed in Arb. Rule 8(b). If there is no stipulation, the Court shall appoint an arbitrator from the list and notify the parties of the arbitrator selected.

(2) Parties may choose an arbitrator who is not on the Court's list provided the arbitrator consents, the Court approves the choice, and the arbitrator otherwise meets all the requirements of Arb. Rule 2 with the exception of the requirement to complete the arbitrator training as prescribed by the Administrative Office of the Courts. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the court order approving such stipulation shall be filed within the same 20-day period for choosing an arbitrator on the Court's list.

(b) *Eligibility.* An arbitrator shall be a member in good standing of the North Carolina State Bar and have been licensed to practice law for five years. The arbitrator shall have been admitted in North Carolina for at least the last two years of the five-year period. Admission outside North Carolina may be considered for the balance of the five-year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia. In addition, an arbitrator shall complete the arbitrator training course prescribed by the Administrative Office of the Courts and be approved by the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing Court.

(c) *Fees and expenses.* Arbitrators shall be paid a $100 fee by the Court for each arbitration hearing when they file their awards with the Court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $100 for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the Chief Judge of the District Court.

(d) *Oath of office.* Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) *Arbitrator ethics; Disqualification.* Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

(f) *Replacement of arbitrator.* If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed by the Court from the list of arbitrators.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (a) and (b).
Amended:	1 August 1995 — (b)
Amended:	19 December 2002 — (a), (b), (c), (e), and (f)
Amended:	1 January 2005 — (c)

COMMENT

Under Arb. Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection,* and they must do it promptly.

When assigning arbitrators to serve in cases, the Court is encouraged to regularly use all arbitrators on the Court's list as established in Arb. Rule 2(a).

The parties in a particular case may choose a person to be an arbitrator who is not on the list required by Arb. Rule 2(a)(1), provided that person consents, the choice is approved by the Chief District Court Judge, and the person otherwise meets the requirements of Arb. Rule 2. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the order approving such stipulation and consent must be filed within the 20-day period mentioned in Arb. Rule 2(a)(1).

Under Arb. Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb. Rule 3(n).

Payments and expense reimbursements authorized by Arb. Rule 2(c) are made subject to Court approval to insure conservation and judicial monitoring of the use of funds available for the program.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Legal Periodicals. — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

Rule 3. Arbitration hearings.

(a) *Hearing scheduled by the court.* Arbitration hearings shall be scheduled by the Court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) *Pre-hearing exchange of information.* At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;
(2) Copies of documents or exhibits they expect to offer in evidence; and
(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation and witnesses and documents, for all or part of the hearing. Failure to comply with Arb. Rule 3(b) may be cause for sanctions under Arb. Rule 3(*l*). Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the Court or included in the case file.

(c) *Exchanged documents considered authenticated.* Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) *Copies of exhibits admissible.* Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) *Witnesses.* Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) *Subpoenas.* N.C. R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) *Authority of arbitrator to govern hearings.* Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Court.

(h) *Law of evidence used as guide.* The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(i) *No ex parte communications with arbitrator.* No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) *Failure to appear; Defaults; Rehearing.* If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear or by dismissing the case. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C. R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The Court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the Court within the time allowed for demanding trial de novo stated in Arb. Rule 5(a).

(k) *No record of hearing made.* No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(*l*) *Sanctions.* Any party failing to attend an arbitration proceeding shall be subject to sanctions by the Court on motion of a party, report of the arbitrator, or by the Court on its own motion. These sanctions may include those provided in N.C. R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(D) and N.C. Gen. Stat. § 6-21.5.

(m) *Proceedings in forma pauperis.* The right to proceed *in forma pauperis* is not affected by these rules.

(n) *Limits of hearings.* Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the Court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 3(b). The Court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) *Hearing concluded.* The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

(p) *Parties must be present at hearings; Representation.* All parties shall be present at hearings in person or through counsel. Parties may appear pro se as permitted by law.

(q) *Motions.* Designation of an action for arbitration does not affect a party's right to file any motion with the Court.

(1) The Court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Arb. Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the Court so orders.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (b), (j), (o), and (q).
Amended:	19 December 2002 — (a), (b), (g), (j), (l), (n), (o), (p) and (q).

COMMENT

Good faith compliance with Arb. Rule 3(b) is required by professional courtesy and fairness as well as the spirit of these rules. Failure to comply with Arb. Rule 3(b) may justify a sanction of limiting of evidence otherwise admissible under Arb. Rules 3(c) — 3(f) and 3(g).

Arb. Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

The purpose of Arb. Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb. Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 4(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C. R. Civ. P. 6 and N.C. Gen. Stat. §§ 103-4, 103-5.

Arb. Rule 3(p) requires that all parties be present in person or through counsel. The presence of the parties or their counsel is necessary for presentation of the case to the arbitrator. Rule 3(p) does not require that a party or any representative of a party have authority to make binding decisions on the party's behalf in the matters in controversy.

The rules do not establish a separate standard for pro se representation in court-ordered arbitrations. Instead, pro se representation in court-ordered arbitrations is governed by applicable principles of North Carolina law in that area. See Arb. Rule 3(p). Conformance of practice in court-ordered arbitrations with the applicable law, whatever it may provide, is ensured by providing that pro se representation be "as permitted by law."

Under Arb. Rule 3(q)(l), the Court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case. The Court will normally defer to the arbitrator's consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which an N.C. R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Legal Periodicals. — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

Violation of This Rule May Result in a Loss of N.C. Arb. Rule 5(a) Rights. — The trial court's order enforcing an arbitration award, which implicitly imposed the sanctions of striking defendants' request for trial de novo or of entering judgment against defendants, was within the purview of G.S. 1A-1, Rule 37(b)(2)(c), did not constitute an abuse of the court's discretion, and did not violate N.C. Arb. Rule 5(a). Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000).

Defendants violated subsection (p) of this rule where they failed to attend the hearing in person, and where no evidence in the record reflected that counsel purporting to appear on defendants' behalf or the representative of defendants' liability insurance carrier were authorized "to make binding decisions .,. . in all matters" on behalf of defendants. Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000).

Defendant violated N.C. R. Arb. 3(p) by not being present at an arbitration hearing and not providing documentation before or at the hearing that defendant's attorney or insurance company's representative was authorized to act for defendant; trial court did not abuse its discretion by denying defendant's request for a trial de novo as a sanction for defendant's violation. Parks v. Green, 153 N.C. App. 405, 571 S.E.2d 14, 2002 N.C. App. LEXIS 1278 (2002).

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner. Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

Evidence Did Not Support Finding of Failure to Participate in Good Faith. — There was no evidence to support the trial court's finding that defendant motorist in a personal injury case failed to participate in court ordered arbitration in a good faith and meaningful manner, and the trial court's sanction striking the motorist's motion for a trial de novo was reversed; an associate attorney appearing for the motorist was a person authorized to make decisions on motorist's behalf. Bledsole v. Johnson, 357 N.C. 133, 579 S.E.2d 379, 2003 N.C. LEXIS 418 (2003).

Insurance Carriers. — N.C. R. Arb. 3(P) does not require that a representative of a defendant's insurance carrier be present at a court-ordered, non-binding arbitration hearing where the insurance carrier is not a party named in the action. Johnson v. Brewington, 150 N.C. App. 425, 562 S.E.2d 919, 2002 N.C. App. LEXIS 484 (2002).

Rule 4. The award.

(a) *Filing the award.* The award shall be in writing, signed by the arbitrator and filed with the clerk within three days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(c) *Scope of award.* The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(d) *Copies of award to parties.* The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the Court shall serve the award after filing. A record shall be made by the arbitrator or the Court of the date and manner of service.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Permanent Rule Adopted:	19 December 2002 — (a), (c), and (d).

COMMENT

Ordinarily, the arbitrator should issue the award at the conclusion of the hearing. See Arb. Rule 4(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb. Rule 3(o) and its Comment. If the arbitrator deems it appropriate, the arbitrator may explain orally the basis of the award.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Legal Periodicals. — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

Rule 5. Trial de novo.

(a) *Trial de novo as of right.* Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the Court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been served, or within 10 days after an adverse determination of an Arb. Rule 3(j) motion to rehear. Demand for jury trial pursuant to N.C. R. Civ. P. 38(b) does not preserve the right to a trial de novo. A demand by any party for a trial de novo in accordance with this section is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo pursuant to this section shall include all claims in the action.

(b) *Filing fee.* The first party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the Court until the case is terminated. The fee shall be returned to the demanding party only upon written order of the trial judge finding that the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the Judicial Department's General Fund.

(c) *No reference to arbitration in presence of jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the Court's approval.

(d) *No evidence of arbitration admissible.* No evidence that there have been arbitration proceedings or of statements made and conduct occurring in arbitration proceedings may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the Court's approval.

(e) *Arbitrator not to be called as witness.* An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) *Judicial immunity.* The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (a), (b), (e), and (f).
Amended:	19 December 2002 — (a), (b), (c), and (d).

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Legal Periodicals. — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

Right to Jury Trial. — Arbitration judgment was not void as a violation of an injured party's right to jury trial under G.S. 1A-1, N.C. R. Civ. P. 38 and 39, N.C. Const. art. I, § 25 or U.S. Const. amend. VII, because her right to a jury trial was protected by N.C. R. Arb. 5(a), which allowed any party to have a trial de novo upon written demand filed within 30 days of the arbitrator's award. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Exercise of Right to Trial De Novo Could Not Support Challenge to the Party's Good Faith Participation in Arbitration. — Fact that a nonprevailing party exercises the right provided in N.C. R. Arb. 5(a) to seek a trial de novo cannot support a challenge to the party's good-faith participation in the arbitration proceedings; there was no evidence to support the trial court's finding that defendant motorist in a personal injury case failed to participate in court ordered arbitration in a good faith and meaningful manner, and the trial court's sanction striking the motorist's motion for a trial de novo was reversed; Bledsole v. Johnson, 357 N.C. 133, 579 S.E.2d 379, 2003 N.C. LEXIS 418 (2003).

Dismissal for failure to appear proper. — In the context of N.C. R. Arb. 5 demand for a trial de novo, a trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award; a trial court properly dismissed a county's appeal from a small claims court judgment where the county failed to appear for the scheduled trial de novo. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

Rule 6. The court's judgment.

(a) *Termination of action before judgment.* Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(b) *Judgment entered on award.* If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (b).
Amended:	19 December 2002 — (a) and (b).

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. A trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award. By failing to demand a trial de novo the right to appeal is waived.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Legal Periodicals. — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

Effective Consent to Arbitration. — When an injured party did not seek a trial de novo regarding an arbitrator's award dismissing her case within the time provided by N.C. R. Arb. 6(b), thus failing to timely avail herself of the opportunity to have a trial de novo of her claims before a jury, she effectively consented to have the matter referred to civil arbitration and was governed by the rules applicable to such proceedings. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

"Consent Judgment." — Trial court's judgment adopting an arbitrator's award dismissing an injured party's personal injury case was not void for being a consent judgment entered without the injured party's express consent because N.C. R. Arb. 6(b) only provided that an arbitration award had the "effect" of a consent judgment, and an arbitration award did not become a consent judgment or have the same requirements for validity as a consent judgment, nor was it required that the parties consent to the entry of an arbitration judgment. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Applied in Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

Rule 7. Costs.

(a) *Arbitration costs.* The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) *Costs denied if party does not improve position in trial de novo.* A party demanding trial de novo whose position is not improved at the trial may be denied costs in connection with the arbitration proceeding by the trial judge, even though that party prevails at trial.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (c).
Amended:	19 December 2002 — (b) and (c).

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Rule 8. Administration.

(a) *Actions designated for arbitration.* The Court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties.

(b) *Hearings rescheduled; 60 day limit; Continuance.*

(1) The Court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled, or continued to a date after the time allowed by this rule only by the Court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) *Date of hearing advanced by agreement.* A hearing may be held earlier than the date set by the Court, by agreement of the parties with Court approval.

(d) *Forms.* Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) *Delegation of nonjudicial functions.* To conserve judicial resources and facilitate the effectiveness of these rules, the Court may delegate nonjudicial, administrative duties and functions to supporting Court personnel and authorize them to require compliance with approved procedures.

(f) *Definitions.* "Court" as used in these rules means:

(1) The Chief District Court Judge or the delegate of such judge; or

(2) Any assigned judge exercising the Court's jurisdiction and authority in an action.

Administrative History.

Pilot Rule Adopted:	28 August 1986.

Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990 — (a), (b), (d), and (f).
Amended:	19 December 2002 — (a), (b), (c), (e), and (f).

COMMENT

One goal of these rules is to expedite disposition of claims filed in District Court. See Arb. Rule 8(a). The 60 days in Arb. Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, e.g. N.C. R. Civ. P. 40(b); rule of Court, e.g. N.C. Prac. L 3; or customary practice.

Any settlement reached prior to the scheduled arbitration hearing must be reported by the parties to the Court official administering the arbitration. The parties must file dismissals or a consent judgment prior to the scheduled hearing to close the case without a hearing. If the dismissals or consent judgment are not filed before the scheduled hearing, the parties should appear at the hearing to have their agreement entered as the award of the arbitrator.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

CASE NOTES

Applied in Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

Rule 9. Application of rules.

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb. Rule 1(b) or referred to arbitration by order of the Court in those districts designated for court-ordered arbitration in accordance with G.S. 7A-37 and G.S. 7A-37.1.

Administrative History.

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989.
Amended:	8 March 1990.
Amended:	19 December 2002.

COMMENT

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, G.S. 7A-37 and G.S. 7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

Editor's note. — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

Index to Rules of Court-Ordered Arbitration

A

ACTIONS SUBJECT TO ARBITRATION.
Agreements, Arbitration Rule 1(b).
Designation of actions eligible.
Court designation on filing of complaint or docketing, Arbitration Rule 8(a).
Exemptions, Arbitration Rule 1(c).
Types of actions, Arbitration Rule 1(a).
Withdrawal from arbitration, Arbitration Rule 1(d).

AGREEMENTS.
Arbitration by agreement, Arbitration Rule 1(b).

APPLICABILITY OF RULES, Arbitration Rule 9.

ARBITRATORS.
Canon of ethics.
Compliance with, Arbitration Rule 2(e).
Disqualification, Arbitration Rule 2(e).
Eligibility, Arbitration Rule 2(b).
Expenses, Arbitration Rule 2(c).
Fees, Arbitration Rule 2(c).
Oath of office, Arbitration Rule 2(d).
Replacement, Arbitration Rule 2(f).
Selection, Arbitration Rule 2(a).

AWARDS.
Copies of award to parties, Arbitration Rule 4(d).
Filing, Arbitration Rule 4(a).
Findings of fact or conclusions of law or opinions.
Not required, Arbitration Rule 4(b).
Judgment entered on award, Arbitration Rule 6(b).
Scope of award, Arbitration Rule 4(c).

C

COSTS.
Arbitration costs, Arbitration Rule 7(a).
Trial de novo, Arbitration Rule 7(b).
Denied if party does not improve his position, Arbitration Rule 7(c).

D

DEFAULT, Arbitration Rule 3(j).

DEFINITIONS, Arbitration Rule 8(f).

DELEGATION OF NONJUDICIAL FUNCTIONS, Arbitration Rule 8(e).

DESIGNATION OF ACTIONS FOR ARBITRATION.
Court designation on filing of complaint or docketing, Arbitration Rule 8(a).

F

FORMS, Arbitration Rule 8(d).

H

HEARINGS.
Authority of arbitrator to govern, Arbitration Rule 3(g).
Conclusion, Arbitration Rule 3(o).
Continuances, Arbitration Rule 8(b).
Copies of exhibits admissible, Arbitration Rule 3(d).
Default, Arbitration Rule 3(j).
Evidence.
Law of evidence, Arbitration Rule 3(h).
Exchange documents considered authenticated, Arbitration Rule 3(c).
Ex parte communications with arbitrator, Arbitration Rule 3(i).
Failure to appear, Arbitration Rule 3(j).
Filing of complaint.
Actions designated as eligible at time of filing, Arbitration Rule 8(a).
In forma pauperis, Arbitration Rule 3(m).
Limits of hearings, Arbitration Rule 3(n).
Motions, Arbitration Rule 3(q).
Notice, Arbitration Rule 8(b).
Parties to be present at hearings, Arbitration Rule 3(p).
Pre-hearing exchange of information, Arbitration Rule 3(b).
Records.
No record made, Arbitration Rule 3(k).
Rehearing, Arbitration Rule 3(j).
Representation, Arbitration Rule 3(p).
Rescheduling, Arbitration Rule 8(b).
Sanctions, Arbitration Rule 3(l).
Schedule by court, Arbitration Rule 3(a).
Subpoenas, Arbitration Rule 3(f).
Time.
Date of hearing advanced by agreement, Arbitration Rule 8(c).
Notice, Arbitration Rule 8(b).
Witnesses, Arbitration Rule 3(e).

J

JUDGMENTS.
Entry on award, Arbitration Rule 6(b).
Termination of action by agreement before judgment, Arbitration Rule 6(a).

N

NOTICE.
Hearings, Arbitration Rule 8(b).

R

REHEARINGS, Arbitration Rule 3(j).

T

TRIAL DE NOVO.
Arbitrator not to be called as witness,
Arbitration Rule 5(e).
Costs.
Denial if party does not improve position, Arbitration Rule 7(c).

TRIAL DE NOVO —Cont'd
Costs —Cont'd
Following trial de novo, Arbitration Rule 7(b).
Evidence of arbitration inadmissible, Arbitration Rule 5(d).
Filing fees, Arbitration Rule 5(b).
Judicial immunity, Arbitration Rule 5(f).
No reference to arbitration in presence of jury, Arbitration Rule 5(c).
Right to trial de novo, Arbitration Rule 5(a).

NORTH CAROLINA CANONS OF ETHICS FOR ARBITRATORS

Adopted August 19, 1999.

Canon
1. An arbitrator shall uphold the integrity and fairness of the arbitration process.
2. An arbitrator shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
3. An arbitrator, in communicating with parties, shall avoid impropriety or the appearance of impropriety.
4. An arbitrator shall conduct proceedings fairly and diligently.

Canon
5. An arbitrator shall make decisions in a just, independent and deliberate manner.
6. An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office.
7. Ethical considerations relating to arbitrators appointed by one party.
8. Canons are subject to laws and professional responsibility principles; choice or law.

Index follows Rules.

Canon 1. An arbitrator shall uphold the integrity and fairness of the arbitration process.

A. Fair and just processes for resolving disputes are indispensable in our society. Arbitration is an important method for deciding many types of disputes. For arbitration to be effective, there must be broad public confidence in and understanding of the integrity and fairness of the process. Therefore, an arbitrator has a responsibility not only to the parties but also to the courts, the public and the process of arbitration itself and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator has a responsibility to the public, parties whose rights will be decided, the courts, and other participants in the proceeding. These Canons shall be construed and applied to further these objectives.

B. It may be inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves. However, persons may indicate a general willingness to serve as arbitrators, e.g., by listing themselves with institutions that sponsor arbitration, or with courts that have court-annexed arbitration programs. Arbitrators may advertise, consistent with the law.

C. Persons may accept appointment as arbitrators only if they believe that they can be available to conduct the arbitration promptly. They shall exercise judgment whether their skills or expertise are sufficient to support demands of the arbitration and, if these skills or expertise are not sufficient, they shall decline to serve or withdraw from the arbitration, with the court's approval in court-administered arbitration, and notice to the parties.

D. After accepting appointment and while serving as an arbitrator, a person shall avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For one year after decision of a case, persons who have served as arbitrators shall avoid entering into any such relationship, or acquiring any such interest, in the circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest, unless all parties to the arbitration consent to any such relationship or acquiring any such interest.

E. Arbitrators shall conduct themselves in a way that is fair, in word and action, to all parties and must not be swayed by outside pressure, public clamor, fear of criticism or self-interest. If an arbitrator determines that he or she cannot serve impartially, that arbitrator shall decline appointment or withdraw from serving and shall notify the parties, and the court in court-administered arbitrations.

F. When an arbitrator's authority is derived from the parties' agreement, the arbitrator shall not exceed that authority nor do less than required to exercise that authority completely. Where the parties' agreement sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, the arbitrator must comply with such procedures or rules.

G. An arbitrator shall make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

H. An arbitrator's ethical obligations begin upon acceptance of appointment and continue throughout all stages of the proceeding. In addition, wherever specifically set forth in these Canons, certain ethical obligations begin as soon as a person is asked to serve as an arbitrator and continue for one year after the decision in the case has been given to the parties.

I. An experienced arbitrator should participate in development of new practitioners in the field and should engage in efforts to educate the public about the value and use of arbitration procedures. An arbitrator should provide pro bono services, as appropriate. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

References to "commercial" in American Bar Association & American Arbitration Association, *Code of Ethics for Arbitrators in Commercial Disputes,* Canon I (1977) (*Code*), 33 Bus. Law. 311 (1977), from which these Canons have been adapted, have been deleted. Excess verbiage has been deleted. The catchline has been changed from "should" to "shall" to underscore the mandatory nature of the principle; "should" has been omitted in Canon I.A in the penultimate sentence, and the language amended, to underscore this. "Should" in the last sentence has been changed to "shall." "Should" has been changed to "shall" or "must" in other parts of the Canon.

Other additions in Canon I.A follow the Preamble to North Carolina Dispute Resolution Commission, *Standards of Conduct for Mediators*, 344 N.C. 753 (*Standards*). The addition in Canon I.B gives examples of circumstances in which persons may offer services as arbitrators. It is consistent with N.C. Ct-Ord. Arb. R. 2(a). Unlike the Code, Canon I.B says it "may be" inconsistent with the integrity of the arbitration process to solicit appointment as an arbitrator. This is because of the difficulty, e.g., in drawing a line between advertisement permitted by law and solicitation that is condemned in some professional standards, e.g., those for lawyers. Arbitrators must be mindful of fairness, neutrality, disclosure and conflict of interest principles stated in these Canons. The last sentence in Canon I.B makes it clear that the Canons should not be read to forbid arbitrator advertising where, e.g., commercial free speech principles under the Constitution allow it. The addition in Canon I.C is taken from *Standards* I.B-I.C and covers situations of court-appointed arbitrators under, e.g., the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.4, or in court-annexed arbitrations; these arbitrators are subject to court order appointing them, and the court is the final arbiter of these issues. The thrust of Canon I.C is consistent with Revised North Carolina Rules of Professional Conduct 1.1 (*Rule*), although the latter deals with competence of a lawyer, and the Canon governs competence to serve as an arbitrator. Canon I.D states a one-year rule instead of the "reasonable time" principle of the *Code*. The one-year rule has been substituted to coincide with the time in the Federal Arbitration Act, 9 U.S.C. §§ 9-11, during which a party can move to set aside an award. The Uniform Act, N.C. Gen. Stat. §§ 1-567.13—1-567.14, requires set-aside applications to be made within 90 days of an award. Fed. R. Civ. P. 60(b) and N.C.R. Civ. P. 60(b) limit certain judgment set-aside motions to one year. One year has been chosen as the time when nearly all conflict issues would arise and be resolved. The addition to Canon I.D, penultimate sentence, follows the consent rule in Rule 1.12(a). Additions in Canon II.E follow *Standard* ll.C, with additions to cover court-annexed arbitration or arbitrations where a court has appointed an arbitrator under, e.g., the Uniform Act. "Asked" replaces "requested" in Canon I.H. The phrase "continues for one year" has been added to coincide with the one-year rule for Canon I.D.

Canon I.I has been adapted from Society of Professionals in Dispute Resolution, *Ethical Standards of Professional Conduct,* Support of the Profession (1987) (*SPIDR Standards*), reprinted in Rena A. Gorlin, Codes of Professional Responsibility 327 (2d ed. 1990); unlike standards applicable to arbitrators in proceedings, Canon I.I is hortatory, not mandatory. The *Rules* do not include the equivalent of ABA, *Model Rules of Professional Conduct*, Rule 6.1, which says a lawyer should aspire to provide 50 hours of public service a year. *See* Alice Neece Moseley et al., *An Overview of the Revised North Carolina Rules of Professional Conduct: An Examination of the Interests Promoted and Subordinated,* 32 Wake Forest L. Rev. 939, 990-91 (1997). Since these Canons would apply to all arbitrators, including non-lawyers, and Canon I.I states aspirations to provide continuing education, there is no inconsistency with the *Rules*. Canon I.I is consistent with North Carolina attorneys' obligations to take 12 hours of continuing legal education a year. Other lawyers teach this CLE, and these lawyers have the same rôle as Canon I.I would contemplate for experienced arbitrators.

The Canon's language has been tightened.

Canon I generally parallels North Carolina Code of Judicial Conduct, Canons 1-3 (*Code of Judicial Conduct*), See also National Academy of Arbitrators et al., *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes,* ¶¶ 1.A-1.C.2, III.A (May 30, 1996) (*Academy Code*); International Bar Association, *Ethics for International Arbitrators*, Arts. 1-2 (1986) (*IBA Ethics*), 26 Int'l Legal Mat'ls 584 (1987), 6A Benedict on Admiralty, Doc. No. 7-12D (Frank L. Wiswall, Jr. ed., 7th rev. ed. 1999), *SPIDR Standards*, General Responsibilities & Responsibilities to the Parties § 1, Background and Qualifications.

Canon 2. An arbitrator shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.

A. Persons asked to serve as arbitrators shall, before accepting, disclose:

(1) any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons asked to serve as arbitrators shall disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They shall also disclose any such relationships involving their spouses or minor children residing in the household or their current employers, partners or business associates; and

(3) any information required by a court in the case of court-administered arbitrations.

B. Persons asked to accept appointment as arbitrators shall make a reasonable effort to inform themselves of any interests or relationships described in Canon II.A.

C. The obligation to disclose interests or relationships described in Canon II.A is a continuing duty which requires a person accepting appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Disclosure shall be made to all parties unless other disclosure procedures are provided in the rules or practices of an institution or court administering the arbitration. Where more than one arbitrator has been appointed, the other arbitrators shall be informed of interests and relationships which have been disclosed.

E. If an arbitrator is asked by all parties to withdraw, the arbitrator shall do so, provided however, if a court is administering the arbitration, the arbitrator shall inform the court of the request and shall comply with court orders. If an arbitrator is asked to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator shall withdraw unless any of these circumstances exists:

(1) If the parties' agreement, or arbitration rules to which the parties have agreed, establish procedures for determining challenges to arbitrators, those procedures shall be followed;

(2) If the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the interest of justice; or

(3) The court administering the arbitration decides otherwise.

F. The parties may waive disqualification of an arbitrator upon full disclosure of any basis for disqualification, and upon approval of the court in court-administered arbitrations. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Excess verbiage has been deleted. "Asked" has been substituted for "requested." "Shall" has been substituted for "should" throughout the Canon; *see Comment* for Canon I.

Canon II.A's provisions have been stated clearly in the conjunctive ("and"). Canon II.A(2) has been amended to follow *Code of Judicial Conduct*, Canon 3(C)(2) as to spouses and minor children. Canon II.A(3) has been added for court-annexed arbitration or arbitration administered by a court under, e.g., the Uniform Act. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the *Code*) ethics standards, Canon VIII.B states an exception for Canon II.D's disclosure principles. Canon II.E has been modified to account for situations where a court administers arbitration, e.g., court-annexed arbitration, but also where a court appoints an arbitrator, e.g., pursuant to the Uniform Act, N.C. Gen. Stat. § 1-567.4. Canon II.F has been added; it is taken from N.C. Ct.-Ord. Arb. R. 2(e); however, court approval is required only if a court has appointed an arbitrator in a court-annexed arbitration or pursuant to, e.g., the Uniform Act.

Canon II generally follows *Code of Judicial Conduct*, Canon 3(C), although Canon II does not specify degrees of kinship as the *Code of Judicial Conduct* does. *See also Academy Code*, ¶¶ 2.B, 3.A; *IBA Ethics*, Arts. 1, 3-4; *SPIDR Standards*, Responsibilities to the Parties § 4.

Canon 3. An arbitrator, in communicating with parties, shall avoid impropriety or the appearance of impropriety.

A. If the parties' agreement or arbitration rules referred to in that agreement establish the manner or content of communications between the arbitrator and the parties, the arbitrator shall follow those procedures notwithstanding any contrary provision in Canons III.B and III.C.

B. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, arbitrators shall not discuss a case with any party in the absence of other parties, except in these circumstances:

(1) Discussions may be had with a party concerning such matters as setting the time and place of hearings or making other arrangements for conducting proceedings. The arbitrator shall promptly inform other parties of the discussion and shall not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

(2) If all parties request or consent to it, such discussion may take place.

C. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, whenever an arbitrator communicates in writing with one party, the arbitrator shall send a copy of the communication to other parties at the same time. whenever the arbitrator receives a written communication concerning the case from a party which has not already been sent to other parties, the arbitrator shall send that communication to other parties. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

"Shall" has been substituted for "should" throughout Canon III; *see Comment* to Canon I. *Code* III.B(2), stating "If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party present," has been deleted as redundant with Canon IV.F. Revisions have also tightened the text; the last phrase clarifies "to do so." *See also Code of Judicial Conduct*, Canon 2, for which Canon III is a rough parallel in some respects; *Academy Code*. ¶ 2.D; *IBA Ethics*, Art. 5.

Canon 4. An arbitrator shall conduct proceedings fairly and diligently.

A. An arbitrator shall conduct proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

B. An arbitrator shall perform duties diligently and conclude the case as promptly as circumstances reasonably permit.

C. An arbitrator shall be patient, dignified and courteous to parties, their lawyers, witnesses, and all others with whom the arbitrator deals in that capacity and shall encourage similar conduct by all participants in the proceedings. This does not preclude an arbitrator's imposing sanctions if permitted by law or by the parties' agreement.

D. Unless otherwise agreed by the parties or provided in arbitration rules to which the parties have agreed, an arbitrator shall accord to all parties the right to appear in person and to be heard after due notice of the time and place of hearing.

E. An arbitrator shall not deny a party the opportunity to be represented by counsel.

F. If a party fails to appear after due notice, an arbitrator may proceed with the arbitration when authorized to do so by the parties or by law. An arbitrator may do so only after receiving assurance that notice has been given to the absent party.

G. When an arbitrator determines that more information than has been presented by the parties is required to decide a case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence.

H. It is not improper for an arbitrator to suggest to the parties that they discuss settling the case. An arbitrator may not be present or otherwise participate in settlement discussions unless asked to do so by all parties. An arbitrator may not pressure a party to settle.

I. Nothing in these Canons is intended to prevent a person from acting as a mediator, conciliator or other neutral in a dispute in which he or she has been appointed as an arbitrator, if asked to do so by all parties or where authorized or required to do so by applicable law or rules.

J. Where there is more than one arbitrator, the arbitrators shall afford each other full opportunity to participate in all aspects of the proceedings.

K. In court-annexed arbitrations where one or more of the parties is proceeding without counsel, at the hearing the arbitrator shall discuss the nature of the arbitration process with all parties and counsel present, including the arbitrator's role, time allotted for each party's case, order of proceedings, and the right to trial de novo (if applicable) if a party not in default is dissatisfied with the arbitrator's award, unless parties waive these explanations. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Language has been tightened, and excess verbiage has been deleted. "Shall" or "may" has been substituted for "should" throughout Canon IV; *see Comment* to Canon I.

Canon IV.C has been amended to follow *Code of Judicial Conduct*, Canon 3(A)(3). The final sentence recognizes that arbitrators may be empowered to impose sanctions in, e.g., court-annexed arbitration or by the parties' agreement, in addition to the arbitrator's ethical obligation to encourage proper conduct. Canon IV.H is consistent with *Standard* IV.B. Canon IV.I has been modified to take into account procedures other than mediation or conciliation, e.g., early neutral evaluation, etc. Canon IV.K has been added; it only applies to court-annexed arbitration. Where there has been an agreement to arbitrate governed by, e.g., the Uniform Act, but parties have not appointed an arbitrator pursuant to the Act and the court does so under, e.g., N.C. Gen. Stat. § 1-567.4, there is no reason to require that arbitrator to explain the nature of arbitration. Many court-annexed arbitrations involve small claims where parties may appear without counsel; fairness and efficiency suggest that an explanation at the beginning of the hearing, unless waived, will expedite the proceeding. Parties in court-annexed arbitration may agree to binding arbitration with no trial de novo; if this is the case, there is no need to explain a right to trial de novo. Canon IV.K was suggested by *Standard* IV.A.

See also Academy Code, ¶¶ 1.A, 2.J, 4-5; *IRA Ethics*, Arts. 7-8, *SPIDR Standards*, Responsibilities to the Parties §§ 2, 5-6. The Uniform Act and the International Commercial Arbitration and Conciliation Act provide for representation by counsel. N.C. Gen. Stat. §§ 1-567.7, 1-567.48(b).

Canon 5. An arbitrator shall make decisions in a just, independent and deliberate manner.

A. An arbitrator shall, after careful deliberation, decide all issues submitted for determination. An arbitrator may decide no other issues.

B. An arbitrator shall decide all issues justly, exercising independent judgment, and shall not permit outside pressure to affect the decision.

C. An arbitrator shall not delegate the duty to decide to any other person, unless the parties agree to such delegation.

D. If all parties agree to settle issues in dispute and ask an arbitrator to embody that agreement in an award, an arbitrator may do so but is not required to do so unless satisfied with the propriety of the settlement terms. Whenever an arbitrator embodies the parties' settlement in an award, the arbitrator shall state in the award that it is based on the parties' agreement. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Revisions tighten the text and omit excess verbiage. "Shall" has been substituted for "should" throughout Canon V; *see Comment* to Canon I. The new material in Canon V.C makes it clear that parties can agree that an arbitrator may delegate decisionmaking in whole or in part, e.g., to conciliators as provided in the North Carolina International Commercial Arbitration and Conciliation Act. *See also Academy Code,* ¶¶ 2.G-2.I, 6.

Canon 6. An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and shall not at any time use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others or to affect adversely the interest of another.

B. Unless the parties agree otherwise, or the law or applicable rules require, an arbitrator shall keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision before it is given to all parties. Where there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the arbitrators' deliberations. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as required by law, or as agreed by the parties.

D. In many types of arbitrations it is customary for arbitrators to serve without pay. In some types of cases it is customary for arbitrators to receive compensation for services and reimbursement for expenses. Where such payments are to be made, all persons asked to serve, or who serve as arbitrators, shall be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons shall scrupulously avoid bargaining with parties over the amount of payments, or engaging in communications concerning payments, which would create an appearance of coercion or other impropriety. Absent provisions in the parties' agreement, in rules to which the parties have agreed, or in applicable law, certain practices relating to payments are generally recognized as preferable to preserve the integrity and fairness of the arbitration process. These practices include:

(1) It is preferable that before the arbitrator finally accepts appointment, the basis of payment be established and that all parties be informed in writing.

(2) In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, payments shall be arranged by the institution to avoid the necessity for arbitrators communicating directly with parties concerning the subject.

(3) Where no institution is available to assist in making arrangements for payments, it is preferable that any discussions with arbitrators concerning payments take place in the presence of all parties.

(4) In cases where arbitration is court-administered, court rules, orders and practices shall be followed. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Excess verbiage has been deleted, and language has been tightened. "Shall" replaces "should" throughout Canon VI, except in Canon VI.D(3), where "should" has been omitted. Canon VI.C has been modified to allow parties to agree to use the arbitrator in other neutral roles, e.g., as a post-award mediator. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the *Code*) ethics standards, Canon VIII.B states an exception for Canon VI.D(2)'s payment principles Canon VI.D(4) has been added to take into account, e.g, court annexed arbitration. *See also Academy Code*, ¶¶ 2.C, 2.K, 3.A; *IBA Ethics*, Arts. 6, 9, *SPIDR Standards*, Responsibilities to the Parties § 3, Disclosure of Fees.

Canon 7. Ethical considerations relating to arbitrators appointed by one party.

A. *Obligations under Canon I.* Non-neutral party-appointed arbitrators shall observe Canon I obligations to uphold the integrity and fairness of the arbitration process, subject to these provisions:

(1) Non-neutral arbitrators may be predisposed to the party appointing them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators shall not engage in delaying tactics or harassment of a party or witness and shall not knowingly make untrue or misleading statements to other arbitrators.

(2) Provisions of Canon I.D relating to relationships and interests do not apply to non-neutral arbitrators.

B. *Obligations under Canon II.* Non-neutral party-appointed arbitrators shall disclose to all parties, and to other arbitrators, interests and relationships which Canon II requires to be disclosed. Disclosure required by Canon II is for the benefit of the party appointing the non-neutral arbitrator and for the benefit of other parties and arbitrators so that they may know of bias which may exist or appear to exist. This obligation is subject to these provisions:

(1) Disclosure by non-neutral arbitrators must be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.

(2) Non-neutral arbitrators are not obliged to withdraw if asked to do so by a party who did not appoint them, notwithstanding Canon II.E.

C. *Obligations under Canon III.* Non-neutral party-appointed arbitrators shall observe Canon III's obligations concerning communications with parties, subject to these provisions:

(1) In an arbitration in which two party-appointed arbitrators are expected to appoint the third arbitrator, non-neutral arbitrators may consult with the party who appointed them concerning acceptability of persons under consideration for appointment as the third arbitrator.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred before the person was appointed as arbitrator, or before the first hearing or other meeting of parties with the arbitrators, the non-neutral arbitrator shall, at the first hearing or meeting, disclose that such communication has taken place. In complying with Canon VII.C(2), it is sufficient that there be disclosure that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future, and there is no requirement thereafter that there be disclosure before each separate occasion when such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with a party that appointed them concerning any matter as to which communication is permitted under these Canons, they are not required to send copies of such writing to other parties or arbitrators.

D. *Obligations under Canon IV.* Non-neutral party-appointed arbitrators shall observe Canon IV's obligations to conduct proceedings fairly and diligently.

E. *Obligations under Canon V.* Non-neutral party-appointed arbitrators shall observe Canon V's obligations concerning making decisions, but such arbitrators may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI.* Non-neutral party-appointed arbitrators shall observe Canon VI's obligations to be faithful to the relationship of trust inherent in the office of arbitrator, but such arbitrators are not subject to Canon VI.D's provisions with respect to payments by the party appointing them. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

"Shall" or "must" has been substituted for "should" in Canon VII; *see Comment* to Canon I. Excess verbiage has been deleted; sentences have been tightened; Canons VII.E and VII.F have been rewritten to convey the same sense as the *Code*. Nothing in *Rule* 1.12(d) conflicts with Canon VII.

Canon 8. Canons are subject to laws and professional responsibility principles; choice or law.

A. These Canons are subject to applicable constitutional, statutory, decisional or administrative rules, State or federal, and when these conflict with these Canons, the Canon provision shall be deemed superseded if it is not possible to give effect to the rule and these Canons.

B. These Canons and other ethics or similar rules which may apply to an arbitrator in any other capacity e.g., as a professional, shall be read in pari materia, giving effect to these Canons and the ethics rules if possible. If an arbitrator is subject to other arbitrator ethics rules, e.g., the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, and these Canons, these Canons shall govern if there is a conflict of standards; provided however, that the principle of primacy in Canon VIII.B shall not apply to disclosure principles in Canon II.D and payment principles in Canon VI.D(2).

C. These Canons apply to arbitrations in North Carolina, or arbitrations administered by a court in North Carolina, to arbitrations where the parties choose North Carolina law exclusive of conflict of laws principles in the contract or other agreement, or where it is determined that North Carolina law exclusive of conflict of laws principles applies, regardless of where the arbitration is conducted. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Canon VIII is not part of the *Code*. However, given the possibility of conflicting rules of court, professional responsibility rules, legislation or constitutional principles, statement of the obvious in Canon VIII.A-B seems appropriate. Canon VIII.B provides that if an arbitrator is subject to professional or other ethics rules because of that arbitrator's status as, e.g., a lawyer, these Canons and the professional ethics rules shall be read in pari materia, giving effect to both if possible.

Rule 8.5 suggested Canon VIII.C, which is intended to cover court-annexed arbitrations, arbitrations where a court has appointed an arbitrator pursuant to, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4, and arbitrations where parties have chosen North Carolina law or where North Carolina law, exclusive of conflict of laws principles, applies. This means that parties and the arbitrator cannot step across a state line and escape these principles.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred before the person was appointed as arbitrator, or before the first hearing or other meeting of parties with the arbitrators, the non-neutral arbitrator shall, at the first hearing or meeting, disclose that such communication has taken place. In complying with Canon VII.C(2), it is sufficient that there be disclosure that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future, and there is no requirement thereafter that there be disclosure before each separate occasion when such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with the party that appointed them concerning any matter as to which communication is permitted under these Canons, they are not required to send copies of such writing to other parties or arbitrators.

D. *Obligations under Canon IV*. Non-neutral party-appointed arbitrators shall observe Canon IV's obligations to conduct proceedings fairly and diligently.

E. *Obligations under Canon V*. Non-neutral party-appointed arbitrators shall observe Canon V's obligations concerning making decisions, but such arbitrators may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*. Non-neutral party-appointed arbitrators shall observe Canon VI's obligations to be faithful to the relationship of trust inherent in the office of arbitrator, but such arbitrators are not subject to Canon VI.D's provisions with respect to payments by the party appointing them. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

"Shall" or "must" has been substituted for "should" in Canon VII; see Comment to Canon I. Excess verbiage has been deleted; sentences have been tightened; Canons VII.E and VII.F have been rewritten to convey the same sense as the Code. Nothing in Canon VII.D(2) [illegible] to Canon VII.

Canon 8. Canons are subject to laws and professional responsibility principles; choice of law.

A. These Canons are subject to applicable constitutional, statutory, decisional or administrative rules, State or federal, and when these conflict with these Canons, the Canon provision shall be deemed superseded, if it is not possible to give effect to the rule and these Canons.

B. These Canons and other ethics or similar rules which may apply to an arbitrator in any other capacity, e.g., as a professional, shall be read in pari materia, giving effect to these Canons and the ethics rules if possible. If an arbitrator is subject to other arbitrator ethics rules, e.g., the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, and these Canons, these Canons shall govern if there is a conflict of standards; provided however, that the principle of primacy in Canon VIII.B shall not apply to disclosure principles in Canon II.D and payment principles in Canon VI.D(2).

C. These Canons apply to arbitrations in North Carolina, to arbitrations administered by a court in North Carolina, to arbitrations where the parties choose North Carolina law exclusive of conflict of laws principles in the contract or the agreement, or where it is determined that North Carolina law exclusive of conflict of laws principles applies, regardless of where the arbitration is conducted. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Canon VIII is not part of the Code. However, given the possibility of conflicting rules of court, professional responsibility rules, legislation or constitutional principles, statement of the obvious in Canon VIII.A seems appropriate. Canon VIII.B provides that if an arbitrator is subject to professional or other ethics rules because of that arbitrator's status, e.g., a lawyer, these Canons and the professional or other rules shall be read in pari materia, giving effect to both if possible.

Rule 8.5 suggested Canon VIII.C, which is intended to cover court-annexed arbitrations, situations where a court has appointed an arbitrator pursuant to, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4, and arbitrations where parties have chosen North Carolina law or where North Carolina law, exclusive of conflict of laws principles, applies. This means that parties and their arbitrators cannot [illegible] escape these principles.

Index to Canons of Ethics for Arbitration

A

APPEARANCE OF IMPROPRIETY.
Communications with parties, CEA 3.

APPEARANCE OF PARTIALITY OR BIAS.
Disclosure of interest or relationship, CEA 2.

APPOINTMENT BY ONE PARTY.
Ethical considerations relating to, CEA 7.

C

CHOICE OF LAW, CEA 8.

CONFIDENTIALITY.
Faithful to the relationship, CEA 6.

CONFLICTS OF INTEREST, CEA 2.

D

DECISIONS.
Just, independent and deliberate manner, CEA 5.

F

FAIR AND DILIGENT PROCEEDINGS, CEA 4.

I

IMPROPRIETY.
Communications with parties, CEA 3.

INTEGRITY AND FAIRNESS OF PROCESS.
Arbitrator to uphold, CEA 1.

L

LAWS AND PROFESSIONAL RESPONSIBILITY PRINCIPLES.
Canons are subject to, CEA 8.

T

TRUST.
Faithful to the relationship of trust, CEA 6.

RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

Adopted October 2, 1991,
with revisions effective October 1, 2008.

Rule
1. Initiating settlement events.
2. Selection of mediator.
3. The mediated settlement conference.
4. Duties of parties, attorneys and other participants in mediated settlement conferences.
5. Sanctions for failure to attend mediated settlement conferences.
6. Authority and duties of mediators.
7. Compensation of the mediator and sanctions.
8. Mediator certification and decertification.

Rule
9. Certification of mediation training programs.
10. Other settlement procedures.
11. Rules for Neutral evaluation.
12. Rules for arbitration.
13. Rules for summary trials.
14. Local rule making.
15. Definitions.
16. Time limits.

Index follows Rules.

Rule 1. Initiating settlement events.

A. *Purpose of mandatory settlement procedures.* Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. *Duty of counsel to consult with clients and opposing counsel concerning settlement procedures.* In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. *Initiating the mediated settlement conference in each action by court order.*

(1) *Order by Senior Resident Superior Court Judge.* The Senior Resident Superior Court Judge of any judicial district shall, by written order, require all persons and entities in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.6 only for good cause shown.

(2) *Motion to authorize the use of other settlement procedures.* The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;
(b) the name, address and telephone number of the neutral selected by the parties;
(c) the rate of compensation of the neutral;
(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;
(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) *Timing of the order.* The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.A.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) *Content of order.* The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an A.O.C. form.

(5) *Motion for court ordered mediated settlement conference.* In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) *Motion to dispense with mediated settlement conference.* A party may move the Senior Resident Superior Court Judge, to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. *Initiating the mediated settlement conference by local rule.*

(1) *Order by local rule.* In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.6. only for good cause shown.

(2) *Scheduling orders or notices.* In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) *Scheduling Conferences.* In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) *Application of Rule 1.B.* The provisions of Rule 1.B.(2), (5) and (6) shall apply to Rule 1.C. except for the time limitations set out therein.

(5) *Deadline for completion.* The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.C. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) *Selection of mediator.* The parties may select or nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.C.

(7) *Use of other settlement procedures.* The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

Cross References. — As to court ordered, mediated settlement conferences in superior court civil actions, see G.S. 7A-38.

Rule 2. Selection of mediator.

A. *Selection of certified mediator by agreement of parties.* The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. *Approval of party nominee eliminated.* As of January 1, 2006, the former Rule 2.B. rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the Senior Resident Superior Court Judge shall appoint mediators certified by the Dispute Resolution Commission, pursuant to Rule 2.C. which follows.

C. *Appointment of mediator by the court.* If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree upon a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Judge's district.

In making such appointments, the Senior Resident Superior Court Judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The Senior Resident Superior Court Judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the Senior Resident Superior Court Judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the Senior Resident Superior Judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. *Mediator information.* To assist the parties in selecting a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at www.ncdrc.org a list of certified superior Court mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

E. *Disqualification of mediator.* Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves. (Amended effective October 1, 2008.)

CASE NOTES

Dismissal Upon Failure to Select Mediator Was Error. — Both G.S. 7A-38.1(h) and Rules of the North Carolina Supreme Court implementing Statewide Mediated Settlement Conferences in Superior Court Civil actions 2C contemplated that if the parties to a lawsuit failed to agree on a settlement conference mediator or that plaintiff failed to report this to the senior resident superior court judge, that the judge was to have appointed a mediator; trial court's dismissal of an action after the parties failed to agree on mediator was error. Gailey v. Triangle Billiards & Blues Club, Inc., — N.C. App. —, 635 S.E.2d 482, 2006 N.C. App. LEXIS 2132 (2006).

Rule 3. The mediated settlement conference.

A. *Where conference is to be held.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. *When conference is to be held.* As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.B.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. *Request to extend deadline for completion.* A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. *The mediated settlement conference is not to delay other proceedings.* The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

Rule 4. Duties of parties, attorneys and other participants in mediated settlement conferences.

A. *Attendance.*

(1) The following persons shall attend a mediated settlement conference:

(a) *Parties.*

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the party's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) *Insurance company representatives.* A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) *Attorneys.* At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) *Scheduling.* Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. *Notifying lien holders.* Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. *Finalizing agreement.*

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within thirty (30) days or within ninety days (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s)

disposing of all issues with the court thirty (30) days or within ninety (90) days if the State or a political subdivision thereof is a party to the action, or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

D. *Payment of mediator's fee.* The parties shall pay the mediator's fee as provided by Rule 7.

E. *Related Cases.* Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order. (Amended effective October 1, 2008.)

CASE NOTES

Requirement of Attending Mediation. — Plaintiffs satisfied the requirements for requesting and participating in pre-litigation mediation as required by G.S. 7A-38.3 and N.C.R. Super. Ct. Mediated Settlement Conf. Rule 4; the pleadings alleged that they participated in pre-litigation mediation, and the mediator's report did not list any party as being absent. Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002).

Sanctions for Failure to Attend. — Trial court did not abuse its discretion by striking defendant's answer and entering default where corporate defendant had no good cause for failing to have officer mediation settlement conference and was not excused. The sanctions entered were specifically authorized by former Rule 37(b)(2)c (repealed by 1993 Session Laws, c. 553, s. 1.). Triad Mack Sales & Serv., Inc. v. Clement Bros. Co., 113 N.C. App. 405, 438 S.E.2d 485 (1994).

Trial court had inherent authority to sanction a party for failing to execute a mediated settlement agreement by refusing to sign the agreement after it orally agreed to the terms. Few v. Hammack Enters., Inc., 132 N.C. App. 291, 511 S.E.2d 665 (1999).

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(l) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

Rule 5. Sanctions for failure to attend mediated settlement conferences.

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a resident or presiding Superior Court Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.G. and the Comment to Rule 7.G.)

CASE NOTES

Striking Answer and Entering Default for Failure to Attend. — Trial court did not abuse its discretion by striking defendant's answer and entering default where corporate defendant had no good cause for failing to have officer mediation settlement conference and was not excused. The sanctions entered were specifically authorized by former Rule 37(b)(2)c (repealed by 1993 Session Laws, c. 553, s. 1.). Triad Mack Sales & Serv., Inc. v. Clement Bros. Co., 113 N.C. App. 405, 438 S.E.2d 485 (1994).

Quoted in Few v. Hammack Enters., Inc., 132 N.C. App. 291, 511 S.E.2d 665 (1999).

Rule 6. Authority and duties of mediators.

A. *Authority of mediator.*

(1) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) *Reporting results of conference.*

(a) The mediator shall report to the Court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. The mediator's report shall include the names of those persons attending the mediated settlement conference. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the Court.

(b) If an agreement upon all issues is reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.C.(1). If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) *Distribution of mediator evaluation form.* At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

Rule 7. Compensation of the mediator and sanctions.

A. *By agreement.* When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. *By court order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 which is due upon appointment.

C. *Change of appointed mediator.* Pursuant to Rule 2.A., the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of payment to the Court's original appointee the $125 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

D. *Indigent cases.* No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. *Postponements and fees.*

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the meditor for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has

no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, the fee shall be $250. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. *Payment of compensation by parties.* Unless otherwise agreed to by the named parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge. (Amended effective October 1, 2008.)

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of $125.00 if scheduling was relatively easy or multiples of that amount if more effort was required.

DRC Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8B.(1) or Rule 8B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005 and have four years of professional, management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of professional, management or administrative experience in a professional, business, or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. (Amended effective October 1, 2008.)

Legal Periodicals. — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

Rule 9. Certification of mediation training programs.

A. Certified training programs for mediators seeking only certification as Superior Court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

Rule 10. Other settlement procedures.

A. *Order authorizing other settlement procedures.* Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. *Other settlement procedures authorized by these rules.* In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules;

(1) *Neutral Evaluation (Rule 11).* Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) *Arbitration (Rule 12).* Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) *Summary trials (Jury or Non-Jury) (Rule 13).* Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. *General rules applicable to other settlement procedures.*

(1) *When proceeding is conducted.* Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) *Authority and duties of neutrals.*

(a) *Authority of neutrals.*

(i) *Control of proceeding.* The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) *Scheduling the proceeding.* The neutral evaluator, arbitrator, or president officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) *Duties of neutrals.*

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(i) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) *Disclosure.* Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) *Reporting results of the proceeding.* The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the court on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) *Scheduling and holding the proceeding.* It is the duty of the neutral evaluator, arbitrator, or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) *Extensions of time.* A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for and extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) *Where procedure is conducted.* The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) *No delay of other proceedings.* Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) *Inadmissibility of settlement proceedings.* Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceedings, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except;

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceedings shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) *No record made.* There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) *Ex parte communication prohibited.* Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) *Duties of the parties.*

(a) *Attendance.* All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) *Finalizing agreement.*

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) *Payment of neutral's fee.* The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) *Selection of neutrals in other settlement procedures.* The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) *Disqualification.* Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) *Compensation of the neutral.* A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) *Sanctions for failure to attend other settlement procedures.* If any person required to attend a settlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

Rule 11. Rules for Neutral evaluation.

A. *Nature of neutral evaluation.* Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. *When conference is to be held.* As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. *Pre-conference submissions.* No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. *Replies to pre-conference submissions.* No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. *Conference Procedure.* Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. *Modification of procedure.* Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. *Evaluator's duties.*

(1) *Evaluator's opening statement.* At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutural consent of the Parties.

(2) *Oral report to parties by evaluator.* In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) *Report of evaluator to court.* Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or

voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. *Evaluator's authority to assist negotiations.* If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

Rule 12. Rules for arbitration.

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. *Arbitrators.*

(1) *Arbitrator's Canon of Ethics.* Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. *Exchange of information.*

(1) *Pre-hearing exchange of information.* At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) *Exchanged documents considered authenticated.* Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) *Copies of exhibits admissible.* Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. *Arbitration hearings.*

(1) *Witnesses.* Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) *Subpoenas.* Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) *Motions.* Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) *Law of evidence used as guide.* The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) *Authority of arbitrator to govern hearings.* Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) *Conduct of hearing.* The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by

the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) *No Record of hearing made.* No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) *Parties must Be present at hearings; Representation.* Subject to the provisions of rule 10.C.(9), all parties shall be present at hearings in person or through representative authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) *Hearing concluded.* The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. *The award.*

(1) *Filing the award.* The arbitrator shall file a written award signed by the arbitrator and filed with the Clerk of Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be an AOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(3) *Scope of award.* The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) *Costs.* The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) *Copies of award to parties.* The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. *Trial De Novo.*

(1) *Trial de novo* as of right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C. R. Civ. P. 39(b) does not preserve the right to a trial *de novo.* A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo.* Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) *No reference to arbitration in presence of jury.* A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. *Judgment on the arbitration decision.*

(1) *Termination of action before judgment.* Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) *Judgment entered on award.* If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. *Agreement for binding arbitration.*

(1) *Written agreement.* The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) *Entry of judgment on a binding decision.* The arbitrator shall file the decision with the Clerk of Superior Court and it shall become a judgment in the same manner as set out in G.S. 1-567.1ff.

H. *Modification procedure.* Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

Rule 13. Rules for summary trials.

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules fo Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. *Pre-summary trial conference.* Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. *Presiding officer to issue order if parties unable to agree.* If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. *Stipulation to a binding summary trial.* At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. *Evidentiary motions.* Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. *Jury selection.* In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. *Presentation of evidence and arguments of counsel.* Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. *Jury charge.* In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. *Deliberation and verdict.* In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. *Jury questioning.* In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit counsels' questioning and shall be informed of the option to depart.

J. *Settlement discussions.* Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. *Modification of procedure.* Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. *Report of presiding officer.* The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

Rule 14. Local rule making.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

Rule 15. Definitions.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

Rule 16. Time limits.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Index to Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions

A

ARBITRATION.
Agreement for binding arbitration, SuperCtMediatedSettlemt Rule 12G.
Arbitrator's canon of ethics, compliance, SuperCtMediatedSettlemt Rule 12A.
Authorized settlement procedure, SuperCtMediatedSettlemt Rule 10B.
Award, SuperCtMediatedSettlemt Rule 12D.
  Dissatisfaction, trial de novo, SuperCtMediatedSettlemt Rule 12E.
  Judgment entered on, SuperCtMediatedSettlemt Rule 12F.
Binding arbitration.
  Agreement for, SuperCtMediatedSettlemt Rule 12G.
Consent judgment.
  Filing before entry of judgment, SuperCtMediatedSettlemt Rule 12F.
Dismissal.
  Filing before entry of judgment, SuperCtMediatedSettlemt Rule 12F.
Exchange of information, SuperCtMediatedSettlemt Rule 12B.
Exhibits, copies admissible, SuperCtMediatedSettlemt Rule 12B.
General rules applicable to other settlement procedures, SuperCtMediatedSettlemt Rule 10C.
Hearings, SuperCtMediatedSettlemt Rule 12C.
  Trial de novo.
    Dissatisfaction with award, SuperCtMediatedSettlemt Rule 12E.
Judgment on decision, SuperCtMediatedSettlemt Rule 12F.
  Binding decision, SuperCtMediatedSettlemt Rule 12G.
Modification procedure, SuperCtMediatedSettlemt Rule 12H.
Pre-hearing exchange of information, SuperCtMediatedSettlemt Rule 12B.
Rules, SuperCtMediatedSettlemt Rule 12.
ATTORNEYS.
Attendance at settlement conference, SuperCtMediatedSettlemt Rule 4A.
Consultation with client and opposing counsel.
  Duty, SuperCtMediatedSettlemt Rule 1B.

C

CONSULTATION WITH CLIENT AND OPPOSING COUNSEL.
Duty of counsel, SuperCtMediatedSettlemt Rule 1B.

D

DEFINITIONS, SuperCtMediatedSettlemt Rule 15.

E

EVIDENCE.
Arbitration hearings, SuperCtMediatedSettlemt Rule 12C.
Inadmissibility of settlement proceedings, SuperCtMediatedSettlemt Rule 10C.
Summary trials, SuperCtMediatedSettlemt Rule 13F.
  Motions, SuperCtMediatedSettlemt Rule 13D.

G

GOVERNMENTAL ENTITIES.
Attendance at settlement conference, representation, SuperCtMediatedSettlemt Rule 4A.

H

HEARINGS.
Arbitration, SuperCtMediatedSettlemt Rule 12C.

I

INADMISSIBILITY OF SETTLEMENT PROCEEDINGS, SuperCtMediatedSettlemt Rule 10C.
INSURANCE COMPANY REPRESENTATIVES.
Attendance at settlement conference, SuperCtMediatedSettlemt Rule 4A.

J

JUDGMENTS.
Arbitration decision, SuperCtMediatedSettlemt Rule 12F.
  Binding decision, SuperCtMediatedSettlemt Rule 12G.
JURY.
Summary trials.
  Charge, SuperCtMediatedSettlemt Rule 13G.
  Deliberation and verdict, SuperCtMediatedSettlemt Rule 13H.
  Questioning after verdict, SuperCtMediatedSettlemt Rule 13I.
  Selection, SuperCtMediatedSettlemt Rule 13E.

L

LIENS.
Notifying lienholder, SuperCtMediatedSettlemt Rule 4B.

LOCAL RULE.
Authorization to publish, SuperCtMediatedSettlemt Rule 14.
Settlement conference ordered by, SuperCtMediatedSettlemt Rule 1D.

M

MEDIATED SETTLEMENT CONFERENCE.
Attendance, SuperCtMediatedSettlemt Rule 4A.
  Parties in related cases, SuperCtMediatedSettlemt Rule 4E.
  Sanctions for failure to attend, SuperCtMediatedSettlemt Rule 5.
Controlled by mediator, SuperCtMediatedSettlemt Rule 6A.
Deadline for completion.
  Request to extend deadline, SuperCtMediatedSettlemt Rule 3C.
  Strike observance, SuperCtMediatedSettlemt Rule 6B.
Extension of completion deadline.
  Request, SuperCtMediatedSettlemt Rule 3C.
Finalizing agreement, SuperCtMediatedSettlemt Rule 4C.
Motion for court ordered conference, SuperCtMediatedSettlemt Rule 1C.
Motion to authorize use of other settlement procedures, SuperCtMediatedSettlemt Rule 1C.
Motion to dispense with mediated settlement conference, SuperCtMediatedSettlemt Rule 1C.
Not to delay other proceedings, SuperCtMediatedSettlemt Rule 3E.
Order by local rule, SuperCtMediatedSettlemt Rule 1D.
  Application of Rule 1B, SuperCtMediatedSettlemt Rule 1D.
  Deadline for completion, SuperCtMediatedSettlemt Rule 1D.
  Other settlement procedures, use, SuperCtMediatedSettlemt Rule 1D.
  Requirements, SuperCtMediatedSettlemt Rule 1D.
  Selection of mediator, SuperCtMediatedSettlemt Rule 1D.
  Withdrawal of order upon motion, SuperCtMediatedSettlemt Rule 1D.
Order of senior resident judge initiating, SuperCtMediatedSettlemt Rule 1C.
  Content, SuperCtMediatedSettlemt Rule 1C.
  Motion for court ordered conference, SuperCtMediatedSettlemt Rule 1C.
  Motion to authorize use of other settlement procedures, SuperCtMediatedSettlemt Rule 1C.
  Motion to dispense with, SuperCtMediatedSettlemt Rule 1C.
  Timing of order, SuperCtMediatedSettlemt Rule 1C.
  Withdrawal of order upon motion, SuperCtMediatedSettlemt Rule 1C.

MEDIATED SETTLEMENT CONFERENCE —Cont'd
Pending case parties.
  Attendance at conference, SuperCtMediatedSettlemt Rule 4E.
Postponement, SuperCtMediatedSettlemt Rule 7E.
Private consultation, SuperCtMediatedSettlemt Rule 6A.
Recesses, SuperCtMediatedSettlemt Rule 3D.
Related cases, SuperCtMediatedSettlemt Rule 4E.
Results of conference.
  Reporting, SuperCtMediatedSettlemt Rule 6B.
Scheduling orders or scheduling conferences utilized by judicial district.
  Settlement conference order by local rule, SuperCtMediatedSettlemt Rule 1D.
When to be held, SuperCtMediatedSettlemt Rule 3B.
  Scheduling the conference, SuperCtMediatedSettlemt Rules 6A, 6B.
Where to be held, SuperCtMediatedSettlemt Rule 3A.

MEDIATORS.
Authority, SuperCtMediatedSettlemt Rule 6A.
Certification, SuperCtMediatedSettlemt Rule 8.
  Training programs, SuperCtMediatedSettlemt Rule 9.
Change of appointed mediator, SuperCtMediatedSettlemt Rule 7C.
Compensation.
  Agreement, SuperCtMediatedSettlemt Rule 7A.
  Change of appointed mediators, SuperCtMediatedSettlemt Rule 7C.
  Court order, SuperCtMediatedSettlemt Rule 7B.
  Indigent cases, SuperCtMediatedSettlemt Rule 7D.
  Payment by parties, SuperCtMediatedSettlemt Rule 7F.
  Postponement fees, SuperCtMediatedSettlemt Rule 7E.
  Sanctions for failure to pay mediator's fee, SuperCtMediatedSettlemt Rule 7G.
Control of conference, SuperCtMediatedSettlemt Rule 6A.
Decertification, SuperCtMediatedSettlemt Rule 8.
Declaring impasse, SuperCtMediatedSettlemt Rule 6B.
Disclosures, SuperCtMediatedSettlemt Rule 6B.
Disqualification, SuperCtMediatedSettlemt Rule 2E.
Duties, SuperCtMediatedSettlemt Rule 6B.
Fees.
  Payment, SuperCtMediatedSettlemt Rule 4D.
  Sanctions for failure to pay mediator's fee, SuperCtMediatedSettlemt Rule 7G.
Holding the conference, SuperCtMediatedSettlemt Rule 6B.
Information directory, SuperCtMediatedSettlemt Rule 2D.
List of mediators, SuperCtMediatedSettlemt Rule 2D.
Non-certified mediator.
  Rule allowing approval rescinded, SuperCtMediatedSettlemt Rule 2B.
Private consultation, SuperCtMediatedSettlemt Rule 6A.

MEDIATORS —Cont'd
Results of conference.
Reporting, SuperCtMediatedSettlemt Rule 6B.
Revocation of certification, SuperCtMediatedSettlemt Rule 8.
Scheduling the conference, SuperCtMediatedSettlemt Rules 6A, B.
Selection.
Agreement of parties, SuperCtMediatedSettlemt Rule 2A.
Court appointment, SuperCtMediatedSettlemt Rule 2C.
Selection by court, SuperCtMediatedSettlemt Rule 2C.
Settlement conference order by local rule, SuperCtMediatedSettlemt Rule 1D.
Training, experience and qualifications, SuperCtMediatedSettlemt Rule 8.
Certification of training programs, SuperCtMediatedSettlemt Rule 9.

MOTIONS.
Arbitration hearings, SuperCtMediatedSettlemt Rule 12C.
Court ordered conference, SuperCtMediatedSettlemt Rule 1C.
Dispense with conference, SuperCtMediatedSettlemt Rule 1C.
Other settlement procedures, authorizing, SuperCtMediatedSettlemt Rule 1C.
Summary trials.
Evidentiary motions, SuperCtMediatedSettlemt Rule 13D.

N

NEUTRAL EVALUATION.
Authorized settlement procedure, SuperCtMediatedSettlemt Rule 10B.
Evaluators.
Authority to assist negotiations, SuperCtMediatedSettlemt Rule 11G.
Opening statement, SuperCtMediatedSettlemt Rule 11G.
Report to court, SuperCtMediatedSettlemt Rule 11G.
Report to parties, SuperCtMediatedSettlemt Rule 11G.
Finalizing agreement, SuperCtMediatedSettlemt Rule 11I.
General rules applicable to other settlement procedures, SuperCtMediatedSettlemt Rule 10C.
Nature, SuperCtMediatedSettlemt Rule 11A.
Pre-conference submissions, SuperCtMediatedSettlemt Rule 11C.
Replies, SuperCtMediatedSettlemt Rule 11D.
Procedure, SuperCtMediatedSettlemt Rule 11E.
When conference to be held, SuperCtMediatedSettlemt Rule 11B.

NEUTRALS IN OTHER SETTLEMENT PROCEDURES.
Arbitrator's canon of ethics, compliance, SuperCtMediatedSettlemt Rule 12A.
Authority and duties, SuperCtMediatedSettlemt Rule 10C.
Compensation, SuperCtMediatedSettlemt Rule 10C.

NEUTRALS IN OTHER SETTLEMENT PROCEDURES —Cont'd
Disqualification, SuperCtMediatedSettlemt Rule 10C.
Evaluators, neutral evaluation.
Authority to assist negotiations, SuperCtMediatedSettlemt Rule 11G.
Opening statement, SuperCtMediatedSettlemt Rule 11G.
Report to court, SuperCtMediatedSettlemt Rule 11G.
Report to parties, SuperCtMediatedSettlemt Rule 11G.
Selection, SuperCtMediatedSettlemt Rule 10C.

O

OTHER SETTLEMENT PROCEDURES.
Arbitration.
Rules, SuperCtMediatedSettlemt Rule 12.
Neutral evaluation conferences, SuperCtMediatedSettlemt Rule 11.
Rules, SuperCtMediatedSettlemt Rule 11.
Order authorizing, SuperCtMediatedSettlemt Rule 10A.
Procedures authorized, SuperCtMediatedSettlemt Rule 10B.
Rules applicable to, SuperCtMediatedSettlemt Rule 10C.
Summary trial.
Rules, SuperCtMediatedSettlemt Rule 13.

P

PARTY NOT NATURAL PERSON.
Attendance at settlement conference, representation, SuperCtMediatedSettlemt Rule 4A.

POSTPONEMENT OF SETTLEMENT CONFERENCE, SuperCtMediatedSettlemt Rule 7E.

PRE-TRIAL CONFERENCE.
Summary trials, SuperCtMediatedSettlemt Rule 13A.

PURPOSE OF MANDATORY PROCEDURES, SuperCtMediatedSettlemt Rule 1A.

S

SCHEDULING CONFERENCES.
Settlement conference order by local rule, SuperCtMediatedSettlemt Rule 1D.

SCHEDULING ORDERS.
Settlement conference order by local rule, SuperCtMediatedSettlemt Rule 1D.

SUBPOENAS.
Arbitration hearings, SuperCtMediatedSettlemt Rule 12C.

SUMMARY TRIALS.
Authorized settlement procedure, SuperCtMediatedSettlemt Rule 10B.
Binding trial.
Stipulation, SuperCtMediatedSettlemt Rule 13C.
Evidentiary motions, SuperCtMediatedSettlemt Rule 13D.

SUMMARY TRIALS —Cont'd
General rules applicable to other settlement procedures, SuperCtMediatedSettlemt Rule 10C.
Jury.
Charge to jury, SuperCtMediatedSettlemt Rule 13G.
Questioning after verdict, SuperCtMediatedSettlemt Rule 13I.
Selection, SuperCtMediatedSettlemt Rule 13E.
Modification of procedure, SuperCtMediatedSettlemt Rule 13K.
Parties unable to agree.
Presiding officer to issue orders, SuperCtMediatedSettlemt Rule 13B.
Presentation of evidence and arguments, SuperCtMediatedSettlemt Rule 13F.
Pre-trial conference, SuperCtMediatedSettlemt Rule 13A.
Rules, SuperCtMediatedSettlemt Rule 13.
Settlement, SuperCtMediatedSettlemt Rule 13L.
Discussions after jury retires, SuperCtMediatedSettlemt Rule 13J.

T

TIME LIMITS.
Waiver or extension permitted, SuperCtMediatedSettlemt Rule 16.

TRIAL DE NOVO.
Arbitration.
Dissatisfaction with award, SuperCtMediatedSettlemt Rule 12E.

W

WITNESSES.
Arbitration hearings, SuperCtMediatedSettlemt Rule 12C.

RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Adopted January 26, 2006; with amendments through October 1, 2008

Rule
1. Initiating mediation in matters before the clerk.
2. Selection of mediator.
3. The mediation.
4. Duties of parties, attorneys and other participants in mediations.
5. Sanctions for failure to attend mediation.
6. Authority and duties of mediators.
7. Compensation of the mediator.

Rule
8. Mediator certification and decertification.
9. Certification of mediation training programs.
10. Procedural details.
11. Definitions.
12. Time limits.

Index follows Rules.

Rule 1. Initiating mediation in matters before the clerk.

A. *Purpose of mandatory mediation.* These Rules are promulgated pursuant to G.S. 7A-38,3B to implement mediation in certain cases within the Clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the Clerk.

B. *Duty of counsel to consult with clients and opposing counsel concerning settlement procedures.* In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the Clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall so discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. *Initiating the mediation by order of the court.*

(1) *Order by The Clerk of Superior Court.* The Clerk of Superior Court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the Clerk has original or exclusive jurisdiction, except those matters under NCGS Chapters 45 and 48 and those matters in which the jurisdiction of the Clerk is ancillary.

(2) *Content of Order.* The order shall be on an AOC form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the Clerk.

(3) *Motion for Court Ordered Mediation.* In matters not ordered to mediation, any party, interested persons, or fiduciary may file a written motion with the Clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the N.C.R.C.P. on non-moving parties, interested persons, and fiduciaries designated by the Clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within 5 days after the date of the service of the motion. Thereafter, the Clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) *Informational Brochure.* The Clerk shall serve a brochure prepared by the Dispute Resolution Commission explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) *Motion to Dispense With Mediation.* A named party, interested person, or fiduciary may move the Clerk of Superior Court to dispense with a mediation ordered by the Clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the Clerk may grant the motion.

(6) *Dismissal of Petition For the Adjudication of Incompetence.* The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

Rule 2. Selection of mediator.

A. *Selection of certified mediator by agreement of parties.* The parties may select a mediator certified by the Dispute Resolution Commission by agreement within a period of time as set out in the Clerk's order. However, the parties may only select mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the Clerk a Notice of Selection of Mediator by Agreement within the period set out in the Clerk's order; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the selection and rate of compensation; and state under what Rules the mediator is certified. The notice shall be on an AOC form.

B. *Appointment of mediator by the clerk.* In the event a notice of selection is not filed with the Clerk within the time for filing stated in the Clerk's order, the Clerk shall appoint a mediator certified by the Dispute Resolution Commission. The Clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The Clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the Clerk.

Except for good cause, mediators shall be appointed by the Clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the Clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether they are an attorney.

C. *Mediator information directory.* The Dispute Resolution Commission shall maintain for the consideration of the Clerks of Superior Court and those selecting mediators for matters within the Clerk's jurisdiction a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's web site.

D. *Disqualification of mediator.* Any person ordered to attend a mediation pursuant to these Rules may move the Clerk of Superior Court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

Rule 3. The mediation.

A. *Where mediation is to be held.* The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. *When mediation is to be held.* The Clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the Clerk.

C. *Request to extend deadline for completion.* The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the court.

D. *Recesses.* The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. *The mediation is not to delay other proceedings.* The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the Clerk of Superior Court.

Rule 4. Duties of parties, attorneys and other participants in mediations.

A. *Attendance.*

(1) Persons ordered by the Clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B. or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator; or

(b) By order of the Clerk of Superior Court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed to such problems as may arise before an anticipated session is scheduled by the mediator.

B. *Finalizing agreement.*

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the Clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the Clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the Clerk but they may be offered into evidence at the hearing of the matter and may be considered by the Clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to NCGS 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

> "This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter."

C. *Payment of mediator's fee.* The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

Rule 5. Sanctions for failure to attend mediation.

If a person ordered to attend a mediation pursuant to these Rules fails to attend without good cause, the Clerk may impose upon the person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The Clerk may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the Clerk imposes sanctions, the Clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38. 1(g).

Rule 6. Authority and duties of mediators.

A. *Authority of mediator.*

(1) *Control of the mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court that shall contain a provision prohibiting mediators from prolonging a mediation unduly.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the Clerk as provided by rule.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstances bearng on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) *Reporting results of mediation.*

(a) The mediator shall report to the court on an AOC form within 5 days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within 5 days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the Clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Dispute Resolution Commission or the Administrative Office of the Courts. Mediators shall not be required to send agreements reached in mediation to the Clerk, except in Estate and Guardianship matters and other matters which may be resolved only by order of the Clerk.

(c) Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) *Scheduling and holding the mediation.* It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the Clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is charged by a written order of the Clerk of Superior Court.

(6) *Distribution of mediator evaluation form.* At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

Rule 7. Compensation of the mediator.

A. *By agreement.* When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. *By order of the clerk.* When the mediator is appointed by the Clerk, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a onetime, per case administrative fee of $125 that is due upon appointment.

C. *Payment of compensation.* In matters within the Clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the Clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the Clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. *Change of appointed mediator.* Parties who fail to select a certified mediator within the time set out in the Clerk's order and then desire a substitution after the Clerk has appointed a certified mediator, shall obtain the approval of the Clerk for the substitution. The Clerk may approve the substitution only upon proof of payment to the Clerk's original appointee the $125 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.b., and any postponement fee due and owing pursuant to Rule 7.F., unless the Clerk determines that payment of the fees would be unnecessary or inequitable.

E. *Indigent cases.* No person ordered to attend a mediation found to be indigent by the Clerk for the purposes of these rules shall required to pay a share of the mediator's fee. Any person ordered by the Clerk of Superior Court to attend may move the Clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the Clerk shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The Clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from persons found by the court to be indigent.

F. *Postponements.*

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation.

After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed or if the request is within two (2) business days of the scheduled date the fee shall be $250. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the Clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of at party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Clerk of Superior Court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the Superior Court pursuant to G.S. 5A. (Amended effective October 1, 2008.)

Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed Clerk of Court mediators.

A. For appointment by the Clerk as mediator in all cases within the Clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Dispute Resolution Commission for either the superior or district court mediation programs;

B. For appointment by the Clerk as mediator in guardianship and estate matters within the Clerk's jurisdiction, a person shall be certified a mediator by the Dispute Resolution Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Dispute Resolution Commission pursuant to Rule 9 concerning estate and guardianship matters within the Clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

D. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the Clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any county in which he or she has served as a mediator or the Standards of Conduct. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Rule 9. Certification of mediation training programs.

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the Clerk of Superior Court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill, and disabled;

(3) Ensuring full participation of Respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill, and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, Rules, and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its web site.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

Rule 10. Procedural details.

The Clerk of Superior Court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

Rule 11. Definitions.

A. The term, Clerk of Superior Court, as used throughout these rules, shall refer both to said Clerk or Assistant Clerk.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

Rule 12. Time limits.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Index to Rules Implementing Mediation in Matters Before the Clerk of Superior Court

A

ADJUDICATION OF INCOMPETENCE.
Dismissal of petition after mediation ordered, MediationSuperCtClerk Rule 1.C.(6).

AGREEMENT REACHED AT MEDIATION.
Finalizing, MediationSuperCtClerk Rule 4.B.

ATTENDANCE AT MEDIATION.
Attorney ordered to attend.
Satisfaction of requirement, MediationSuperCtClerk Rule 4.A.(4).
Excuse or modification of requirement, MediationSuperCtClerk Rule 4.A.(1).
Failure to attend.
Sanctions, MediationSuperCtClerk Rule 5.
Other persons participating.
Discretion of mediator, MediationSuperCtClerk Rule 4.A.(5).
Problems with dates or time.
Notice, MediationSuperCtClerk Rule 4.A.(6).
Requirement, MediationSuperCtClerk Rule 4.A.(1).

AUTHORITY OF MEDIATOR, MediationSuperCtClerk Rule 6.A.

B

BIAS, PREJUDICE OR PARTIALITY.
Disclosure by mediator, MediationSuperCtClerk Rule 6.B.(2).

C

CERTIFICATION OF MEDIATORS, MediationSuperCtClerk Rule 8.
Hours of instruction, curriculum, MediationSuperCtClerk Rule 9.A.

CHANGE OF APPOINTED MEDIATOR, MediationSuperCtClerk Rule 7.D.

COMPENSATION OF MEDIATOR.
Agreement by parties, MediationSuperCtClerk Rule 7.A.
Change of appointed mediator.
Fee to original mediator, MediationSuperCtClerk Rule 7.D.
Indigent cases, MediationSuperCtClerk Rule 7.E.
Order of clerk, MediationSuperCtClerk Rule 7.B.
Payment, MediationSuperCtClerk Rules 4.C, 7.C.
Sanctions, failure to pay, MediationSuperCtClerk Rule 7.G.
Postponement.
Fee to mediator, MediationSuperCtClerk Rule 7.F.
Substitution for appointed mediator.
Fee to original mediator, MediationSuperCtClerk Rule 7.D.

COMPLETION OF MEDIATION.
Deadline.
Order to state, MediationSuperCtClerk Rule 3.B.
Request to extend, MediationSuperCtClerk Rule 3.C.

CONSULTATION WITH CLIENTS AND OPPOSING COUNSEL.
Duty of counsel, MediationSuperCtClerk Rule 1.B.

CONTROL OF MEDIATION.
Duty of mediator, MediationSuperCtClerk Rule 6.A.(1).

D

DATE AND TIME FOR MEDIATION.
Clerk to set, MediationSuperCtClerk Rule 3.B.
Problems with, notice, MediationSuperCtClerk Rule 4.A.(6).

DEADLINE FOR COMPLETING MEDIATION.
Order to state, MediationSuperCtClerk Rule 3.B.
Request to extend, MediationSuperCtClerk Rule 3.C.

DECERTIFICATION OF MEDIATORS, MediationSuperCtClerk Rule 8.

DEFINITIONS.
AOC forms, MediationSuperCtClerk Rule 11.B.
Clerk of the superior court, MediationSuperCtClerk Rule 11.A.

DELAY OF OTHER PROCEEDINGS.
Prohibition, MediationSuperCtClerk Rule 3.E.

DISPENSING WITH MEDIATION.
Motion, MediationSuperCtClerk Rule 1.C.(5).

DISQUALIFICATION OF MEDIATOR, MediationSuperCtClerk Rule 2.D.

DUTIES OF MEDIATOR, MediationSuperCtClerk Rule 6.B.

E

EXTENDING TIME LIMITS.
Deadline for completing mediation.
Request, MediationSuperCtClerk Rule 3.C.
Good cause shown, MediationSuperCtClerk Rule 12.

F

FINALIZING AGREEMENT REACHED AT MEDIATION.
Maters as matter of law may be resolved by mediation, MediationSuperCtClerk Rule 4.B.(1).
Other matters, guardianship and estate matters, MediationSuperCtClerk Rule 4.B.(1).

I

IMPASSE, DECLARING.
Duty of mediator, MediationSuperCtClerk Rule 6.B.(3).

INDIGENT CASES, MediationSuperCtClerk Rule 7.E.

INITIATION OF MEDIATION.
Order of clerk, MediationSuperCtClerk Rule 1.C.

M

MEDIATION TRAINING PROGRAMS.
Certification, MediationSuperCtClerk Rule 9.B.
  Administrative fees, pay, MediationSuperCtClerk Rule 9.C.
  Hours of instruction, curriculum, MediationSuperCtClerk Rule 9.A.

MEDIATOR EVALUATION FORM.
Distributing, duty of mediator, MediationSuperCtClerk Rule 6.B.(6).

MOTION FOR COURT ORDERED MEDIATION, MediationSuperCtClerk Rule 1.C.(3).

MOTION TO DISPENSE WITH MEDIATION, MediationSuperCtClerk Rule 1.C.(5).

O

OFFICER, EMPLOYEE OR AGENT.
Representation at mediation by, MediationSuperCtClerk Rules 4.A.(2), (3).

ORDER OF CLERK INITIATING MEDIATION, MediationSuperCtClerk Rule 1.C.(1).
Brochure explaining process.
  Clerk to serve with order, MediationSuperCtClerk Rule 1.C.(4).
Contents, MediationSuperCtClerk Rule 1.C.(2).

P

PLACE FOR HOLDING MEDIATION, MediationSuperCtClerk Rule 3.A.

POSTPONEMENTS, MediationSuperCtClerk Rule 7.F.

PRIVATE CONSULTATION WITH PARTICIPANT OR COUNSEL.
Authority of mediator, MediationSuperCtClerk Rule 6.A.(2).

PROCEDURAL DETAILS.
Orders supplementing.
  Clerk's power, MediationSuperCtClerk Rule 10.

PURPOSE OF RULES, MediationSuperCtClerk Rule 1.A.

R

RECESSES, MediationSuperCtClerk Rule 3.D.

REPORTING RESULTS OF MEDIATION.
Duty of mediator, MediationSuperCtClerk Rule 6.B.(4).

S

SCHEDULING AND HOLDING MEDIATION.
Duty of mediator, MediationSuperCtClerk Rule 6.B.(5).

SELECTION OF MEDIATOR.
Agreement of parties, MediationSuperCtClerk Rule 2.A.
Clerk appointing, MediationSuperCtClerk Rule 2.B.
  Substitution of clerk's appointed mediator.
    Approval required, payment of original mediator's fee, MediationSuperCtClerk Rule 7.D.
Directory of information, MediationSuperCtClerk Rule 2.C.

T

TIME LIMITS.
Deadline for completing mediation.
  Order to state deadline, MediationSuperCtClerk Rule 3.B.
  Request to extend deadline, MediationSuperCtClerk Rule 3.C.
Waiving or extending.
  Good cause shown, MediationSuperCtClerk Rule 12.

W

WAIVING TIME LIMITS.
Good cause shown, MediationSuperCtClerk Rule 12.

RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

Adopted November 8, 2007.

Rule
1. Initiating voluntary mediation in District Criminal Court.
2. Program administration.
3. Appointment of mediator.
4. The Mediation.
5. Duties of the parties.

Rule
6. Authority and duties of the mediator.
7. Mediator certification and decertification.
8. Certification of mediation training programs.
9. Local rule making.

Index follows Rules.

Editor's note. — Session Laws 2007-387, s. 4, provides: "The Supreme Court shall adopt rules under G.S. 7A-38.3D(d), as enacted in Section 1 of this act, and shall establish requirements for the certification or qualification under G.S. 7A-38.3D(f), as enacted by Section 1 of this act, no later than January 1, 2008." The Rules Implementing Mediation in Matters Pending in District Criminal Court were adopted by the Supreme Court of North Carolina, effective November 8, 2007.

Cross References. — As to mediation in matters within the jurisdiction of the district criminal courts, generally, see G.S. 7A-38.3D in Volume 2 of the General Statutes of North Carolina Annotated.

Rule 1. Initiating voluntary mediation in District Criminal Court.

A. *Purpose of mediation.* Pursuant to G.S. 7A-38.3D, these Rules are promulgated to implement programs for voluntary mediation of certain cases within the jurisdiction of the district criminal courts. These procedures are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The Chief District Court Judge, the District Attorney and the Community Mediation Center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness or any other person who declines to participate in mediation or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his/her failure to participate or reach an agreement and the case shall simply be returned to court. Consistent with G.S. 7A-38.3D(j) a party's participation or failure to participate in mediation is to be held confidential and not revealed to the court or the district attorney.

B. *Definitions.*

(1) *Court.* The term "court" as used throughout these rules, shall refer both to a criminal district court judge or his/her designee, including a district attorney or designee, or personnel affiliated with a Community Mediation Center.

(2) *Mediation Process.* The term "mediation process" as used throughout these rules, shall encompass intake, screening, and mediation through impasse or until the case is dismissed.

(3) *District Attorney.* The term "district attorney" as used throughout these rules, shall refer to the District Attorney, assistant district attorneys and any staff or designee of the District Attorney.

C. *Initiating the mediation.*

(1) *Suggestion by the court.* In districts that establish a program, the court may encourage private parties to attend mediation in certain cases or categories of cases. In determining whether to encourage mediation in a case or category of cases, the judge or designee may consider among other factors:

(a) whether the parties are willing to participate;

(b) whether continuing prosecution is in the best interest of the parties or of any non-parties impacted by the dispute;

(c) whether the private parties involved in the dispute have an expectation of a continuing relationship and there are issues underlying their dispute that have not been addressed and which may create later conflict or require court involvement;

(d) whether cross-warrants have been filed in the case; and

(e) whether the case might otherwise be subject to voluntary dismissal.

(2) *Multiple charges.* Multiple charges pending in the same court against a single defendant or pending against multiple defendants and involving the same complainant or complainants may be consolidated for purposes of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) *Timing of suggestion.* The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in mediation, the judge is not required to provide a court-appointed attorney to a defendant prior to his/her mediation.

(4) *Notice to parties.* The court shall provide to parties who have agreed to attend mediation notice of the following either orally or in writing on an AOC approved form: (1) the deadline for completion of the mediation process, (2) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator, and (3) and that the defendant may be required to pay the dismissal fee set forth in Rule 5.B.(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center whose staff shall advise the parties of the above information.

(5) *Motion for mediation.* Any complainant or defendant may file an oral or written request with the court to have a mediation conducted in his or her dispute and the court shall determine whether the dispute is appropriate for referral. If in writing, the motion may be on an AOC form.

(6) *Screening.* A mediator as defined by Rule 7 below or a Community Mediation Center to which the parties are referred for mediation shall advise the court, if it is determined upon screening of the case or parties, that the matter is not appropriate for mediation.

Rule 2. Program administration.

Pursuant to G.S. 7A-38.3D(c), a Community Mediation Center may assist a judicial district in administering and operating its mediation program for district court criminal matters. The court may delegate to a Center responsibility for the scheduling of cases and the Center may provide volunteer and/or staff mediators to conduct the mediations. The Center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission or the Administrative Office of the Courts, including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with G.S.7A-38.7 and G.S. 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

Rule 3. Appointment of mediator.

A. *Authority to appoint.* When the parties have agreed to attend mediation, the court shall appoint a Community Mediation Center mediator by name or shall designate a Center to appoint a mediator to conduct the mediation. The mediator appointed shall be qualified pursuant to Rule 8 of these rules.

B. *Disqualification of mediator.* For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct their mediation. If the mediator is disqualified, the court or designee shall appoint a new one to conduct the mediation. Nothing in this provision shall preclude a mediator from disqualifying him or herself.

Rule 4. The Mediation.

A. *Scheduling mediation.* The mediator appointed to conduct the mediation or the Community Mediation Center to which the matter has been referred by the court for appointment of a mediator, shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules, and the maintenance of any files pertaining to the mediation.

B. *Where mediation is to be held.* Mediation shall be held in the courthouse or if suitable space is available, in the offices of a Community Mediation Center, or at any other place as agreed upon between the mediator and parties.

C. *Request to extend deadline for completion of medation.* A mediator or Community Mediation Center staff may for good cause, request that the court extend the deadline for completion of the mediation process set pursuant to Rule 1.C.(4) above.

D. *Recesses.* The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall take into account whether the parties wish to continue mediating and whether they are making progress toward resolving their dispute.

Rule 5. Duties of the parties.

A. *Attendance.*

(1) Complainant(s) and defendant(s) who agree to attend mediation will physically attend the proceeding until an agreement is reached, or the mediator has declared an impasse.

(2) The following may attend and participate in mediation:

(a) Parents or guardians of a minor party. Parent(s) or guardian(s) of a minor complainant or defendant who have been encouraged by the court to attend. However, a court shall encourage attendance by a parent or guardian only in consultation with the mediator and a mediator may later excuse the participation of a parent or guardian if the mediator determines his/her presence is not helpful to the process.

(b) Attorneys. Attorneys representing parties may physically attend and participate in mediation. Alternatively, lawyers may participate indirectly by advising clients before, during and after mediation sessions, including monitoring compliance with any agreements reached.

(c) Others. In the mediator's discretion, others whose presence and participation is deemed helpful to resolving the dispute or to addressing any issues underlying it, may be permitted to attend and participate unless and until the mediator determines their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counter-productive.

(3) *Exceptions to Physical Attendance.* A party or other person may be excused from physically attending the mediation and allowed to participate by telephone or through any attorney:

(a) by agreement of the complainant(s) and defendant(s) and the mediator, or

(b) by order of the court.

(4) *Scheduling.* The complainant(s) and defendant(s) and any parent, guardian or attorney who will be attending the mediation will:

(a) Make a good faith effort to cooperate with the mediator or Community Mediation Center to schedule the mediation at a time that is convenient for all participants,

(b) Promptly notify the mediator or Community Mediation Center to which the case has been referred of any significant scheduling concerns which may impact that person's ability to be present for mediation, and

(c) Notify the mediator or the Center about any other concerns that may impact a party or person's ability to attend and participate meaningfully, *e.g.*, the need for wheelchair access or for a deaf or foreign language interpreter.

B. *Finalizing agreement.*

(1) *Written agreement.* If an agreement is reached at the mediation, the complainant and defendant are to insure that the terms are reduced to writing and signed. Agreements that are not reduced to writing and signed will not be deemed enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court or its designee.

(2) *Dismissal Fee.* To be dismissed by the District Attorney, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee as set by G.S. 7A-38.7 and G.S. 7A-38.3D(m) to the Clerk of Superior Court in the county where the case was filed and supply proof of payment to the Community Mediation Center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The Center shall, thereafter, provide the District Attorney with a dismissal form, which may be an approved WOE form. In his or her discretion, a judge or his/her designee may waive the dismissal fee pursuant to G.S. 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, is a recipient of public assistance or for any other

appropriate reason. The mediator shall advise the parties where and how to pay the fee.

Rule 6. Authority and duties of the mediator.

A. *Authority of the mediator.*

(1) *Control of Mediation.* The mediator shall at all times be in control of the mediation process and the procedures to be followed.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that previous communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) *Inclusion and exclusion of participants at mediation.* In the mediator's discretion, he or she may encourage or allow persons other than the parties or their attorneys, to attend and participate in mediation, provided that the mediator has determined the presence of such persons to be helpful to resolving the dispute or to addressing issues underlying it. Mediators may also exclude persons other that the parties and their attorneys whose presence the mediator deems would likely be or which has, in fact, been counter-productive.

(4) *Scheduling the mediation.* The mediator or Community Mediation Center staff involved in scheduling shall make a good faith effort to schedule the mediation at a time that is convenient for the parties and any parent(s), guardian(s) or attorney(s) who will be attending. In the absence of agreement, the mediator or Community Mediation Center staff shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing the information required by Rule 5.A.(4).

B. *Duties of the mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) That the mediation is not a trial and the mediator is not a judge, attorney or therapist;

(c) That the mediator is present only to assist the parties in reaching their own agreement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;

(f) The inadmissibility of conduct and statements as provided in G.S. 7A-38.3D(i);

(g) The duties and responsibilities of the mediator and the participants;

(h) That any agreement reached will be by mutual consent;

(i) That if the parties are unable to agree and the mediator declares an impasse that the parties and the case will return to court; and

(j) That if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee in accordance with G.S. 7A-38.7 and G.S. 7A-38.3D(m), unless a judge in his or her discretion has waived the fee for good cause. Payment of the dismissal fee shall be made to the Clerk of Superior Court in the county where the case was filed and the Community Mediation Center must provide the District Attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.

(2) *Disclosure.* Consistent with the Standards of Professional Conduct for Mediators, the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring Impasse.* Consistent with the Standards of Professional Conduct for Mediators, it is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should conclude. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) *Distributing informational brochure.* The mediator shall distribute to the parties a copy of an informational brochure explaining the mediation process and advising them where they may file a complaint if they are unhappy with their mediator's conduct. The Dispute Resolution Commission shall develop, print, and distribute the

informational brochure to participating community mediation centers and each center may add an insert to the brochure which more fully explains the operations of that center's program.

(5) *Reporting results of mediation.* The mediator or Community Mediation Center shall report the outcome of mediation to the court or its designee in writing on an AOC approved form by the date the case is next calendared. If the criminal court charges are on the court docket the same day as the mediation, the mediator shall inform the attending District Attorney of the outcome of the mediation before close of court on that date unless alternative arrangements are approved by the District Attorney.

(6) *Scheduling and holding the mediation.* It is the duty of the mediator and Community Mediation Center staff to schedule the mediation and conduct it prior to any deadline set by the court or its designee. Deadlines shall be strictly observed by the mediator and Center staff unless the deadline is extended orally or in writing by a judge or his/her designee.

(7) *Distribution of mediator evaluation form.* At the mediation, the mediator shall distribute a mediator evaluation form provided by the Dispute Resolution Commission to the parties, one copy per party with additional copies available on request. The mediator shall deliver any completed evaluation forms to the Community Mediation Center with which he or she is affiliated.

Rule 7. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as district criminal court mediators. For certification, an applicant shall:

A. At the time of application, be affiliated with a Community Mediation Center established pursuant to G.S. 7A-38.5 as either a volunteer or staff mediator and have received the Center's endorsement that he or she possesses the training, experience, and skills necessary to conduct district court criminal mediations.

B. Have the following training and experience:

(1) Have both:

(a) Attended at least 24 hours of training in a district criminal court mediation training program certified by the Dispute Resolution Commission, and

(b) Have a four-year degree from an accredited college or university; or have four years of post high school education through an accredited college, university or junior college or four years of full-time work experience, or any combination thereof; or have two years experience as a staff or volunteer mediator at a Community Mediation Center, or

(2) Be a Mediated Settlement Conference or Family Financial Settlement mediator certified by the North Carolina Dispute Resolution Commission or be an Advanced Practitioner Member of the Association for Conflict Resolution.

C. Observations and Mediation Experience:

(1) Observe at least two court-referred criminal district court mediations conducted by a mediator certified pursuant to these rules or, for a one year period following the initial adoption of these rules, observe any mediator who is affiliated with a Community Mediation Center established pursuant to G.S. 7A-38.5 and who has mediated at least ten (10) criminal district court cases.

(2) Co-mediate or mediate at least three court-referred district criminal court mediations under the observation of staff affiliated with a Community Mediation Center whose criminal district court mediation training program has been certified by the Dispute Resolution Commission pursuant to Rule 9 of these Rules.

D. Demonstrate familiarity with the statutes, rules, and practice governing district criminal court mediations in North Carolina.

E. Be of good moral character, submit to a criminal background check within one year prior to applying for certification under these Rules, and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified district criminal court mediators shall report to the Commission any criminal convictions, disbarments, or other disciplinary complaints and actions or any judicial sanctions as soon as the applicant or mediator has notice of them.

F. Commit to serving the district court as a mediator under the direct supervision of a Community Mediation Center authorized under G.S. 7A-38.5 for a period of at least two years.

G. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training.

H. Submit proof of qualifications set out in this Section on a form provided by the Dispute Resolution Commission.

Community Mediation Centers participating in the program shall assist the Dispute Resolution Commission in implementing the certification process established by this Rule by:

(1) Documenting sections A-F for the mediator and Commission;

(2) Reviewing its documentation with the mediator in a face-to-face meeting scheduled no less than 30 days from the mediator's request to apply for certification;

(3) Making a written recommendation on the applicant's certification to the Dispute Resolution Commission; and

(4) Forwarding the documentation for sections A-F and its recommendation to the Dispute Resolution Commission along with the mediator's completed certification application form.

Through December 31, 2008, an applicant may be certified pursuant to these rules without compliance with Rules 7B, C, D, E, F, G or H above provided that he or she is certified by and affiliated with a Community Mediation Center established pursuant to G.A. 7A-38.5 at the time of his/her application and is endorsed by the Center as possessing the training, experience and skills necessary to conduct district criminal court mediations. However, such certification shall be for the period of one year only and it is expected that during the course of that year that the mediator will work toward complying with all the requirements established by Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. Certification renewal shall be required every two years.

A Community Mediation Center may withdraw it's affiliation with a mediator certified pursuant to these rules. Such disaffiliation does not revoke said mediator's certification. A mediator's certification is portable and a mediator may agree to be affiliated with a different Center. However to mediate under this program in the district criminal court, a mediator must be affiliated with the Community Mediation Center providing services in that court. A mediator maybe affiliated with more than one center and provide services in the county served by those centers.

Rule 8. Certification of mediation training programs.

A. Certified training programs for mediators seeking certification as District Criminal Court Mediators shall consist of a minimum of 24 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of district court criminal mediation;

(3) Agreement writing;

(4) Communication and information gathering;

(5) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct for Mediators adopted by the Supreme Court;

(6) Statutes, rules, forms and practice governing mediations in North Carolina's district criminal courts;

(7) Demonstrations of district criminal court mediations;

(8) Simulations of district criminal court mediations, involving student participation as mediator, victim, offender and attorneys which shall be supervised, observed and evaluated by program faculty;

(9) Courtroom protocol;

(10) Domestic violence awareness, and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing district district court mediations in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be deemed as satisfying Rule 8.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. Renewal of certification shall be required every two years.

Rule 9. Local rule making.

The Chief District Court Judge of any district conducting mediations under these Rules is authorized to publish local rules, not inconsistent with these rules and G.S. 7A-38.3D, implementing mediation in that district.

Index to Rules Implementing Mediation in Matters Pending in District Criminal Court

A

ADMINISTRATION OF PROGRAM, MediationDistCrimCt Rule 2.

APPOINTMENT OF ATTORNEY PRIOR TO MEDIATION.
Not required, MediationDistCrimCt Rule 1(C)(3).

APPOINTMENT OF MEDIATOR, MediationDistCrimCt Rule 3.

APPROPRIATENESS OF MEDIATION.
Screening of case or parties, MediationDistCrimCt Rule 1(C)(6).

ATTENDANCE AT MEDIATION.
Attorney.
  Participation through, MediationDistCrimCt Rule 5(A)(3).
Physical presence until agreement reached, MediationDistCrimCt Rule 5(A)(1).
  Exceptions, MediationDistCrimCt Rule 5(A)(3).
Scheduling concerns.
  Duties of participants, MediationDistCrimCt Rule 5(A)(4).
Telephone.
  Participation by, MediationDistCrimCt Rule 5(A)(3).
Who may attend, MediationDistCrimCt Rule 5(A)(2).

ATTORNEY.
Mediation participation through, MediationDistCrimCt Rule 5(A)(3).

AUTHORITY OF COURT TO APPOINT MEDIATOR, MediationDistCrimCt Rule 3(A).

AUTHORITY OF MEDIATOR, MediationDistCrimCt Rule 6(A).

B

BEGINNING OF MEDIATION.
Explanation by mediator.
  Duty, MediationDistCrimCt Rule 6(B)(1).

BIAS, PREJUDICE OR PARTIALITY.
Disclosure.
  Mediator's possible bias, prejudice, or partiality, MediationDistCrimCt Rule 6(B)(2).

BROCHURE.
Distributing.
  Duty of mediator, MediationDistCrimCt Rule 6(B)(4).

C

CERTIFICATION OF MEDIATORS, MediationDistCrimCt Rule 7.

CERTIFICATION OF TRAINING PROGRAMS, MediationDistCrimCt Rule 8.

CHARGES PENDING IN MULTIPLE COURTS.
Consolidation for purposes of mediation, MediationDistCrimCt Rule 1(C)(2).

COMMUNICATE PRIVATELY WITH PARTICIPANT.
Mediator's authority, MediationDistCrimCt Rule 6(A)(2).

COMMUNITY MEDIATION CENTER.
Assistance in administering and operating program, MediationDistCrimCt Rule 2.

CONSOLIDATION FOR PURPOSES OF MEDIATION.
Multiple charges, MediationDistCrimCt Rule 1(C)(2).

CONTINUANCE.
Recess of mediation, MediationDistCrimCt Rule 4(D).

CONTROL OF MEDIATION.
Mediator, MediationDistCrimCt Rule 6(A)(1).

COURT APPOINTMENT OF ATTORNEY PRIOR TO MEDIATION.
Not required, MediationDistCrimCt Rule 1(C)(3).

COURT APPOINTMENT OF MEDIATOR, MediationDistCrimCt Rule 3.

D

DEADLINE FOR COMPLETION.
Extension request, MediationDistCrimCt Rule 4(C).
Mediator's duty to observe, MediationDistCrimCt Rule 6(B)(6).
Notice provided parties, MediationDistCrimCt Rule 1(C)(4).

DECERTIFICATION OF MEDIATORS, MediationDistCrimCt Rule 7.

DEFINITIONS, MediationDistCrimCt Rule 1(B).

DISCLOSURE.
Mediator's possible bias, prejudice, or partiality, MediationDistCrimCt Rule 6(B)(2).

DISMISSAL FEE.
Defendant required to pay, MediationDistCrimCt Rule 5(B)(2).
  Notice provided parties, MediationDistCrimCt Rule 1(C)(4).

DISQUALIFICATION OF MEDIATOR, MediationDistCrimCt Rule 3(B).

DUTIES OF MEDIATOR, MediationDistCrimCt Rule 6(B).

DUTIES OF PARTIES, MediationDistCrimCt Rule 5.

E

EXCLUSION OF PARTICIPANTS.
Mediator's authority, MediationDistCrimCt Rule 6(A)(3).

F

FACTORS CONSIDERED.
Determining whether to encourage mediation, MediationDistCrimCt Rule 1(C)(1).
FILES MAINTAINED BY CENTERS, MediationDistCrimCt Rule 2.
FINAL AGREEMENT, MediationDistCrimCt Rule 5(B).

G

GOOD CAUSE.
Disqualification of mediator, MediationDistCrimCt Rule 3(B).
Extension of deadline for completion, MediationDistCrimCt Rule 4(C).

I

IMPASSE.
Duty of mediator to declare, MediationDistCrimCt Rule 6(B)(3).
INCLUSION OF PARTICIPANTS.
Mediator's authority, MediationDistCrimCt Rule 6(A)(3).
INFORMATIONAL BROCHURE.
Distributing.
Duty of mediator, MediationDistCrimCt Rule 6(B)(4).
INITIATING MEDIATION, MediationDistCrimCt Rule 1(C).

L

LOCAL RULES.
Authority of chief district court judge, MediationDistCrimCt Rule 9.

M

MEDIATOR EVALUATION FORM.
Distribution, MediationDistCrimCt Rule 6(B)(7).
MEDIATOR'S NAME.
Notice provided parties, MediationDistCrimCt Rule 1(C)(4).
MOTION FOR MEDIATION, MediationDistCrimCt Rule 1(C)(5).
MULTIPLE CHARGES PENDING.
Consolidation for purposes of holding single mediation, MediationDistCrimCt Rule 1(C)(2).

N

NOTICE PROVIDED PARTIES AGREEING TO ATTEND MEDIATION, MediationDistCrimCt Rule 1(C)(4).

O

OUTCOME OF MEDIATION.
Report by mediator, MediationDistCrimCt Rule 6(B)(5).

P

PLACE OF HOLDING MEDIATION, MediationDistCrimCt Rule 4(B).
PRIVATE CONSULTATION WITH PARTICIPANT.
Mediator's authority, MediationDistCrimCt Rule 6(A)(2).
PURPOSE OF MEDIATION, MediationDistCrimCt Rule 1(A).

R

RECESS OF MEDIATION, MediationDistCrimCt Rule 4(D).
RECORDS.
Files maintained by centers, MediationDistCrimCt Rule 2.
REPORT BY MEDIATOR.
Result, MediationDistCrimCt Rule 6(B)(5).
REQUEST TO HAVE MEDIATION CONDUCTED.
Motion, MediationDistCrimCt Rule 1(C)(5).
RESULTS OF MEDIATION.
Report by mediator, MediationDistCrimCt Rule 6(B)(5).

S

SCHEDULING MEDIATION, MediationDistCrimCt Rule 4(A).
Court may delegate to centers, MediationDistCrimCt Rule 2.
Mediator's authority, MediationDistCrimCt Rule 6(A)(4).
Mediator's duty, MediationDistCrimCt Rule 6(B)(6).
SCREENING OF CASE OR PARTIES.
Whether matter appropriate for mediation, MediationDistCrimCt Rule 1(C)(6).
STAFF MEDIATORS.
Centers may provide, MediationDistCrimCt Rule 2.
SUGGESTION BY COURT.
Initiating mediation, MediationDistCrimCt Rule 1(C)(1).

T

TELEPHONE.
Mediation participation by, MediationDistCrimCt Rule 5(A)(3).

TRAINING PROGRAMS FOR MEDIATORS.
Certification, MediationDistCrimCt Rule 8.

V

VENUE.
Place of holding mediation, MediationDistCrimCt Rule 4(B).

VOLUNTEER MEDIATORS.
Centers may provide, MediationDistCrimCt Rule 2.

W

WRITTEN AGREEMENT.
Final agreement, MediationDistCrimCt Rule 5(B)(1).

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE ELECTRIC SUPPLIER TERRITORIAL DISPUTE MEDIATION PROGRAM

Adopted January 26, 2006.

Rule
1. Submission of dispute to electric supplier territorial dispute mediation.
2. Exemption from G.S. 7A-38.1.
3. Selection of mediator.
4. The electric supplier territorial dispute mediation.
5. Authority and duties of the mediator.
6. Compensation of the mediator.
7. Waiver of mediation.

Rule
8. Mediator's certification that mediation concluded.
9. Resolution of the territorial dispute by a member of the public staff.
10. Certification and decertification of mediators of electric supplier territorial disputes.
11. Certification of mediation training programs.

Index follows Rules.

Rule 1. Submission of dispute to electric supplier territorial dispute mediation.

A. Mediation shall be initiated by the filing of a Request for Electric Supplier Mediation of Territorial Dispute (Request) with the Clerk of Superior Court in a county in which an action may have been brought but for the provisions of G.S. 7A-38.3C[1]. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the Clerk of Superior Court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute. Copies of the Request also shall be filed with the North Carolina Utilities Commission and served on the Executive Director of the Public Staff of the North Carolina Utilities Commission.

B. The Clerk of Superior Court shall file the Request and shall open a Special Proceeding under the name of the requesting party. The provisions set forth herein in Rules 1 through 10 shall apply to all Electric Supplier Territorial Dispute Mediations in lieu of any other rules applicable to Special Proceedings.

Rule 2. Exemption from G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3C shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1 should a voluntary or mandatory mediation be unsuccessful.

Rule 3. Selection of mediator.

A. Time period for selection.

The parties to the dispute shall have seven (7) days from the date of the filing of the Request to select by agreement a mediator to conduct their mediation and to file a Notice of Selection of Mediator by Agreement.

B. Selection of certified mediator by agreement.

The Clerk shall make available to each party to the dispute named in the Request a list of mediators certified by the Dispute Resolution Commission to conduct mediated settlement conferences in Superior Court civil actions. If the parties are able to agree in writing on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the Clerk by filing with the Clerk a Notice of Selection of Mediator by Agreement and the Clerk shall appoint the mediator selected by the parties. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state at the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the

---

[1] Enacted as G.S. 7A-38.3B, but codified as G.S. 7A-38.3C.

Administrative Office of the Courts and available through the Clerk of Superior Court in the county in which the Request was filed.

C. Court appointment of mediator.

If the parties to the dispute cannot agree on selection of a mediator within the required time period, the party who filed the Request shall file with the Clerk a Motion for Court Appointment of Mediator and the Senior Resident Superior Court Judge shall appoint a certified mediator. The Motion shall be filed with the Clerk within 10 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the Clerk of Superior Court in the county in which the Request was filed.

D. Mediator information directory.

To assist parties in learning more about the qualifications and experience of mediators, the Clerk of Superior Court in the county in which the Request was filed shall make available to the disputing parties named in the Request a central directory of information on all persons certified to conduct mediated settlement conferences in Superior Court civil actions who wish to mediate cases in that county, including those who wish to mediate electric supplier territorial disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

E. Disqualification of mediator.

Any party may move the Senior Resident Superior Court Judge of the district where the mediation is pending for an order disqualifying the mediator, regardless of whether the mediator was selected by agreement or was appointed by the Court. For good cause and after a hearing, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this Rule 3. Nothing in this provision shall preclude mediators from disqualifying themselves.

Rule 4. The electric supplier territorial dispute mediation.

A. When mediation is to be completed.

The mediation shall be convened and completed within thirty (30) days of the Notice of Selection of Mediator by Agreement or the date of entry of the order appointing a mediator to conduct the mediation.

B. Extensions.

A party or the mediator may file a motion with the Clerk seeking to extend the 30 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within thirty (30) days of the mediator's appointment. The Senior Resident Superior Court Judge may grant the motion by entering a written order establishing a new date, which date shall be not more than thirty (30) days after the original date for completion of the mediation as provided for in subpart A above.

C. Where the conference is to be held.

Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses.

The mediator may recess the mediation at any time and may set a time for reconvening, except at such time for reconvening shall fall within the original thirty (30) day period provided for in subpart A above, or if extended pursuant to subpart B above, within the sixty (60) day period after the filing of the Notice of Selection of Mediator by Agreement or the date of entry of the order appointing a mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of parties, attorneys and other participants.

Rule 4 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. Sanctions for failure to attend.

Rule 5 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

Rule 5. Authority and duties of the mediator.

A. Authority of mediator.

(1) Control of mediation.

The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct is governed by standards of conduct promulgated by the Supreme Court and governing the conduct of persons certified to conduct mediated settlement conferences in Superior Court civil actions.

(2) Private consultation.

The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the conference.

The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may not pursue their dispute in court if mediation is not successful because, pursuant to the provisions of G.S. 7A-38.3C(i), it will be decided by a member of the Public Staff of the North Carolina Utilities Commission in a decision that is binding on the parties named in the Request;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether or under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3C and G.S. 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure.

The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring impasse.

It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and holding the conference.

It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator.

Rule 6. Compensation of the mediator.

A. By agreement.

When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. By court order.

When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125.00 per hour. The parties shall also pay to the mediator a onetime, per case administrative fee of $125.00, which is due upon appointment.

C. Change of appointed mediator;

Pursuant to Rule 3.A., the parties have seven (7) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125.00 one time, per case administrative fee provided for in Rule 6.B.

D. Postponements and Fees.

(1) As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediation conference once a date for a mediation session has been scheduled by the mediator. After a mediation conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator.

(3) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125.00 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250.00. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

E. Payment of compensation by parties.

Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties or their counsel. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation. Mediators may be compensated for travel time, mileage, or any other out-of-pocket expenses regardless of whether they are appointed by the court or selected by the parties.

F. Sanctions for failure to pay mediator's fee.

Willful failure of a party or their counsel to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC Comment to Rule 6.D. — Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, expected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators, and potentially members of the public, and serve only to inject delay into a process and program designed to expedite the resolution of electric supplier territorial disputes. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled, or the public interest likely will be adversely affected.

DRC Comment to Rule 6.E. — If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 6.F. — If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. Rule 6.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce agreements as to fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee).

Rule 7. Waiver of mediation.

All parties to a territorial dispute, acting jointly, may waive voluntary or mandatory mediation pursuant to G.S. 7A-38.3C by informing the mediator of their waiver in writing. The Waiver of Mediation in Electric Supplier Territorial Disputes shall be on a form prescribed by the Administrative Office of the Courts and available through the Clerk. The party who requested mediation shall be responsible for obtaining the written consent to waiver from all parties named in the Request, and shall file the waiver with the Clerk and mail a copy to the mediator and all parties named in the Request.

Rule 8. Mediator's certification that mediation concluded.

A. Contents of certification.

Following the conclusion of mediation or the receipt of a joint waiver of mediation signed by all parties named in the Request, the mediator shall prepare a Mediator's Certification in Electric Supplier Territorial Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation conference was convened, the certification shall state the date on which the mediation was concluded by impasse or settlement, and report the general results. If a mediation conference was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. Deadline for filing mediator's certification.

The mediator shall file the completed certification with the Clerk within five (5) days of the completion of the mediation, the failure of the mediation to be held or the receipt of a jointly signed waiver of mediation. If the certification reports an impasse, a waiver, or a failure of the mediation to be held, the mediator shall also file, by mail or delivery, a copy of the completed certification with the Clerk of the North Carolina Utilities Commission and serve, by mail or delivery, a copy on the Executive Director of the Public Staff of the North Carolina Utilities Commission within five (5) days of the completion of the mediation, the receipt of the joint waiver, or the failure to hold the mediation within the applicable period of time provided for in Rule 4. The mediator also shall serve a copy of the certification on each of the parties named in the Request.

Rule 9. Resolution of the territorial dispute by a member of the public staff.

A. Nomination or appointment of a member of the Public Staff to hear the territorial dispute.

Within five (5) days of receipt by the Clerk of the North Carolina Utilities Commission of the certification from the mediator reporting an impasse, a waiver, or a failure of the mediation to be held, the parties shall agree on the selection of a member of the Public Staff to hear and decide the territorial dispute (the "Hearing Officer") pursuant to the provisions of G.S. 7A-38.3C(i), file with the Clerk of the North Carolina Utilities Commission a Notice of Selection of Hearing Officer by Agreement, and serve a copy of said Notice on the Executive Director of the Public Staff. In the event the parties do not agree on a member of the Public Staff within such five (5) day period, the Executive Director of the Public Staff shall appoint a member of the Public Staff as the Hearing Officer, and shall file a Notice of Appointment of Hearing Officer with the Clerk of the North Carolina Utilities Commission, who shall serve a copy of said Notice on each of the parties. The Notice of Selection of Hearing Officer and the Notice of Appointment of Hearing Officer shall be on a form prescribed by the Administrative Office of the Courts and be available through the Clerk of Superior Court.

B. Scheduling and location of the hearing.

The Hearing Officer shall make a good faith effort to schedule the hearing at a time that is convenient for the participants, attorneys and the Hearing Officer. In the absence of the agreement of all parties, the Hearing Officer shall select the date for the hearing. Unless the parties otherwise agree, the location of the hearing shall be at a place in Raleigh, North Carolina designated by the Hearing Officer.

C. Duties of the member of the Public Staff.

(1) The Hearing Officer shall have such powers as are conferred upon arbitrators under Article 45C of Chapter 1 of the General Statutes not inconsistent with the provisions of G.S. 7A-38.3C or these Rules. The Hearing Officer shall meet in person or by phone with counsel for the parties at least five (5) working days before the hearing is scheduled to convene to determine the procedures that will be followed in the hearing and the remainder of the proceeding. The Hearing Officer also shall define and describe the following at the beginning of the hearing:

(a) The procedure to be followed at the hearing;

(b) The fact that the Hearing Officer will make a decision that will be binding on the participants; and

(c) The time allotted to each party to present its position on the territorial dispute and the extent to which the Hearing Officer will review documentation or other evidence submitted by the parties.

(2) Disclosure.

The Hearing Officer has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Issuance of a binding opinion.

It shall be the duty of the Hearing Officer to issue a written opinion resolving the territorial dispute as soon as practicable, but not later than forty-five (45) days of receipt by the Clerk of the Utilities Commission of the certification from the mediator. The opinion issued by the Hearing Officer shall be binding on the participants.

(4) Written opinion of the Hearing Officer.

The Hearing Officer shall prepare a written opinion resolving the territorial dispute, file it with the Clerk of Superior Court in the county in which the Request was filed, file it with the Clerk of the North Carolina Utilities Commission, and deliver it to all of the participants and their counsel.

(5) Modification or correction and enforcement of the opinion.

The opinion of the Hearing Officer shall be considered in the nature of an arbitration award and may be modified or corrected and enforced only in the manner of an arbitrator's award under G.S. 1-569.24 and 1-569.25.

Rule 10. Certification and decertification of mediators of electric supplier territorial disputes.

Mediators who conduct mediation of Electric Supplier Territorial Disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators certified to conduct mediated settlement conferences in Superior Court civil actions.

Rule 11. Certification of mediation training programs.

The Dispute Resolution Commission may specify a curriculum for an Electric Supplier Territorial Dispute Mediation training program and may set qualifications for trainers.

Index to Rules Implementing the Electric Supplier Territorial Dispute Mediation Program

A

ATTENDANCE, TerritorialDisputes Rule 4.E.
Failure, sanctions, TerritorialDisputes Rule 4.F.

AUTHORITY OF MEDIATOR, TerritorialDisputes Rule 5.A.

C

CERTIFICATION OF MEDIATORS, TerritorialDisputes Rule 10.

CERTIFICATION THAT MEDIATION CONCLUDED.
Contents, TerritorialDisputes Rule 8.A.
Deadline for filing, TerritorialDisputes Rule 8.B.
Service of copy, TerritorialDisputes Rule 8.B.

CHANGE OF APPOINTED MEDIATOR, TerritorialDisputes Rule 6.C.

COMPENSATION OF MEDIATOR, TerritorialDisputes Rule 6.
Agreement, TerritorialDisputes Rule 6.A.
Change of appointed mediator.
Fee to original mediator, TerritorialDisputes Rule 6.C.
Court order, TerritorialDisputes Rule 6.B.
Payment by parties, TerritorialDisputes Rule 6.E.
Sanctions, failure to pay, TerritorialDisputes Rule 6.F.
Postponement of mediation.
Fee to mediator, TerritorialDisputes Rule 6.D.

COMPLETION OF MEDIATION, TerritorialDisputes Rule 4.A.
Certification that mediation concluded, TerritorialDisputes Rule 8.

CONTROL OF MEDIATION.
Duty of mediator, TerritorialDisputes Rule 5.A.(1).

COURT APPOINTMENT OF MEDIATOR, TerritorialDisputes Rule 3.C.
Change of appointed mediator, TerritorialDisputes Rule 6.C.

D

DECERTIFICATION OF MEDIATORS, TerritorialDisputes Rule 10.

DISQUALIFICATION OF MEDIATOR, TerritorialDisputes Rule 3.E.

DUTIES OF MEDIATOR, TerritorialDisputes Rule 5.B.

E

EXEMPTION FROM ORDER REFERRING DISPUTE TO MEDIATION, TerritorialDisputes Rule 2.

EXTENSION OF TIME FOR COMPLETING MEDIATION, TerritorialDisputes Rule 4.B.

H

HEARING OFFICER.
Member of public staff resolving dispute, TerritorialDisputes Rule 9.

I

INITIATION OF MEDIATION.
Filing request, TerritorialDisputes Rule 1.A.

M

MEDIATION TRAINING PROGRAMS.
Certification, TerritorialDisputes Rule 11.

P

PLACE FOR HOLDING CONFERENCE, TerritorialDisputes Rule 4.C.

POSTPONEMENT OF CONFERENCE, TerritorialDisputes Rule 6.D.

PRIVATE COMMUNICATIONS WITH PARTICIPANT OR COUNSEL.
Authority of mediator, TerritorialDisputes Rule 5.A.(2).

PUBLIC STAFF MEMBER RESOLVING DISPUTE.
Nomination or appointment to hear dispute, TerritorialDisputes Rule 9.A.
Place of holding hearing, TerritorialDisputes Rule 9.B.
Powers and duties of staff member, TerritorialDisputes Rule 9.C.
Scheduling hearing.
Duty of hearing officer when scheduling, TerritorialDisputes Rule 9.B.

R

RECESSES OF MEDIATION, TerritorialDisputes Rule 4.D.

REQUEST FOR ELECTRIC SUPPLIER MEDIATION.
Mediation initiated by filing, TerritorialDisputes Rule 1.A.

S

SCHEDULING CONFERENCE.
Duty of mediator when scheduling, TerritorialDisputes Rule 5.A.(3).

SELECTION OF MEDIATOR, TerritorialDisputes Rule 3.
Agreement by parties, TerritorialDisputes Rule 3.B.
Court appointment, TerritorialDisputes Rule 3.C.
  Change of appointed mediator, TerritorialDisputes Rule 6.C.
Directory of information, TerritorialDisputes Rule 3.D.
Time period, TerritorialDisputes Rule 3.A.

SPECIAL PROCEEDING.
Clerk of superior court to open, TerritorialDisputes Rule 1.B.

SUBMISSION OF DISPUTE TO MEDIATION, TerritorialDisputes Rule 1.

SUBSTITUTION.
Change of appointed mediator, TerritorialDisputes Rule 6.C.

T

TIME PERIOD FOR COMPLETING MEDIATION, TerritorialDisputes Rule 4.A.
Extension, TerritorialDisputes Rule 4.B.

W

WAIVER OF MEDIATION, TerritorialDisputes Rule 7.

RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

Adopted Pursuant to G.S. 7A-38.4A
Effective October 16, 2001,
with amendments received effective October 1, 2008.

Rule
1. Initiating settlement procedures.
2. Selection of mediator.
3. The mediated settlement conference.
4. Duties of parties, attorneys and other participants in mediated settlement conferences.
5. Sanctions for failure to attend mediated settlement conferences.
6. Authority and duties of mediators.
7. Compensation of the mediator and sanctions.
8. Mediator certification and decertification.

Rule
9. Certification of mediation training programs.
10. Other settlement procedures.
11. Rules for neutral evaluation.
12. Judicial settlement conference.
13. Local rule making.
14. Definitions.
15. Time limits.

Index follows Rules.

Editor's note. — These rules were adopted by an order of the North Carolina Supreme Court dated and effective October 16, 2001, which provided, in part:

"WHEREAS, section 7A-38.4A of the North Carolina General Statutes established pretrial settlement procedures in district court actions, and

"WHEREAS, N.C.G.S. § 7A-38.4A(k) and (o) enables this Court to implement section 7A-38.4A by adopting rules and by adopting standards for certification of mediators and procedures for the enforcement of those standards,

"NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), the Settlement Procedures in District Court Actions Involving Family Financial Issues are adopted to read as attached hereto."

Rule 1. Initiating settlement procedures.

A. *Purpose of mandatory settlement procedures.* Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. *Duty of counsel to consult with clients and opposing counsel concerning settlement procedures.* In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. *Ordering settlement procedures.*

(1) *Equitable distribution scheduling conference.* At the scheduling conference mandated by G.S. 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2). The court shall dispense with the

requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) *Scope of settlement proceedings.* All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) *Authorizing settlement procedures other than mediated settlement conference.* The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;
(b) the name, address and telephone number of the neutral selected by the parties;
(c) the rate of compensation of the neutral;
(d) that all parties consent to the motion.

(4) *Content of order.* The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) *Court-ordered settlement procedures in other family financial cases.* Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) *Motion to dispense with settlement procedures.* A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) or that one of the parties has alleged domestic violence. The Court may also dispense with the

mediated settlement conference for good cause upon its own motion or by local rule. (Adopted effective October 16, 2001; amended effective March 1, 2006.)

Rule 2. Selection of mediator.

A. *Selection of certified family financial mediator by agreement of the parties.* The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. *Appointment of certified family financial mediator by the court.* If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Notice of Selection with the court, the Court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Court's district.

In making such appointments, the Court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The District Court Judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the District Court Judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the District Court Judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. *Mediator information.* To assist the parties in selecting a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at www.ncdrc.org a list of certified family financial mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

D. *Disqualification of mediator.* Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves. (Adopted effective October 16, 2001; amended effective March 1, 2006; amended effective October 1, 2008.)

Rule 3. The mediated settlement conference.

A. *Where conference is to be held.* The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. *When conference is to be held.* As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. *Request to extend deadline for completion.* A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. *The mediated settlement conference is not to delay other proceedings.* The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court. (Adopted effective October 16, 2001.)

Rule 4. Duties of parties, attorneys and other participants in mediated settlement conferences.

A. *Attendance.*

(1) The following persons shall attend a mediated settlement conference:

(a) *Parties.*

(b) *Attorneys.* At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) *Scheduling.* Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. *Finalizing Agreement.*

(1) If an agreement is reached at the conference, the parties shall reduce to writing the essential terms of the agreement.

a. If the parties conclude the conference with a written document containing all the terms of their agreement, signed by all parties and formally acknowledged as required by NCGS 50-20(d) for property distribution, the mediator shall report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court.

b. If the parties are able to reach an agreement at the conference, but are unable to have it written or have it signed and acknowledged as required by NCGS 50-20(d) for property distribution agreements, then the parties shall summarize their understanding in written form and shall use it as a memorandum and guide to writing such agreements and orders as may be required to give legal effect to its terms. In that event, the mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) If the agreement is reached at the conference, the person(s) responsible for filing closing documents with the Court shall sign the mediator's report to the Court. The parties shall file their consent judgment or voluntary dismissal with the Court within thirty (30) days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached prior to the conference or finalized while the conference is in recess, the parties shall notify the mediator and file the consent judgment or voluntary dismissal(s) with the Court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer. The mediator shall report to the Court that the matter has been settled and who reported the settlement.

(4) No settlement agreement resolving issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required by NCGS 50-20(d).

C. *Payment of mediator's fee.* The parties shall pay the mediator's fee as provided by Rule 7. (Adopted effective October 16, 2001; amended effective March 4, 2004; amended effective March 1, 2006; amended effective October 1, 2008.)

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.B. — N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

Rule 5. Sanctions for failure to attend mediated settlement conferences.

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rules 7.F.) (Adopted effective October 16, 2001; Amended November 21, 2002.)

Rule 6. Authority and duties of mediators.

A. *Authority of mediator.*

(1) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) *Private consultation.* The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) *Reporting results of conference.*

(a) The mediator shall report to the court, on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties.

The mediator's report shall include the names of those persons attending the mediated settlement conference. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B.2. If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) *Scheduling and holding the conference.* The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) *Informational brochure.* Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution

Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) *Evaluation forms.* At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms. (Adopted effective October 16, 2001; amended effective November 21, 2002; amended effective March 4, 2004; amended effective October 1, 2008.)

Rule 7. Compensation of the mediator and sanctions.

A. *By agreement.* When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. *By Court order.* When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment.

C. *Change of appointed mediator.* Pursuant to Rule 2.A., the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of payment to the Court's original appointee the $125 one time, per case administrative fee, and any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

D. *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

E. *Inability to pay.* No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

F. *Postponements and fees.*

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement

is made within seven (7) calendar days of the scheduled date for mediation, the fee shall be $250. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the court. (Adopted effective October 16, 2001; amended effective November 21, 2002; amended effective March 4, 2004; amended effective October 1, 2008.)

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B. — Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.D. — If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.F. —
Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rules 7.G. — If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. FFS Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.F. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. *Training and experience.* Each applicant for certification under this provision shall have completed the North Carolina Bar Association's two-day basic family law CLE course or equivalent course work in North Carolina law relating to separation and divorce, alimony and post separation support, equitable distribution, child custody and support and domestic violence and in addition, shall:

1. Be an Advanced Practitioner member of the Association for Conflict Resolution and have earned an undergraduate degree from an accredited four-year college or university; or

2. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, or, if already a certified Superior Court mediator, have completed the 16 hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a Licensed Attorney and/or Judge of the General Court of Justice of the State of North Carolina or other state for at least five years; or

(b) as a Licensed Physician certified in psychiatry pursuant to NCGS 90-9 et seq., for at least five years; or

(c) as a person licensed to practice psychology in North Carolina pursuant to NCGS 90-270.1 et seq., for at least five years; or

(d) as a Licensed Marriage and Family Therapist pursuant to NCGS 90-270.45 et seq., for at least five years; or

(e) as a Licensed Clinical Social Worker pursuant to NCGS 90B-7 et seq., for at least five years; or

(f) as a Licensed Professional Counselor pursuant to NCGS 90-329 et seq., for at least five years; or

(g) as a Certified Public Accountant certified in North Carolina for at least five years.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission. Attorneys licensed to practice law in states other than North Carolina shall complete this requirement through a course of self-study as directed by the Commission's Executive Secretary.

C. Be a member in good standing of the State Bar of one of the United States or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the Association for Conflict Resolution or who is an A.O.C. mediator, and, if the applicant is not an attorney licensed to practice law in one of the United States, have observed three additional Court ordered mediations in cases that are pending in State or Federal Courts in North Carolina having rules for mandatory mediation similar to these.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other disciplinary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification. (Adopted effective October 16, 2001; amended November 21, 2002; amended March 1, 2006; amended October 1, 2008.)

Rule 9. Certification of mediation training programs.

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections.

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission. (Adopted effective October 16, 2001; amended November 21, 2002.)

Rule 10. Other settlement procedures.

A. *Order authorizing other settlement procedures.* Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. *Other settlement procedures authorized by these rules.* In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. *General rules applicable to other settlement procedures.*

(1) *When proceeding is conducted.* The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) *Extensions of time.* A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) *Where procedure is conducted.* Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) *No delay of other proceedings.* Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) *Inadmissibility of settlement proceedings.* Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or others neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) *No record made.* There shall be no stenographic or other record made of any proceedings under these Rules.

(7) *Ex parte communication prohibited.* Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) *Duties of the parties.*

(a) *Attendance.* All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) *Finalizing agreement.*

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) *Payment of neutral's fee.* The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) *Sanctions for failure to attend other settlement procedures.* If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) *Selection of neutrals in other settlement procedures.*

Selection by agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) *Disqualification of neutrals.* Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause,

such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) *Compensation of neutrals.* A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) *Authority and duties of neutrals.*

(a) *Authority of neutrals.*

(i) *Control of proceeding.* The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) *Scheduling the proceeding.* The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) *Duties of neutrals.*

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants;

(ii) *Disclosure.* The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) *Reporting results of the proceeding.* The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) *Scheduling and holding the proceeding.* It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court. (Adopted effective October 16, 2001; amended March 4, 2004; amended March 1, 2006.)

Rule 11. Rules for neutral evaluation.

A. *Nature of neutral evaluation.* Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. *When conference is to be held.* As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. *Pre-conference submissions.* No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

(d) *Replies to pre-conference submissions.* No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. *Conference procedure.* Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. *Modification of procedure.* Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. *Evaluator's duties.*

(1) *Evaluator's opening statement.* At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) *Oral report to parties by evaluator.* In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) *Report of evaluator to court.* Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent report judgments or voluntary dismissals with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. *Evaluator's authority to assist negotiations.* If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b). (Adopted effective October 16, 2001; amended March 4, 2004.)

Rule 12. Judicial settlement conference.

A. *Settlement judge.* A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. *Conducting the conference.* The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. *Confidential nature of the conference.* Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. *Report of judge.* Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgments or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court. (Adopted effective October 16, 2001; amended March 4, 2004.)

Rule 13. Local rule making.

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district. (Adopted effective October 16, 2001.)

Rule 14. Definitions.

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

(C) The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52B. (Adopted effective October 16, 2001.)

Rule 15. Time limits.

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure. (Adopted effective October 16, 2001.)

all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. *Report of judge.* Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgments or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court. (Adopted effective October 16, 2001; amended March 4, 2004.)

Rule 13. Local rule making.

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district. (Adopted effective October 16, 2001.)

Rule 14. Definitions.

(A) The word Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

(C) The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52B. (Adopted effective October 16, 2001.)

Rule 15. Time limits.

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure. (Adopted effective October 16, 2001.)

Index to Rules of the North Carolina Supreme Court Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

A

AGREEMENT OF PARTIES.
Certified family financial mediator.
Selection by parties, SettlmtEquitDistrib Rule 2.A.
Compensation of mediator selected by parties, SettlmtEquitDistrib Rule 7.A.
Mediated settlement conference.
Agreement reached, SettlmtEquitDistrib Rule 4.B.
Neutrals.
Selection by parties, SettlmtEquitDistrib Rule 10.C.(10).
Non-certified family financial mediator.
Selection by parties, SettlmtEquitDistrib Rule 2.A.
Other settlement procedures.
Finalizing settlement agreement, SettlmtEquitDistrib Rule 10.C.(8).

APPOINTMENT OF MEDIATOR BY COURT, SettlmtEquitDistrib Rule 2.B.
Compensation, SettlmtEquitDistrib Rule 7.B.
Mediator substituted by parties, SettlmtEquitDistrib Rule 7.C.

ARBITRATION.
Family Law Arbitration Act.
Parties may agree to use arbitration under, SettlmtEquitDistrib 10.(B).

ATTENDANCE.
Mediated settlement conference, SettlmtEquitDistrib Rule 4.A.
Sanction for failure to attend, SettlmtEquitDistrib Rule 5.
Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(8).
Sanction for failure to attend, SettlmtEquitDistrib Rule 10.C.(9).

AUTHORITY OF MEDIATORS, SettlmtEquitDistrib Rule 6.

AUTHORIZING PROCEDURES OTHER THAN MEDIATED SETTLEMENT CONFERENCE, SettlmtEquitDistrib Rule 1.C.(3).

B

BIAS.
Disclosure by mediator, SettlmtEquitDistrib Rule 6.B.(2).
Disclosure by neutral, SettlmtEquitDistrib Rule 10.C.(13).

C

CERTIFICATION.
Mediators, SettlmtEquitDistrib Rule 8.

CERTIFICATION—Cont'd
Mediator training programs, SettlmtEquitDistrib Rule 9.

CHILD CUSTODY AND VISITATION.
Including in settlement proceedings, SettlmtEquitDistrib Rule 1.C.(2).

COMPELLING MEDIATOR OR NEUTRAL TO TESTIFY.
Prohibition, SettlmtEquitDistrib Rule 10.C.(5).

COMPENSATION.
Mediator, SettlmtEquitDistrib Rule 7.
Payment, SettlmtEquitDistrib Rule 4.C.
Neutrals, SettlmtEquitDistrib Rule 10.C.(12).
Payment, SettlmtEquitDistrib Rule 10.C.(8).

COMPUTATION OF TIME, SettlmtEquitDistrib Rule 15.

CONFIDENTIALITY.
Judicial settlement conference, SettlmtEquitDistrib Rule 12.C.

CONSENT JUDGMENT.
Agreement reached.
Filing consent judgment or voluntary dismissal with court, SettlmtEquitDistrib Rule 4.B.
Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(8).

CONSULTATIONS WITH CLIENTS AND OPPOSING COUNSEL.
Duty of counsel, SettlmtEquitDistrib Rule 1.B.

CONTEMPT.
Mediator's fee.
Failure to pay, SettlmtEquitDistrib Rule 7.G.
Mediator's report.
Failure to file, SettlmtEquitDistrib Rule 6.B.(4).

COURT APPOINTMENT OF MEDIATOR, SettlmtEquitDistrib Rule 2.B.
Compensation, SettlmtEquitDistrib Rule 7.B.
Mediator substituted by parties, SettlmtEquitDistrib Rule 7.C.

D

DEADLINE FOR COMPLETION OF CONFERENCE.
Mediated settlement conference, SettlmtEquitDistrib Rule 3.B.
Extension, request, SettlmtEquitDistrib Rule 3.C.
Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(1).
Extension of time, SettlmtEquitDistrib Rule 10.C.(2).

DECERTIFICATION OF MEDIATORS, SettlmtEquitDistrib Rule 8.

DEFINITIONS.
AOC forms, SettlmtEquitDistrib Rule 14.B.

DEFINITIONS —Cont'd
Court, SettlmtEquitDistrib Rule 14.A.
Family financial case, SettlmtEquitDistrib Rule 14.C.

DELAY OF OTHER PROCEEDINGS.
Mediated settlement conference.
  Not cause for, SettlmtEquitDistrib Rule 3.E.
Other settlement procedures.
  Not cause for delay, SettlmtEquitDistrib Rule 10.C.(4).

DESIGNATION OF MEDIATOR BY AGREEMENT.
Selection of mediator by agreement of parties.
  Filing with court, SettlmtEquitDistrib Rule 2.A.

DISCLOSURES BY MEDIATOR.
Possible bias, prejudice or partiality, SettlmtEquitDistrib Rule 6.B.(2).

DISCOVERY.
Statements or conduct at settlement proceeding.
  Prohibition, SettlmtEquitDistrib Rule 10.C.(5).

DISMISSAL.
Agreement reached.
  Filing consent judgment or voluntary dismissal with court, SettlmtEquitDistrib Rule 4.B.
    Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(8).

DISPENSING WITH SETTLEMENT.
Motion, SettlmtEquitDistrib Rule 1.C.(6).

DISQUALIFICATION.
Mediator, SettlmtEquitDistrib Rule 2.D.
Neutral, SettlmtEquitDistrib Rule 10.C.(11).

E

EVIDENCE OF STATEMENTS AND CONDUCT AT SETTLEMENT PROCEEDING.
Inadmissibility, SettlmtEquitDistrib Rule 10.C.(5).

EX PARTE COMMUNICATION.
By mediators, SettlmtEquitDistrib Rule 6.A.(2).
Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(7).

EXTENSION OF TIME LIMITS, SettlmtEquitDistrib Rule 15.

F

FAMILY LAW ARBITRATION ACT.
Parties may agree to use arbitration under, SettlmtEquitDistrib 10.(B).

FEE.
Mediators.
  Compensation generally, SettlmtEquitDistrib Rule 7.
  Payment, SettlmtEquitDistrib Rule 4.C.

FINALIZING AGREEMENT, SettlmtEquitDistrib Rule 4.B.
Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(8).

I

IMPASSE.
Mediator declaring, SettlmtEquitDistrib Rule 6.B.(3).

INDIGENT CASES.
Inability to pay mediators, SettlmtEquitDistrib Rule 7.E.

INSURANCE REPRESENTATIVES.
Attendance at conference, SettlmtEquitDistrib Rule 4.A.(1).

J

JUDICIAL SETTLEMENT CONFERENCE.
Conduct of conference, SettlmtEquitDistrib Rule 12.B.
Confidentiality, SettlmtEquitDistrib Rule 12.C.
General rules for other settlement procedures, SettlmtEquitDistrib Rule 10.C.
Other settlement procedures authorized, SettlmtEquitDistrib Rule 10.B.(2).
Report by judge, SettlmtEquitDistrib Rule 12.D.
Settlement judge, SettlmtEquitDistrib Rule 12.A.

L

LIST OF CERTIFIED FAMILY FINANCIAL MEDIATORS, SettlmtEquitDistrib Rule 2.C.

LOCAL RULE.
Authorized to publish, SettlmtEquitDistrib Rule 13.
Other settlement procedures authorized by, SettlmtEquitDistrib Rule 10.B.(3).
  General rules for, SettlmtEquitDistrib Rule 10.C.

M

MEDIATED SETTLEMENT CONFERENCE.
Agreement reached, SettlmtEquitDistrib Rule 4.B.
Attendance.
  Excused or modified attendance, SettlmtEquitDistrib Rule 4.A.(2).
  Parties in related pending case, SettlmtEquitDistrib Rule 4.E.
  Persons required to attend, SettlmtEquitDistrib Rule 4.A.(1).
  Phone, attendance by, SettlmtEquitDistrib Rule 4.A.(2).
  Sanction for failure to attend, SettlmtEquitDistrib Rule 5.
  Scheduling conflict, SettlmtEquitDistrib Rule 4.A.(3).
Authority and duties of mediators, SettlmtEquitDistrib Rule 6.
Consent judgment or voluntary dismissals.
  Filing after agreement reached, SettlmtEquitDistrib Rule 4.B.
Deadline for completion, SettlmtEquitDistrib Rule 3.B.
  Request to extend, SettlmtEquitDistrib Rule 3.C.

MEDIATED SETTLEMENT CONFERENCE —Cont'd
Delay of other proceedings prohibited, SettlmtEquitDistrib Rule 3.E.
Finalizing agreement, SettlmtEquitDistrib Rule 4.B.
Payment of mediator's fee, SettlmtEquitDistrib Rule 4.C.
Postponement of conference, SettlmtEquitDistrib Rule 7.F.
Recesses, SettlmtEquitDistrib Rule 3.D.
Report that matter settled.
  Mediator's report, SettlmtEquitDistrib Rule 4.B.
Scheduling conflicts, SettlmtEquitDistrib Rule 4.A.(3).
Summary memorandum.
  Agreement reached but not in writing or acknowledged, SettlmtEquitDistrib Rule 4.B.
When held, SettlmtEquitDistrib Rule 3.B.
Where held, SettlmtEquitDistrib Rule 3.A.

MEDIATION TRAINING PROGRAMS.
Certification, SettlmtEquitDistrib Rule 9.

MEDIATOR INFORMATION DIRECTORY, SettlmtEquitDistrib Rule 2.C.

MEDIATORS.
Agreement of parties.
  Certified family financial mediator.
    Selection by parties, SettlmtEquitDistrib Rule 2.A.
  Compensation of mediator selected, SettlmtEquitDistrib Rule 7.A.
  Mediator not certified pursuant to rules.
    Selection by parties, SettlmtEquitDistrib Rule 2.A.
Appointment by court, SettlmtEquitDistrib Rule 2.B.
  Compensation, SettlmtEquitDistrib Rule 7.B.
    Mediator substituted by parties, SettlmtEquitDistrib Rule 7.C.
Authority, SettlmtEquitDistrib Rule 6.A.
Bias, prejudice or partiality.
  Disclosure, SettlmtEquitDistrib Rule 6.B.(2).
Certification, SettlmtEquitDistrib Rule 8.
Certified family financial mediators.
  List, SettlmtEquitDistrib Rule 2.C.
  Selection by agreement of parties, SettlmtEquitDistrib Rule 2.A.
  Selection by court, SettlmtEquitDistrib Rule 2.B.
Change of appointed mediator.
  Compensation of mediator substituted by parties, SettlmtEquitDistrib Rule 7.C.
Compelling mediator or neutral to testify.
  Prohibition, SettlmtEquitDistrib Rule 10.C.(5).
Compensation.
  Amount per hour.
    Mediator appointed by court, SettlmtEquitDistrib Rule 7.B.
      Mediator substituted by parties, SettlmtEquitDistrib Rule 7.C.
  Change of court appointed mediator.
    Mediator substituted by parties, SettlmtEquitDistrib Rule 7.C.
  Contempt.
    Failure to pay, SettlmtEquitDistrib Rule 7.G.
  Duty of parties to pay, SettlmtEquitDistrib Rule 4.C.
  Failure to pay, SettlmtEquitDistrib Rule 7.G.

MEDIATORS —Cont'd
Compensation —Cont'd
  Inability to pay, SettlmtEquitDistrib Rule 7.E.
  Mediator agreed to by parties, SettlmtEquitDistrib Rule 7.A.
  Mediator appointed by court, SettlmtEquitDistrib Rule 7.B.
    Mediator substituted by parties, SettlmtEquitDistrib Rule 7.B.
  Payment, SettlmtEquitDistrib Rules 4.C, 7.D.
  Postponement fee, SettlmtEquitDistrib Rule 7.F.
Contempt.
  Failing to report, SettlmtEquitDistrib Rule 6.B.(4).
  Failure to pay mediator's fee, SettlmtEquitDistrib Rule 7.G.
Control of conference, SettlmtEquitDistrib Rule 6.A.(1).
Disqualification, SettlmtEquitDistrib Rule 2.D.
Duties, SettlmtEquitDistrib Rule 6.B.(1).
Evaluation forms, distributing, SettlmtEquitDistrib Rule 6.B.(7).
Fee.
  Administrative fee, SettlmtEquitDistrib Rule 7.B.
  Compensation generally, SettlmtEquitDistrib Rule 7.
  Payment, SettlmtEquitDistrib Rule 4.C.
Impasse.
  Declaring, SettlmtEquitDistrib Rule 6.B.(3).
Indigent cases.
  Inability to pay mediator's fee, SettlmtEquitDistrib Rule 7.D.
Informational brochure, distributing, SettlmtEquitDistrib Rule 6.B.(6).
List of certified family financial mediators, SettlmtEquitDistrib Rule 2.C.
Mediator information directory, SettlmtEquitDistrib Rule 2.C.
Mediator not certified pursuant to rules.
  Selection by agreement of parties, SettlmtEquitDistrib Rule 2.A.
Postponement fee, SettlmtEquitDistrib Rule 7.F.
Private communications with participant during conference, SettlmtEquitDistrib Rule 6.A.(2).
Replacement for disqualified mediator.
  Selection, SettlmtEquitDistrib Rule 2.D.
Reports.
  Matter settled, SettlmtEquitDistrib Rule 4.B.
  Results of conference, SettlmtEquitDistrib Rule 6.B.(4).
Revocation of mediator certification, SettlmtEquitDistrib Rule 8.
Scheduling and holding conference, SettlmtEquitDistrib Rule 6.B.(5).
Selection, SettlmtEquitDistrib Rule 2.
Training and experience.
  Certification, SettlmtEquitDistrib Rule 8.
Training programs.
  Certification, SettlmtEquitDistrib Rule 9.

MEDIATORS' FEE.
Compensation generally, SettlmtEquitDistrib Rule 7.
Payment, SettlmtEquitDistrib Rule 4.C.

MEDIATOR TRAINING PROGRAMS.
Certification, SettlmtEquitDistrib Rule 9.

MOTIONS.
Appointment of mediator by court, SettlmtEquitDistrib Rule 2.B.

MOTIONS —Cont'd
Dispensing with settlement, SettlmtEquitDistrib Rule 1.C.(6).
Disqualification of mediator, SettlmtEquitDistrib Rule 2.D.
Extension of time to complete settlement conference, SettlmtEquitDistrib Rule 3.C.
Inability to pay mediator's fee, SettlmtEquitDistrib Rule 7.D.
Sanction for failure to attend conference, SettlmtEquitDistrib Rule 5.
Settlement procedures in other family financial cases, SettlmtEquitDistrib Rule 1.C.(5).
Use of settlement procedures other than mediated settlement conference, SettlmtEquitDistrib Rule 1.C.(3).

N

NEUTRAL EVALUATION.
Abbreviated presentation of facts and issues, SettlmtEquitDistrib Rule 11.A.
Authorized settlement procedures, SettlmtEquitDistrib Rule 10.B.(1).
Conference procedure, SettlmtEquitDistrib Rule 11.E.
  Modification, SettlmtEquitDistrib Rule 11.F.
General rules applicable to other procedures authorized, SettlmtEquitDistrib Rule 10.C.
Neutral evaluator.
  Assistance to parties in settlement discussions, SettlmtEquitDistrib Rule 11.H.
  Duties, SettlmtEquitDistrib Rule 11.G.
  Opening statements, SettlmtEquitDistrib Rule 11.G.(1).
  Report to court, SettlmtEquitDistrib Rule 11.G.(3).
  Report to parties, SettlmtEquitDistrib Rule 11.G.(2).
  Responsibilities, SettlmtEquitDistrib Rule 11.A.
Pre-conference submissions, SettlmtEquitDistrib Rule 11.C.
  Replies, SettlmtEquitDistrib Rule 11.D.
Time.
  Pre-conference submissions, SettlmtEquitDistrib Rule 11.C.
  Replies, SettlmtEquitDistrib Rule 11.D.
When conference held, SettlmtEquitDistrib Rule 11.B.

NEUTRALS.
Agreement of parties.
  Selection of neutrals, SettlmtEquitDistrib Rule 10.C.(10).
Authority, SettlmtEquitDistrib Rule 10.C.(13).
Bias, prejudice or partiality.
  Disclosure, SettlmtEquitDistrib Rule 10.C.(13).
Compelling to testify or produce evidence concerning settlement proceeding.
  Prohibition, SettlmtEquitDistrib Rule 10.C.(6).
Compensation, SettlmtEquitDistrib Rule 10.C.(12).
  Payment, SettlmtEquitDistrib Rule 10.C.(8).
Control of proceedings, SettlmtEquitDistrib Rule 10.C.(13).
Disqualification, SettlmtEquitDistrib Rule 10.C.(11).
Duties, SettlmtEquitDistrib Rule 10.C.(13).

NEUTRALS —Cont'd
Ex parte communications with neutral, SettlmtEquitDistrib Rule 10.C.(8).
Notice.
  Selection, SettlmtEquitDistrib Rule 10.C.(10).
Reporting results of proceedings, SettlmtEquitDistrib Rule 10.C.(13).
Scheduling proceeding, SettlmtEquitDistrib Rule 10.C.(13).
Selection, SettlmtEquitDistrib Rule 10.C.(10).

NOMINATION OF NON-CERTIFIED FAMILY FINANCIAL MEDIATOR.
Selection of mediator by agreement of parties.
  Filing with court, SettlmtEquitDistrib Rule 2.A.

NOTICE OF SELECTION OF NEUTRAL BY AGREEMENT, SettlmtEquitDistrib Rule 10.C.(10).

O

ORDERING SETTLEMENT PROCEDURES, SettlmtEquitDistrib Rule 1.C.(1).
Contents of order, SettlmtEquitDistrib Rule 1.C.(4).
Other family financial cases, SettlmtEquitDistrib Rule 1.C.(5).
Other settlement procedures, SettlmtEquitDistrib Rule 10.A.
Procedures other than mediated settlement conference, SettlmtEquitDistrib Rule 1.C.(3).

OTHER SETTLEMENT PROCEDURES.
Attendance, SettlmtEquitDistrib Rules 10.C.(8), (9).
  Sanction for failure to attend, SettlmtEquitDistrib Rule 10.C.(9).
Deadline for completion.
  Extension of time, SettlmtEquitDistrib Rule 10.C.(2).
  Strict observance, SettlmtEquitDistrib Rule 10.C.(1).
Delay of other proceeding prohibited, SettlmtEquitDistrib Rule 10.C.(4).
Duties of parties, SettlmtEquitDistrib Rules 10.C.(8), (9).
Ex parte communications.
  Restriction, SettlmtEquitDistrib Rule 10.C.(7).
Ex parte communications with neutral, SettlmtEquitDistrib Rule 10.C.(8).
Finalizing agreement, SettlmtEquitDistrib Rules 10.C.(8), (9).
General rules, SettlmtEquitDistrib Rule 10.C.
Inadmissibility of proceedings, SettlmtEquitDistrib Rule 10.C.(5).
Neutrals.
  Rules governing, SettlmtEquitDistrib Rule 10.C.
  Selection, disqualification, compensation, authority, duties, SettlmtEquitDistrib Rule 10.C.
Order authorizing, SettlmtEquitDistrib Rule 10.A.
Procedures authorized by rules, SettlmtEquitDistrib Rule 10.B.
Record not made, SettlmtEquitDistrib Rule 10.C.(6).
Time for conducting, SettlmtEquitDistrib Rule 10.C.(1).
  Extension, SettlmtEquitDistrib Rule 10.C.(2).

OTHER SETTLEMENT PROCEDURES —Cont'd
When proceeding conducted, SettlmtEquitDistrib Rule 10.C.(1).
Where conducted, SettlmtEquitDistrib Rule 10.C.(3).

P

PARTIALITY.
Disclosure by mediator, SettlmtEquitDistrib Rule 6.B.(2).
Disclosure by neutral, SettlmtEquitDistrib Rule 10.C.(13).

PHONE.
Attendance at settlement conference by, SettlmtEquitDistrib Rule 4.A.(2).

POSTPONEMENT FEE.
Mediators, SettlmtEquitDistrib Rule 7.F.

POSTPONEMENT OF CONFERENCE, SettlmtEquitDistrib Rule 7.F.

PREJUDICE.
Disclosure by mediator, SettlmtEquitDistrib Rule 6.B.(2).
Disclosure by neutral, SettlmtEquitDistrib Rule 10.C.(13).

PRIVATE COMMUNICATION.
By mediators, SettlmtEquitDistrib Rule 6.A.(2).

PURPOSE OF MANDATORY SETTLEMENT PROCEDURES, SettlmtEquitDistrib Rule 1.A.

R

RECESSES.
Mediated settlement conference, SettlmtEquitDistrib Rule 3.D.

REPLACEMENT FOR DISQUALIFIED MEDIATOR.
Selection, SettlmtEquitDistrib Rule 2.D.

REPORT BY SETTLEMENT JUDGE.
Judicial settlement conference, SettlmtEquitDistrib Rule 12.D.

REPORTS.
Mediators.
  Matter settled, SettlmtEquitDistrib Rule 4.B.
  Results of conference, SettlmtEquitDistrib Rule 6.B.(4).
Neutral evaluators.
  To court, SettlmtEquitDistrib Rule 11.G.(3).
  To parties, SettlmtEquitDistrib Rule 11.G.(2).
Neutrals, SettlmtEquitDistrib Rule 10.C.(13).

REVOCATION OF MEDIATOR CERTIFICATION, SettlmtEquitDistrib Rule 8.

S

SANCTIONS.
Failure to attend mediated settlement conference, SettlmtEquitDistrib Rule 5.
Failure to attend other settlement procedures, SettlmtEquitDistrib Rule 10.C.(9).

SANCTIONS —Cont'd
Failure to pay mediator's fee, SettlmtEquitDistrib Rule 7.G.

SCHEDULING CONFERENCE.
Mediated settlement conference.
  Authority and duties of mediators, SettlmtEquitDistrib Rule 6.

SCHEDULING CONFLICTS.
Mediated settlement conference, SettlmtEquitDistrib Rule 4.A.(3).

SCHEDULING ORDER.
Order requiring settlement procedures, SettlmtEquitDistrib Rule 1.C.
  Contained in scheduling order, SettlmtEquitDistrib Rule 1.C.(4).

SCOPE OF SETTLEMENT PROCEEDINGS, SettlmtEquitDistrib Rule 1.C.(2).

SELECTION OF MEDIATOR, SettlmtEquitDistrib Rule 2.

SETTLEMENT CONFERENCE.
Mediated settlement conference, SettlmtEquitDistrib Rule 3.
  Authority of mediators, SettlmtEquitDistrib Rule 6.
  Duties of parties, attorneys and other participants, SettlmtEquitDistrib Rule 4.
  Postponement, SettlmtEquitDistrib Rule 7.F.
  Sanctions for failure to attend, SettlmtEquitDistrib Rule 5.
Other settlement procedures, SettlmtEquitDistrib Rule 10.

SUMMARY MEMORANDUM.
Agreement reached but not in writing or acknowledged, SettlmtEquitDistrib Rule 4.B.
Other settlement procedures.
  Essential terms of agreement reduced to, SettlmtEquitDistrib Rule 10.C.(8).

T

TELEPHONE.
Attendance at settlement conference by, SettlmtEquitDistrib Rule 4.A.(2).

TIME.
Completion of settlement conference, SettlmtEquitDistrib Rule 3.B.
  Extension of time, SettlmtEquitDistrib Rule 3.C.
Computation, SettlmtEquitDistrib Rule 15.
Consent judgment or voluntary dismissals.
  Filing, SettlmtEquitDistrib Rule 4.B.
Mediator's report, SettlmtEquitDistrib Rule 6.B.(4).
Motion for court-appointment of mediator.
  Filing, SettlmtEquitDistrib Rule 2.B.
Neutral evaluation pre-conference submission, SettlmtEquitDistrib Rule 11.C.
  Replies, SettlmtEquitDistrib Rule 11.D.
Neutral evaluator's report to court, SettlmtEquitDistrib Rule 11.G.(3).
Neutral's report, SettlmtEquitDistrib Rule 10.C.(13).
Other settlement procedures, SettlmtEquitDistrib Rule 10.C.(1).
  Extension of time, SettlmtEquitDistrib Rule 10.C.(2).

TIME —Cont'd
Settlement judge's report.
  Judicial settlement conference, SettlmtEquitDistrib Rule 12.D.
Waiver or extension of time limits, SettlmtEquitDistrib Rule 15.

TRAINING AND EXPERIENCE.
Certification of mediators, SettlmtEquitDistrib Rule 8.

TRAINING PROGRAMS FOR MEDIATORS.
Certification, SettlmtEquitDistrib Rule 9.

W

WAIVER OF TIME LIMITS, SettlmtEquitDistrib Rule 15.

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Adopted June 24, 1999, effective October 1, 1999; Amended effective August 16, 2001; Amended effective March 1, 2006.

Preamble

Rule

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the partys options within the process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what

Rule

terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

VIII. Protecting the Integrity of the Mediation Process: A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

Index follows Rules.

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators participating in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, NCGS 7A-38.4A, NCGS 7A-38.3B, NCGS 7A-38.3C or who are certified by the NC Dispute Resolution Commission. These Standards shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

Rule I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his judgment whether his skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw. (Adopted June 24, 1999, effective October 1, 1999.)

Editor's note. — The order adopting the above rules provided that the Standards of Professional Conduct for Superior Court Mediators adopted by the Court on December 30, 1998, should remain in effect until October 1, 1999.

Rule II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his serving on grounds of lack of impartiality or

(2) the mediator determines he cannot serve impartially. (Adopted June 24, 1999, effective October 1, 1999.)

Rule III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process.

B. A mediator shall not disclose, directly or indirectly, to any non-participant, information communicated to the mediator in confidence by any participant in the mediation process, unless that participant gives permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential conduct or statements made in preparation for, during, or as a follow-up to mediation to a participant, non-participant, law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances:

(1) A statute requires or permits a mediator to testify, to give an affidavit, or to tender a copy of any agreement reached in mediation to the official designated by the statute.

(2) Where public safety is an issue:

(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat.

(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures. (Adopted June 24, 1999, effective October 1, 1999; Amended effective August 16, 2001; Amended effective March 1, 2006.)

Rule IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the partys options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;
(2) that mediation is informal;
(3) that mediation is confidential to the extent provided by law;
(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;
(5) the mediator's role; and
(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors. (Adopted June 24, 1999, effective October 1, 1999.)

Rule V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator may raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility, for all sides, of proposed options for settlement—including their impact on third parties. Furthermore, a mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.

C. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

D. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality. (Adopted June 24, 1999, effective October 1, 1999.)

Rule VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may, in areas where he is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise. (Adopted June 24, 1999, effective October 1, 1999.)

Rule VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services. (Adopted June 24, 1999, effective October 1, 1999.)

Rule VIII. Protecting the Integrity of the Mediation Process: A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality. (Adopted June 24, 1999, effective October 1, 1999.)

Index to Standards of Professional Conduct for Mediators

A

ABUSE OF CHILD OR ELDER.
Disclosure of confidential information, SPCM Rule 3.

ABUSE OF PROCESS.
Mediator discovering, SPCM Rule 8.

B

BIAS.
Absence of, SPCM Rule 2.

C

COMPETENCY, SPCM Rule 1.

COMPLAINT REGARDING PROFESSIONAL MISCONDUCT, MORAL CHARACTER OR FITNESS.
Disclosure of communications or conduct for purposes of defending against complaint, SPCM Rule 3.

CONFIDENTIALITY, SPCM Rule 3.

CONFLICTS OF INTEREST, SPCM Rule 7.

CONSENT, SPCM Rule 4.

CONTINGENT FEE.
Mediator charging based on outcome, SPCM Rule 7.

D

DEATH RESULTING FROM PARTY'S CONDUCT.
Disclosure of confidential information, SPCM Rule 3.

DECLINE TO SERVE.
Lack of competency, SPCM Rule 1.
Lack of impartiality, SPCM Rule 2.

DISCRETIONARY DISCLOSURE OF CONFIDENTIAL INFORMATION, SPCM Rule 3.

F

FEE BASED ON OUTCOME.
Mediator charging, SPCM Rule 7.

I

IMPARTIALITY, SPCM Rule 2.

INJURY RESULTING FROM PARTY'S CONDUCT.
Disclosure of confidential information, SPCM Rule 3.

INTEGRITY OF MEDIATION PROCESS, PROTECTING, SPCM Rule 8.

INTEGRITY OF PROCESS COMPROMISED.
Informing parties, SPCM Rule 5.

INTIMIDATION BY PARTY.
Mediator to prevent, SPCM Rule 8.

L

LEGAL OR PROFESSIONAL ADVICE.
Mediator offering in response to questions, SPCM Rule 6.

M

MANIPULATION BY PARTY.
Mediator to prevent, SPCM Rule 8.

P

PERSONAL INTEREST OF MEDIATOR, SPCM Rule 7.

PREJUDICE.
Absence of, SPCM Rule 2.

R

REFERRAL OF CLIENTS FOR MEDIATION SERVICES.
Receiving commission, rebate, SPCM Rule 7.

RELATIONSHIPS WITH PARTIES OR COUNSEL.
Disclosure, SPCM Rule 2.

S

SELF-DETERMINATION, SPCM Rule 5.

SEPARATION FROM LEGAL OR OTHER PROFESSIONAL ADVICE, SPCM Rule 6.

T

THREATS COMMUNICATED.
Disclosure of confidential information, SPCM Rule 3.

W

WITHDRAWAL.
Lack of competency, SPCM Rule 1.
Lack of impartiality, SPCM Rule 2.

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

Effective July 1, 1996, with revisions effective
September 1, 2000.

Rule
1. Submission of dispute to prelitigation farm nuisance mediation.
2. Exemption from G.S. 7A-38.1.
3. Selection of mediator.
4. The prelitigation farm mediation.
5. Authority and duties of the mediator.
6. Compensation of the mediator.
7. Waiver of mediation.

Rule
8. Mediator's certification that mediation concluded.
9. Certification and decertification of mediators of prelitigation farm nuisance disputes.
10. Certification of mediation training programs.

Index follows Rules.

Rule 1. Submission of dispute to prelitigation farm nuisance mediation.

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

Rule 2. Exemption from G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1.

Rule 3. Selection of mediator.

A. *Time period for selection.* The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. *Selection of certified mediator by agreement.* The Clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate farm nuisance disputes in the judicial district encompassing the county in which the request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. *Nomination of non-certified mediator by agreement.* The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. *Court appointment of mediator.* If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator and the senior resident superior court judge shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator.

E. *Mediator information directory.* To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

Rule 4. The prelitigation farm mediation.

A. *When mediation is to be completed.* The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. *Extensions.* A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. *Where the conference is to be held.* Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. *Recesses.* The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a sixty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. *Duties of parties, attorneys and other participants.* Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. *Sanctions for failure to attend.* Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

Rule 5. Authority and duties of the mediator.

A. *Authority of mediator.*

(1) *Control of mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communica-

tions have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose.

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether or under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

Rule 6. Compensation of the mediator.

A. *By agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. *By court order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $125.00, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. *Indigent cases.* No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. *Postponement Fee.* As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business (7) days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E. *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge. (Amended effective July 15, 1996; Amended effective September 1, 2000.)

DRC Comments to Rule 6

DRC Comment to Rule 6.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 6.D.

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavailable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 6.E.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 6.F.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 6.E. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

Rule 7. Waiver of mediation.

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute shall be on form prescribed by the Administrative Office of the Courts and available through the clerk. The party who requested mediation shall file the waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

Editor's note. — It appears that the word "form" in the second sentence should either read "forms" or should read "a form" or "the form".

Rule 8. Mediator's certification that mediation concluded.

A. *Contents of certification.* Following the conclusion of mediation or the receipt of a waiver of mediation signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation was held, the certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. *Deadline for filing mediator's certification.* The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

Rule 9. Certification and decertification of mediators of prelitigation farm nuisance disputes.

Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

Rule 10. Certification of mediation training programs.

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the request who failed without good cause to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. *Deadline for filing mediator's certification.* The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

Rule 9. Certification and decertification of mediators of prelitigation farm nuisance disputes.

Mediators certified to conduct prelitigation mediation of farm nuisance disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

Rule 10. Certification of mediation training programs.

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

Index to Rules of Farm Nuisance Mediation

A

AUTHORITY OF MEDIATOR, FarmMediation Rule 5.

C

CERTIFICATION.
Mediators.
  Generally, FarmMediation Rule 9.
Reports, FarmMediation Rule 8.
Training programs, FarmMediation Rule 10.

COMPENSATION OF MEDIATOR, FarmMediation Rule 6.

COMPLETION, FarmMediation Rule 4.

CONTEMPT.
Failure to pay mediator's fee, FarmMediation Rule 6.

D

DECERTIFICATION OF MEDIATORS, FarmMediation Rule 9.

DUTIES OF MEDIATOR, FarmMediation Rule 5.

F

FAILURE TO PAY MEDIATOR'S FEE.
Sanctions, FarmMediation Rule 6.

FILING OF MEDIATOR'S CERTIFICATION, FarmMediation Rule 8.

M

MEDIATED SETTLEMENT CONFERENCES.
Exemption from provisions, FarmMediation Rule 2.

MEDIATOR, FarmMediation Rule 3.
Authority and duties, FarmMediation Rule 5.
Certification and decertification, FarmMediation Rule 9.
Compensation, FarmMediation Rule 6.
Waiver of mediation, FarmMediation Rule 7.

N

NOT PROCEEDING AFTER CONFERENCE SCHEDULED.
Postponement fee, FarmMediation Rule 6.

O

ORDERS.
Referral of dispute to mediated settlement conference.
  Exemption from provisions, FarmMediation Rule 2.

P

POSTPONEMENT, FarmMediation Rule 6.

POSTPONEMENT FEE, FarmMediation Rule 6.

R

REPORTS.
Mediator's certification, FarmMediation Rule 8.

REQUEST FOR PRELITIGATION MEDIATION, FarmMediation Rule 1.

RESCHEDULING CONFERENCE.
Postponement fee, FarmMediation Rule 6.

S

SANCTIONS.
Failure to pay mediator's fee, FarmMediation Rule 6.

SELECTION OF MEDIATOR, FarmMediation Rule 3.

SUBMISSION OF DISPUTE, FarmMediation Rule 1.

T

TIME OF COMPLETION, FarmMediation Rule 4.

TRAINING PROGRAMS, FarmMediation Rule 10.

W

WAIVER OF MEDIATION, FarmMediation Rule 7.

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE YEAR 2000 PRELITIGATION MEDIATION PROGRAM

Effective January 1, 2000.

Rule
1. Submission of dispute to Prelitigation Year 2000 Mediation.
2. Selection of mediator.
3. The Prelitigation Year 2000 Mediation.
4. Authority and duties of the mediator.
5. Compensation of the mediator.
6. Waiver of mediation.
7. Affirmative defense.

Rule
8. Mediator's certification that mediation concluded.
9. Certification and decertification of mediators of Year 2000 disputes.
10. Certification of mediation training programs.
11. Responsibility for enforcement.

Index follows Rules.

Rule 1. Submission of dispute to Prelitigation Year 2000 Mediation.

A. A person with a claim for damages allegedly resulting from a Year 2000 problem may initiate mediation by filing a Request for Prelitigation Mediation of Year 2000 Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in the miscellaneous file under the name of the requesting party.

Cross References. — For section establishing a program to provide for mediation of year 2000 disputes, and providing for the adoption of rules in its implementation, see G.S. 66-298.

Rule 2. Selection of mediator.

A. *Time period for selection.* The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file their Notice of Selection of Certified Mediator by Agreement.

B. *Selection of certified mediator by agreement.* The clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate Year 2000 disputes in the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a certified mediator to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice). Such Notice shall state the name, address, and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. *Nomination of non-certified mediator by agreement.* The parties may by agreement select a mediator who is not certified but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator (Nomination) and shall simultaneously deliver a copy of the Nomination to the senior resident superior court judge. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the Nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The Nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. *Court appointment of mediator.* If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with clerk a Motion for Court Appointment of Mediator (Motion) and simultaneously deliver a copy to the senior resident superior court judge who shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator. The Clerk shall notify the mediator and the parties of the appointment of the mediator.

E. *Mediator information directory.* To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation Year 2000 disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

Rule 3. The Prelitigation Year 2000 Mediation.

A. *When mediation is to be completed.* The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. *Extensions.* A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. *Where the Conference is to be held.* Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time, and location of the mediation to all parties named in the Request or their attorneys.

D. *Recesses.* The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation section.

E. *Duties of parties, attorneys and other participants.* Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference to the extent it is consistent with prelitigation disputes.

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded.

F. *Sanctions for Failure to Attend.* Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

COMMENT

Comment to Rule 3.E

N.C. Gen. Stat. § 7A-38.1(l) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Rule 4. Authority and duties of the mediator.

A. *Authority of mediator.*

(1) *Control of mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation;

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) That the mediation is not a trial, the mediator is not a judge and the parties may pursue their dispute in court if mediation is not successful and they so choose.

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(*l*);

(h) The duties and responsibilites of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(3) *Declaring Impasse.* It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) *Scheduling and Holding the Conference.* It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 3 above. Rule 3 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

(5) *Certification.* The mediator has a duty to timely file a Certification as required by Rule 8.

Rule 5. Compensation of the mediator.

A. *By agreement.* When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

B. *By court order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $125, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

C. *Indigent cases.* No party found to be indigent by the court for the purposes of there rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

E. *Postponement fees.* As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediated settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing, attorney/party. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the shall be $250, except that no postponement fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business days prior to the occurrence of an initial mediation session. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 5.B.

F. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent statues to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and findings and the imposition of any and all lawful sanctions by a resident or presiding superior court judge.

Rule 6. Waiver of mediation.

All parties to a Year 2000 dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation (Waiver) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The disputant who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request. No costs shall be assessed any party if all parties waive mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

Rule 7. Affirmative defense.

If a party to the dispute is entitled to an affirmative defense pursuant to G.S. 1-539.26, that party may refuse to participate in the mediation. A party refusing mediation shall advise the mediator in writing of his or her refusal. The Refusal of Prelitigation Mediation (Refusal) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party refusing to participate shall file the Refusal with the clerk and mail a copy to the mediator and to all parties. No costs shall be assessed any party if a party with an affirmative defense advises the mediator in writing of his or her refusal to participate in mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

Rule 8. Mediator's certification that mediation concluded.

A. *Contents of certification.* Following the conclusion of mediation, the receipt of a waiver of mediation signed by all parties to the Year 2000 dispute, or the receipt of a refusal of a party with an affirmative defense under G.S. 1-539.26 to participate in mediation, the mediator shall prepare a Mediator's Certification in Prelitigation Year 2000 Dispute (Certification) on a form prescribed by the Administrative Office of the Courts and available through the clerk. If a mediation were held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation were not held, the Certification shall state that all parties waived mediation in writing pursuant to Rule 7 above, that a party with an affirmative defense under G.S. 1-539.26 refused to participate with good cause, or that the mediation was not held for other, specified reasons. The mediator shall identify any parties named in the Request who failed, without good cause, to attend or participate in mediation.

B. *Deadline for filing mediator's certification.* The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation or a refusal to participate. The mediator shall serve a copy of the Certification on each of the parties named in the request.

Rule 9. Certification and decertification of mediators of Year 2000 disputes.

Mediators certified to conduct prelitigation mediation of Year 2000 disputes shall be subject to all rules and regulations regarding certification, conduct, discipline, and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of Year 2000 disputes.

Rule 10. Certification of mediation training programs.

The Dispute Resolution Commission may specify a curriculum for a Year 2000 mediation training program and may set qualifications for trainers.

Rule 11. Responsibility for enforcement.

The Senior Resident Superior Court Judge or his/her designee shall be responsible for enforcing these rules and shall enter appropriate court orders as necessary to enforce these rules.

Rule 8. Mediator's certification that mediation concluded.

A. *Contents of certification.* Following the conclusion of mediation, the receipt of a waiver of mediation signed by all parties to the Year 2000 dispute, or the receipt of a refusal of a party with an affirmative defense under G.S. 1-539.25 to participate in mediation, the mediator shall prepare a Mediator's Certification in Prelitigation Year 2000 Dispute ("Certification") on a form prescribed by the Administrative Office of the Courts and available through the clerk. If a mediation were held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation were not held, the Certification shall state that all parties waived mediation in writing pursuant to Rule 7 above, that a party with an affirmative defense under G.S. 1-539.25 refused to participate with good cause, or that the mediation was not held for other, specified reasons. The mediator shall identify any parties named in the Request who failed, without good cause, to attend or participate in mediation.

B. *Deadline for filing mediator's certification.* The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation or a refusal to participate. The mediator shall serve a copy of the Certification on each of the parties named in the request.

Rule 9. Certification and decertification of mediators of Year 2000 disputes.

Mediators certified to conduct prelitigation mediation of Year 2000 disputes shall be subject to all rules and regulations regarding certification, conduct, discipline, and decertification applicable to mediators serving the Mediated Settlement Conference Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of Year 2000 disputes.

Rule 10. Certification of mediation training programs.

The Dispute Resolution Commission may specify a curriculum for a Year 2000 mediator training program and may set qualifications for trainers.

Rule 11. Responsibility for enforcement.

The Senior Resident Superior Court Judge of each district shall be responsible for enforcing these rules and shall enter appropriate orders as necessary to enforce these rules.

Index to Rules of the North Carolina Supreme Court Implementing the Year 2000 Prelitigation Mediation Program

A

AFFIRMATIVE DEFENSE, PARTY ENTITLED TO.
Refusal to participate, Y2KMediation Rule 7.

AGREEMENT ON MEDIATOR, Y2KMediation Rule 2.

ATTORNEYS, PARTIES AND OTHER PARTICIPANTS, Y2KMediation Rule 3.

AUTHORITY OF MEDIATOR, Y2KMediation Rule 4.

B

BIAS, PREJUDICE OR PARTIALITY.
Disclosure by mediator, Y2KMediation Rule 4.

C

CERTIFICATION OF MEDIATORS, Y2KMediation Rule 9.

CERTIFICATION THAT MEDIATION CONCLUDED, Y2KMediation Rule 8.

CERTIFIED MEDIATOR, SELECTION BY AGREEMENT, Y2KMediation Rule 2.

COMPENSATION OF MEDIATOR, Y2KMediation Rule 5.

COMPLETING MEDIATION, TIME, Y2KMediation Rule 3.

CONCLUSION OF MEDIATION, CERTIFICATION, Y2KMediation Rule 8.

COURT APPOINTED MEDIATOR.
Parties unable to agree on mediator, Y2KMediation Rule 2.

D

DECERTIFICATION OF MEDIATORS, Y2KMediation Rule 9.

DIRECTORY ON CERTIFIED MEDIATORS, Y2KMediation Rule 2.

DUTIES OF MEDIATOR, Y2KMediation Rule 4.

E

ENFORCEMENT OF RULES, RESPONSIBILITY, Y2KMediation Rule 10.

EXTENSION OF TIME.
Completion of mediation, Y2KMediation Rule 3.

F

FAILURE TO ATTEND, SANCTIONS, Y2KMediation Rule 3.

FAILURE TO PAY MEDIATOR, SANCTIONS, Y2KMediation Rule 5.

I

IMPASSE, MEDIATOR DECLARING, Y2KMediation Rule 4.

INDIGENT CASES.
Compensation of mediator, Y2KMediation Rule 5.

M

MOTION FOR COURT APPOINTED MEDIATOR, Y2KMediation Rule 2.

N

NON-CERTIFIED MEDIATOR, SELECTION BY AGREEMENT, Y2KMediation Rule 2.

NOTICE OF DATE, TIME AND PLACE OF HOLDING MEDIATION.
Mediator's responsibility, Y2KMediation Rule 3.

NOTICE OF SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT, Y2KMediation Rule 2.

P

PLACE OF HOLDING MEDIATION, Y2KMediation Rule 3.

POSTPONEMENT OF CONFERENCE, FEES, Y2KMediation Rule 5.

R

RECESS OF MEDIATION, Y2KMediation Rule 3.

REFUSAL TO PARTICIPATE.
Party entitled to affirmative defense, Y2KMediation Rule 7.

REQUEST FOR PRELITIGATION MEDIATION OF YEAR 2000 DISPUTE.
Filing to initiate mediation, Y2KMediation Rule 1.
Initiation of mediation.
  Filing request, Y2KMediation Rule 1.

S

SELECTION OF MEDIATOR, Y2KMediation Rule 2.

SERVICE OF REQUEST ON PARTIES TO DISPUTE.
Certified mail, Y2KMediation Rule 1.

SIGNING AGREEMENT REACHED IN CONFERENCE, Y2KMediation Rule 3.

T

TIME FOR CERTIFYING MEDIATION CONCLUDED, Y2KMediation Rule 8.

TIME FOR COMPLETING MEDIATION, Y2KMediation Rule 3.

TIME FOR SELECTING MEDIATOR, Y2KMediation Rule 2.

W

WAIVER OF MEDIATION, Y2KMediation Rule 6.

WRITING, AGREEMENT REACHED IN CONFERENCE, Y2KMediation Rule 3.

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted June 13, 1975,
with amendments effective through December 1, 2008.

These rules were promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They are effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N.C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N.C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N.C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

An Appendix of Tables and Forms prepared by the Drafting Committee, as revised, is published with the rules for its possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, it is not an authoritative source on parity with the rules.

Article I. Applicability of Rules

Rule

1. Scope of rules: Trial tribunal defined.
2. Suspension of rules.

Article II. Appeals from Judgments and Orders of Superior Courts and District Courts

3. Appeal in civil cases — How and when taken.
3A. Appeal in qualifying juvenile cases — How and when taken, special rules.
4. Appeal in criminal cases — How and when taken.
5. Joinder of parties on appeal.
6. Security for costs on appeal.
7. Preparation of the transcript; Court reporter's duties.
8. Stay pending appeal.
9. The record on appeal.
10. Assigning error on appeal.
11. Settling the record on appeal.
12. Filing the record; Docketing the appeal; Copies of the record.
13. Filing and service of briefs.

Article III. Review by Supreme Court of Appeals Originally Docketed in Court of Appeals: Appeals of Right; Discretionary Review

Rule

14. Appeals of right from Court of Appeals to Supreme Court under G.S. 7A-30.
15. Discretionary review on certification by Supreme Court under G.S. 7A-31.
16. Scope of review of decisions of Court of Appeals.
17. Appeal bond in appeals under G.S. 7A-30, 7A-31.

Article IV. Direct Appeals from Administrative Agencies to Appellate Division

Rule

18. Taking appeal; Record on appeal — Composition and settlement.
19. [Reserved].
20. Miscellaneous provisions of law governing in agency appeals.

Article V. Extraordinary Writs

21. Certiorari.
22. Mandamus and prohibition.
23. Supersedeas.
24. Form of papers: Copies.

Article VI. General Provisions

25. Penalties for failure to comply with rules.
26. Filing and service.
27. Computation and extension of time.
28. Briefs: Function and content.
29. Sessions of courts; Calendar of hearings.
30. Oral argument and unpublished opinions.
31. Petition for rehearing.
32. Mandates of the courts.
33. Attorneys.
33A. Secure leave periods for attorneys.
34. Frivolous appeals; Sanctions.
35. Costs.
36. Trial judges authorized to enter orders under these rules.
37. Motions in appellate courts.
38. Substitution of parties.
39. Duties of clerks; When offices open.
40. Consolidation of actions on appeal.
41. Appeal information statement.
42. Title.

Appendixes

Appx.
A. Timetables for appeals.
B. Format and style.
C. Arrangement of record on appeal.
D. Forms.
Appx.
E. Content of briefs.
F. Fees and costs.
G.

Index follows Rules.

Editor's note. — By order dated June 30, 1988, the Supreme Court directed that effective September 1, 1988, the Drafting Committee Notes and Commentary which had been appended to each of the Rules of Appellate Procedure should be deleted, and that in their stead should be annotations containing the date of each rule's adoption and any subsequent dates of amendment, indicating which of the rule's paragraphs was amended and the effective date thereof.

ARTICLE I. APPLICABILITY OF RULES

Rule 1. Scope of rules: Trial tribunal defined.

(a) *Scope of rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) *Rules do not affect jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) *Definition of trial tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division. (Adopted June 13, 1975; Amended November 27, 1984 — 1(a), (c) —; effective February 1, 1985.)

Editor's note. — For North Carolina court system website, see www.nccourts.org.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Mandatory. — The North Carolina Rules of Appellate Procedure are mandatory, and for violation of the rules an appeal is subject to dismissal. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985), aff'd, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

The North Carolina Rules of Appellate Procedure are mandatory. Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976); State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981).

The Rules of Appellate Procedure are mandatory and violations thereof subject an appeal to dismissal. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

The rules of this court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the legislature, (2) by order of the judge of the superior court, (3) by consent of litigants or counsel. The court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

North Carolina Rules of Appellate Procedure Inapplicable. — North Carolina Rules of Appellate Procedure did not apply to an appeal by certiorari to the superior court from a hearing before a county zoning board of adjustment because there was no direct right of appeal from the board of adjustment to the appellate division. The board of adjustment was not a trial tribunal as defined by N.C. R. App. P. 1(c), and appeals from the board of adjustment were to the superior court, by certiorari pursuant to N.C. Gen.Stat. § 153A-345(e). Cook v. Union County Zoning Bd. of Adjustment, 185 N.C. App. 582, 649 S.E.2d 458, 2007 N.C. App. LEXIS 1949 (2007).

Quoted in Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983). In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004); City of Asheville v. State, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1556 (Aug. 19, 2008).

Cited in Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

II. DECISIONS UNDER PRIOR LAW.

***Editor's note.** — The cases cited below were decided under former Rules 1 and 4, Rules of Practice in the Supreme Court of North Carolina.*

The rules of the Supreme Court are mandatory, not directory. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943); Warshaw v. Warshaw, 236 N.C. 754, 73 S.E.2d 900 (1952); Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966).

The rules of practice in the Supreme Court are mandatory and will be enforced. Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95 (1967); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

The rules of the Supreme Court have been dictated by experience and stem from a desire to expedite business. They are mandatory and will be enforced. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S. Ct. 253, 27 L. Ed. 2d 252 (1970).

The impression seems to prevail to some extent that the rules of practice prescribed by the Supreme Court are merely directory — that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The Supreme Court has ample authority to make them. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Supreme Court will certainly see that they have effect and are duly observed whenever they properly apply. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

Exclusive Power to Make Rules. — The Supreme Court is given, by N.C. Const., Art. IV, § 13(2), exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Supreme Court will be observed. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

The General Assembly can enact no rules of practice and procedure for the Supreme Court. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

Dismissal of Appeal for Noncompliance with Rules. — Ordinarily motions to dismiss appeals will be allowed, upon a failure to comply with the rules of the Supreme Court, without discussing the merits of the case. Davis v. Wall, 142 N.C. 450, 55 S.E. 350 (1906).

Rule 2. Suspension of rules.

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions. (Adopted June 13, 1975.)

CASE NOTES

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Consideration of Constitutional Questions Not Properly Raised Below. — While the Supreme Court will generally refrain from deciding constitutional questions which are not raised or passed upon in the trial court or properly presented in the Court of Appeals, the court may pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Although defendant's conditional cross-appeal had not been properly preserved for appellate review, in the interests of judicial economy the Supreme Court may elect pursuant to this rule to consider the merits of defendant's arguments. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Heinous, atrocious, or cruel aggravating circumstance under G.S. 15A-2000(e)(9) was argued to be unconstitutionally vague and overbroad, and that that vagueness could not be cured through appellate narrowing after Ring; although the issue was not raised in the lower court so as to be properly addressed on appeal, the highest court found the issue to be in the public interest, addressed the issue to further develop its jurisprudence under N.C. R. App. P. 2, and determined that the circumstance was constitutional under the Sixth Amendment because (1) the pattern jury instructions included language approved by the Court that narrowed the definition of the circumstance, and (2) the appellate review of the circumstance as submitted to the jury did not make the appellate court a "co-finder of fact" with the jury. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

But the Court May Suspend Requirements

Pursuant to This Section. — The court elected to suspend the requirement for the clerk's date stamp, pursuant to its discretionary authority accorded by N.C. R. App. P., Rule 2 where neither party objected to the absence of the stamp. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

Reliance on Rule Presumed Constitutional at Time of Trial. — Because under G.S. 8C-1-103(a)(2), which was later held unconstitutional but had been presumed constitutional at the time of trial, the trial court had assured defendant that he did not need to renew his objections to the evidence when it was offered at trial, the appellate court would review defendant's arguments as to the affected evidence. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Residual Power to Consider Important Issues. — On rare occasions, when issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, the Supreme Court will exercise its inherent residual power or its authority under this rule and address those issues, even though they are not properly raised on appeal. This residual power to suspend or vary operation of the court's published rules does not depend on express reservation by the court in its body of rules, but is included in the rules as a reminder to counsel that the power exists and may be drawn upon where the justice of doing so or the injustice of failing to do so appears manifest to the court. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986).

This rule relates to the residual power of appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice that appears manifest to the court and only in such instances. Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

Where defendant's appellate brief, challenging defendant's first-degree murder conviction, did not cite the specific assignment of error that defendant contended supported defendant's one argument that was not waived and defendant did not attach to the brief the pertinent portions of the trial proceedings related to the argument, defendant violated N.C. R. App. P. 28(b)(6), (d)(1); however, the appellate court, rather than deeming the error waived, exercised its discretion under N.C. R. App. P. 2 to examine the merits of defendant's argument. State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Even though defendant failed to object or raise as plain error the jury instructions given in a case relating to damage to computers, appellate court could review the case under N.C. App. Proc., Rule 2 because there was limited case law and no jury instructions on the crime. State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Power to Resolve Case in the Interests of Justice. — On appeal from the trial court's judgment dismissing an inmate's medical malpractice action against a sheriff and various medical providers, the Supreme Court of North Carolina held that, although the Court of Appeals of North Carolina's judgment affirming the trial court's judgment was flawed, the supreme court would review the inmate's appeal to the supreme court, pursuant to its authority under N.C. R. App. P. 2; the supreme court modified the court of appeals' judgment and, as modified, that judgment was affirmed. Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003).

Despite the fact that defendant did not object to the admission of his uncorroborated statements at trial, the appellate court reviewed his appeal of the issue because he relied on G.S. 8C-1, N.C. R. Evid. 103(a)(2), which only preserved the issue after defendant filed his motion in limine, during trial and it would have been a manifest injustice no to do so. State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

Provisions of N.C. R. App. P. 2 are discretionary, and cannot be used to confer jurisdiction upon an appellate court in the absence of jurisdiction. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

When the North Carolina Industrial Commission exceeded its authority by finding a prior version of G.S. 97-26(b) unconstitutional, the question of the statute's constitutionality was not properly presented to an appellate court on appeal of the Commission's decision because, among other reasons, no party filed a certiorari petition, pursuant to N.C. R. App. P. 21, nor did a party seek suspension of the Rules of Appellate Procedure, under N.C. R. App. P. 2, nor did the Commission certify the question to the appellate court, under G.S. 97-86. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Despite the fact that defendant did not object to the admission of his uncorroborated statements at trial, the appellate court reviewed his appeal of the issue because he relied on G.S. 8C-1, N.C. R. Evid. 103(a)(2), which only preserved the issue after defendant filed his motion in limine, during trial and it would have been a manifest injustice no to do so. State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

Even though the issue was not properly preserved for appellate review, a sentence for first degree kidnapping was remanded because the dual use of rapes to elevate a second degree kidnapping to first degree kidnapping was prohibited; therefore, the use of the court's inherent authority was necessary to prevent a manifest injustice. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

When defendant was convicted of perjury and false statements for executing an affidavit of indigency stating that he had no interest in real property when his girlfriend had placed his name on a deed of trust on property she owned, an appellate court reviewed the merits of his conviction, even though he had not moved to dismiss at the close of all the evidence and had thus not preserved the issue for appeal, under N.C. R. App. P. 10(b)(3), because under N.C. R. App. P. 2 it determined it would "prevent manifest injustice" to defendant to review his convictions. State v. Denny, — N.C. App. —, 635 S.E.2d 438, 2006 N.C. App. LEXIS 2158 (2006), rev'd, in part, aff'd in part, 361 N.C. 662, 652 S.E.2d 212 (2007), In re T.M., — N.C. App. —, 643

S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

While defendant's assignment of error did not provide the legal basis pursuant to N.C.R.A.P. 10(c)(1) for an argument that the testimony violated G.S. 8C-1-701, the appellate court incorrectly concluded that it had no authority to apply N.C.R.A.P. 2; thus, the matter had to be remanded. State v. Hart, 361 N.C. 309, 644 S.E.2d 201, 2007 N.C. LEXIS 410 (2007).

As an employer and two of its officers violated N.C. R. App. P. 10(c)(1) and 28(b)(6) in their brief by failing to include clear and specific record references in their assignments of error, and in failing to set forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, dismissal of the appeal was warranted; review in the interests of justice under N.C. R. App. P. 2 was declined, as the appeal did not present exceptional circumstances. Capps v. NW Sign Indus. of N.C., Inc., — N.C. App. —, 652 S.E.2d 372, 2007 N.C. App. LEXIS 2268 (2007).

Power to Resolve Case to Prevent Manifest Injustice to a Party. — N.C. R. App. P. 2 permits appellate courts to excuse a party's default in both civil and criminal appeals when necessary to prevent manifest injustice to a party or to expedite decision in the public interest. Rule 2, however, must be invoked cautiously, and exceptional circumstances allow the appellate courts to take this extraordinary step. Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

In response to defendant's alternative argument to invoke N.C. R. App. P. 2, the appellate court noted that it would have been manifestly unjust to have defendant remain imprisoned when the State failed to prove guilt beyond a reasonable doubt and thus, review of the trial court's failure to rule on defendant's motion to dismiss made at the close of the State's evidence would have been proper even if the claim had not been preserved. State v. Batchelor, — N.C. App. —, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

Review of Significant Issues Warranted. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), (d)(1)c., and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Although petitioner failed to cite in the record on appeal the record pages corresponding to each of her assignments of error, the appellate court was able to determine the issues in the case; therefore, as petitioner's violation of the N.C. Rules of Appellate Procedure was not so egregious as to invoke dismissal, the appellate court would review the issues pursuant to N.C. R. App. P. 2. Davis v. Macon County Bd. of Educ., 178 N.C. App. 646, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

Although the appellants' brief did not conform completely to the mandates of the North Carolina Rules of Appellate Procedure, thereby subjecting their appeal to dismissal, the appellate court nevertheless elected to reach the merits of their appeal; the court found that it was proper not to dismiss the appeal because, inter alia, the court did not believe that the appellees were substantially prejudiced as the appellants' assignments of error were specific enough to put the appellees on notice of the contested issues and upon what basis the court might rule, and maintaining the integrity of the laws through proper interpretation and application outweighed the importance of dismissal in a case in which the rules violations had little to no impact. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

Review in Spite of Failure to Comply With N.C. R. App. P. 10(c)(1) — While defendants failed to specify any enumerated findings of fact or conclusions of law, as required by N.C. R. App. P. 10(c)(1) but did refer to the page of the record where the disputed finding of fact was located, the court chose to review the assignments of error given the provision in N.C. R. App. P. 2 allowing the court to review an appeal despite rules violations. Davis v. Columbus County Schs., 175 N.C. App. 95, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005).

In order to prevent manifest injustice, the appellate court decided to review defendant's appellate issue, asserting that his statement to officers should have been suppressed pursuant to G.S. 7B-2101 despite the fact that defendant failed to properly preserve the issue for review; defendant may have relied to his detriment on a 2003 amendment to G.S. 8C-1-103(a)(2) which, although deficient, was presumed constitutional at the time of defendant's trial. State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

Review in Spite of Failure to Comply With N.C. R. App. P. 28. — Where the denial of a property owner's subdivision application was reversed and the parties appealed the decision to remand for a new hearing, although the property owner did not state the standard of review in its appellate brief, its appeal was not dismissed based on this error. Blue Ridge Co., L.L.C. v. Town of Pineville, — N.C. App. —, 655 S.E.2d 843, 2008 N.C. App. LEXIS 227 (2008).

Failure to Request Application of Rule. — On appeal in a workers' compensation case, defendants, an employer and its workers' compensation carrier, did not assign error to a conclusion of law pursuant to N.C. R. App. P. 10(a); thus, the arguments regarding that conclusion of law were not properly before the appellate court. Further, even after the claimant, in his appellate brief, pointed out the lack of an assignment of error, defendants did not move to amend the record on appeal to add an assignment or error and did not ask, in their reply brief, for the appellate court to apply N.C. R. App. P. 2; thus, the arguments were not addressed on appeal. Hunter v. Apac/Barrus Constr. Co., — N.C. App. —, 656 S.E.2d 652, 2008 N.C. App. LEXIS 274 (2008).

Discretion of Appellate Court. — Although defendant did not properly preserve for appeal either issue on which he relied, the Court of Appeals may hear appeals in its discretion under this rule. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Although defendant's assignments of error set out in the record on appeal did not conform to Appellate Rule 10(c), pursuant to the court's discretionary power in this Rule, they elected to review the merits of defendants' appeal. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), cert. denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

Although the appellant's failure to comply with appellate rules may have subjected his appeal to dismissal, the appellate court exercised its discretion to consider the merits of the appeal. North Carolina Farm Bur. Mut. Ins. Co. v. Allen, 146 N.C. App. 539, 553 S.E.2d 420, 2001 N.C. App. LEXIS 988 (2001).

Where corporation failed to argue the dismissal of its counterclaim or any other assignments of error in its brief, the appellate court deemed the corporation's assignments of error abandoned; however, since the appellate court had the power to suspend the rules of appellate procedure, it chose to address the corporation's claim to the extent implicated in the creditor's cross-appeal. LexisNexis v. TRaviSHan Corp., 155 N.C. App. 205, 573 S.E.2d 547, 2002 N.C. App. LEXIS 1635 (2002).

Although the trial court did not have the authority to extend the time for plaintiffs to file the record on appeal by 45 days, defendants failed to object to the extension at the time and did not contest the extension in their objections to the proposed record on 18 January 2002; in light of the intervening death of the trial judge and the timely filing of the record according to the order, appellate court exercised its discretion to hear the case under Rule 2 of the North Carolina Rules of Appellate Procedure in the interests of justice. Lancaster v. Maple St. Homeowners Ass'n, 156 N.C. App. 429, 577 S.E.2d 365, 2003 N.C. App. LEXIS 194 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 272 (2003).

While a defendant was not entitled to plain error review because he did not object to a restitution ordered and did not assert plain error in his assignment of error in violation of N.C.R. App. P. 10(c)(4), because the issue raised important questions concerning the trial court's authority to order restitution in a criminal case, the appellate court addressed his contentions in its discretion under N.C. R. App. P. 2. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

Court of Appeals of North Carolina exercised its discretion under N.C. R. App. P. 2 and addressed the fact that defendant was improperly sentenced for both larceny and possession of stolen goods relating to the same stolen property, even though defendant failed to raise that error. State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003).

Where the parents and the widow of a deceased employee, and the employer, all failed to designate which assignments of error, as well as which particular findings and conclusions, they brought forward on their appeal from a determination of the North Carolina Industrial Commission which denied them death benefits, they violated N.C. R. App. P. 10 and none of the assignments of error were properly before the court for review; however, a court may exercise its discretion under N.C. R. App. P. 2 and consider the merits of the issues raised, as the court did. Goodrich v. R.L. Dresser, Inc., 161 N.C. App. 394, 588 S.E.2d 511, 2003 N.C. App. LEXIS 2204 (2003).

Appellate court suspended the appellate rules after an appellant committed appellate rules violations because the appellant presented a compelling appeal warranting reversal, the merits of which were orally argued before the court; and dismissal of the appeal for technical appellate rules violations would have amounted to a manifest injustice. Viar v. N.C. DOT, 162 N.C. App. 362, 590 S.E.2d 909, 2004 N.C. App. LEXIS 184 (2004).

Although the record that defendants presented to the appellate court did not contain an instruction that defendants requested and the trial court refused to give, or the charge that the trial court gave to the jury, the appellate court elected, pursuant to N.C. R. App. P. 2, to consider defendants' claim that the trial court erred when it instructed the jury. However, the appellate court rejected defendants' claims that the trial court erred when it gave the jury an instruction on sudden emergency arising from a motor vehicle accident, or when it decided to instruct the jury on reasonable and prudent speed instead of instructing the jury that plaintiff had a duty to decrease his speed to avoid a collision. Campbell v. McIlwain, 163 N.C. App. 553, 593 S.E.2d 799, 2004 N.C. App. LEXIS 399 (2004).

Although mother involved in the abuse and neglect case did not object to having the county social services department consolidating the adjudication and disposition hearings, and, thus, waived that issue for the purpose of review, the appellate court was entitled to exercise its authority, pursuant to N.C. R. App. P. 2, to disregard that waiver and address the merits of that argument. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

By failing to address the interlocutory nature of an order in a brief to the appellate court, the appellants (siblings who were not allowed to intervene in a G.S. 49-14 paternity action) violated N.C. R. App. P. 28(b)(4); however, pursuant to N.C. R. App. P. 2, the appellate court elected, in its discretion, to hear the merits of the appellants' argument. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Where the trial court did not certify the order, which denied the construction company's motion to dismiss an action brought by a homeowners association for lack of standing, as immediately appealable pursuant to G. S.1A-1, Rule 54, and the construction company did not appear to be deprived of any substantial right which could not be protected by timely appeal from the ultimate disposition of the controversy on its merits, the appellate court held there was no reason to invoke N.C. R. App. P. 2. Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co., 175 N.C. App. 380, 623 S.E.2d 620, 2006 N.C. App. LEXIS 71 (2006).

Citizens who sought to block the building of a modular school abandoned their assignment of error to the trial court's dismissal of their claims based on mootness under N.C.R.A.P., Rule 28(b)(6) because they submitted no authority in support of their contention that the trial court erred in concluding that their claims were moot; nevertheless, pursuant to its discretion under N.C.R.A.P., Rule 2, the appellate court elected to suspend the appellate rules and to reach the merits of the mootness contentions. Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ., 182 N.C. App. 241, 641 S.E.2d 824, 2007 N.C. App. LEXIS 593 (2007).

Although an employee's brief failed to comply with N.C. R. App. P. 28(b)(4) and (6) by failing to include a statement of the grounds for appellate review and a concise statement of the applicable standards of review for each question, the rule violations, while serious, were not so egregious as to warrant dismissal of the appeal because: (1) reaching the merits of the case did not create an appeal for the employee or cause the court to examine issues not raised by the employee; and (2) the employer was given sufficient notice of the issues on appeal as evidenced by the filing of its brief thoroughly responding to the employee's arguments; as a result, the court elected to review the merits of the employee's appeal pursuant to N.C. R. App. P. 2. Hassell v. Onslow County Bd. of Educ., 182 N.C. App. 1, 641 S.E.2d 324, 2007 N.C. App. LEXIS 487 (2007).

Appellate court refused to use its discretion under N.C. R. App. P. 2 to overlook a company's numerous and egregious appellate rule violations as: (1) the company failed to respond to an LLC's motion to dismiss the company's appeal; (2) none of the company's assignments of error in the original record on appeal or in an addendum to the record on appeal contained any clear and specific record or transcript references; (3) in the argument section of its brief, the company stated the question presented but failed to reference any assignments of error pertinent to the question in violation of N.C. R. App. P. 28(b)(6); (4) the company's failure to state the grounds for appellate review violated Rule 28(b)(4); and (5) the company's failure to state the applicable standard of review for each question presented violated Rule 28(b)(6). Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 183 N.C. App. 389, 645 S.E.2d 212, 2007 N.C. App. LEXIS 1167 (2007), rev'd 362 N.C. 191, 657 S.E.2d 361 (2008).

Appellate court denied a motion to dismiss by the county agency and the guardian ad litem under N.C.R.A.P. 37, and invoked its discretion pursuant to N.C.R.A.P. 2 to review the record to determine whether the evidence supported a trial court's findings of fact and conclusions of law in terminating a father's parental rights; the court concluded that the affirmance of the trial court's order was proper because: (1) the trial court's findings regarding the father were properly supported by clear, cogent, and convincing evidence; (2) the trial court's findings supported its conclusions; and (3) there was no merit in any of the assignments of error noted in the record. In re N.B., 183 N.C. App. 114, 644 S.E.2d 22, 2007 N.C. App. LEXIS 831 (2007).

Even assuming for the sake of argument that the husband's appellate brief did not strictly comply with the North Carolina Rules of Appellate Procedure, it was within the appellate court's discretion as to whether dismissal was warranted as a sanction; since the husband's alleged violations were not sufficiently egregious to warrant dismissal, the appellate court declined to dismiss the husband's appeal and would review the husband's remaining assignment of error. Cotter v. Cotter, 185 N.C. App. 511, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Employee's appeal from the denial of her claim under the North Carolina Workers' Compensation Act was dismissed because the court declined to invoke its discretionary authority under N.C.R.A.P. 2 and the employee violated N.C.R.A.P. 28(b)(6) by failing to argue specific findings and conclusions or cite authority in her brief. Ord v. IBM, 184 N.C. App. 543, 646 S.E.2d 656, 2007 N.C. App. LEXIS 1429 (2007).

Although the appellant's brief failed to state a standard of review for the first argument in his brief, as was required by N.C. R. App. P. 28(b)(6), the appellate court, pursuant to N.C. R. App. P. 2, chose to decide the appeal based upon the merits because the appellees failed to comply with N.C. R. App. P. 37 as their motion to dismiss the appeal was made in their brief instead of in a separate motion. Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

Because: (1) an insured presented no authority to support his claim that the express terms of his homeowner's policy provided coverage for his personal property; (2) the insured did not assign error to any of the trial court's findings of fact and conclusions of law; and (3) the court declined to exercise the court's discretion under N.C. R. App. P. 2 to suspend the requirements of N.C. R. App. P. 28, due to improper briefing, the trial court properly found that the insured's personal property was not covered under that policy. Hannah v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1018 (May 20, 2008).

Section Used to Extend Provisions of N.C.R.A.P., Rule 38. — The court used this provision to vary the requirements of N.C.R.A.P., Rule 38 so as to allow an appeal by the decedent's attorney where the plaintiff died before she was entitled to an appeal. Brown v. Brown, 353 N.C. 220, 539 S.E.2d 621, 2000 N.C. LEXIS 904 (2000).

Lack of Jurisdiction. — Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2. Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994), cert. denied, 339 N.C. 609, 454 S.E.2d 246, aff'd, 341 N.C. 702, 462 S.E.2d 219 (1995).

Court of Appeals of North Carolina lacked jurisdiction to hear the State Bar of North Carolina's appeal of a grant of summary judgment to an attorney in a disciplinary proceeding because G.S. 84-28(h) provided no appeal from a final order that did not impose discipline and in the instant case, no discipline had been imposed; further, certiorari was inappropriate because the case did not fall within the rubric of N.C. R. App. P. 21(a)(1) and the court declined to suspend the requirement of Rule 21(a)(1) using N.C. R. App. P. 2. N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. State v. McCoy, 171 N.C. App. 636, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

Appellate court was without jurisdiction to hear a father's appeal of a termination of parental rights case under circumstances in which the father failed to satisfy the jurisdictional requirement of filing a notice of appeal and including the same in the record on appeal; without proper notice of appeal, the appellate court acquired no jurisdiction and neither the court nor the parties could have waived the jurisdictional requirements even for good cause. In re Me.B., 181 N.C. App. 597, 640 S.E.2d 407, 2007 N.C. App. LEXIS 364 (2007).

Appellate court lacked jurisdiction to hear a mother's claim of an alleged violation of G.S. 7B-911(c) as the mother failed to appeal a civil custody order, and § 7B-911(c) applied to civil custody orders, but not to review orders; without proper notice of appeal, the appellate court did not acquire jurisdiction, and neither the court nor the parties could waive the jurisdictional requirements even for good cause shown under N.C. R. App. P. 2. In re H.S.F., — N.C. App. —, 645 S.E.2d 383, 2007 N.C. App. LEXIS 748 (2007).

Because defendant failed to give oral or written notice of his appeal within fourteen days of his conviction, and failed to show good cause for the appeals court to entertain the appeal, the appeals court lacked jurisdiction to address that appeal, mandating dismissal of the appeal. State v. Webber, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 994 (May 20, 2008).

The court could not suspend the rules pursuant to this section in order to accommodate the Attorney General's petition challenging the grant of class action attorneys' fees. Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000).

Mother's Notice of Appeal, filed 42 days after the trial court's order granting her motion for additional findings, was untimely as to that order, and the appellate court was therefore without jurisdiction to address the mother's challenge of that order; without proper notice of appeal, the appellate court acquired no jurisdiction and neither the court nor the parties were allowed to waive the jurisdictional requirements even for good cause shown under N.C. R. App. P. 2. Sillery v. Sillery, 168 N.C. App. 231, 606 S.E.2d 749, 2005 N.C. App. LEXIS 167 (2005).

Suspension Not Warranted. — Because appellant management company violated N.C. R. App. P. 28(b)(6), by failing to identify an assignment of error by the page where it appeared in the record following the question presented, and violated N.C. R. App. P. 26(g)(1), by submitting a brief that contained an improper index margin, double-spaced captions and headings, and no appendix page reference, and the appellant acknowledged its violations but made no attempt to correct, amend, or substitute its brief, the court declined to apply N.C. R. App. P. 2 and to review the merits of the appeal and instead dismissed it; nothing in the record or briefs demonstrated exceptional circumstances to suspend or vary the rules in order to prevent manifest injustice to a party, or to expedite a decision in the public interest. Selwyn Vill. Homeowners Ass'n v. Cline & Co., — N.C. App. —, 651 S.E.2d 909, 2007 N.C. App. LEXIS 2297 (2007).

Dismissal of appeal was proper since the plaintiff presented sufficient evidence to establish a prima facie breach of contract claim and the defendant's appeal therefrom was defective in several respects, implicating violations of N.C. R. App. P. 28(b)(4), 28(b)(6), and no exceptional circumstances warranting N.C. R. App. P. 2 relief were present. Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1555 (Aug. 19, 2008).

Consideration of Issue Not Raised in Dissent. — Under G.S. 7A-30(2), only the issue raised in the dissent is properly before the Supreme Court for review. N.C.R.A.P., Rule 16 defines the permissible scope of review in such cases. Nevertheless, additional issues which arise frequently in the administration of estates and must often be determined by the Department of Revenue would be considered under the court's residual power or authority under this rule. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986).

While convictions that result in a judgment of death are automatically appealable to the Supreme Court of North Carolina, all other convictions are properly appealed to the Court of Appeals pursuant to G.S. 7A-27 and N.C. R.App. P. 4(d), and while neither party filed a motion to bypass the Court of Appeals as to defendant's non-capital conviction for burglary, when he appealed his conviction for murder and his death sentence, the Supreme Court of North Carolina, on its own initiative, and consistently with N.C. R. App. P. 2, considered defendant's assignments of error that concerned his burglary conviction under N.C. Gen. Stat. § 14-51 because the issue also related to one of his arguments regarding an aggravating circumstance. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Consideration of Matter Court's Prerogative. — Although defendant made no assignment of error regarding whether the trial court should have awarded attorney's fees but sought to address that question summarily in his brief, the court of appeals choose to deal with the question in accordance with its prerogative under this rule. Forsyth Mun. ABC Bd. v. Folds, 117 N.C. App. 232, 450 S.E.2d 498 (1994).

When, after defendant was convicted of possession of cocaine and having attained the status of being an habitual felon, the trial court, sua sponte, granted a motion for appropriate relief, vacating the habitual felon conviction, and reducing defendant's sentence, finding the sentence violated defendant's rights under the Eighth and Fourteenth Amendments, the State's petition for a writ of certiorari did not satisfy the requirements of N.C. R. App. P. 21 as (1) the right to prosecute an appeal was not lost by failure to take timely action, (2) it was not shown that no right of appeal from an interlocutory order existed, and (3) review pursuant to G.S. 15A-1422(c)(3) of an order denying a motion for appropriate relief was not involved, nor was it appropriate for the appellate court to suspend the rules of appellate procedure, under N.C. R. App. P. 2. State v. Starkey, 177 N.C. App. 264, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

Invalid Sentence. — Appellate court need not employ N.C. R. App. P. 2 to reach the issue of whether a sentencing determination was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law because such issues may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. State v. Robertson, 161 N.C. App.

288, 587 S.E.2d 902, 2003 N.C. App. LEXIS 2049 (2003).

State had no right to appeal from a concurrent sentence because the sentence was governed by G.S. 14-7.6, which was outside the scope of appeal of G.S. 15A-1445(a)(3)(c); however, because the concurrent sentence was contrary to G.S. 14-7.6, under N.C. R. App. P. 2 the court would treat the appeal as a mandamus petition, vacate the judgment, and remand for resentencing. State v. Watkins, — N.C. App. —, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

McKoy Errors in Sentencing Under G.S. 15A-2000. — At least for all trials conducted after State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), and before Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the Supreme Court will decline to require that a McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), error be reviewed under the plain error standard when the defendant failed to object at trial to the error, and will instead apply this rule. State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990).

Erroneous Assumption by Trial Court and Appellant. — Where plaintiff's contract claim was dismissed because the trial court erroneously assumed, as did plaintiff, that plaintiff was barred by the statute of frauds from recovering on that claim, but plaintiff failed to properly preserve this error for appellate review, the supreme court would consider the issue pursuant to this rule. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

Although the appellant failed to identify various exceptions upon which its assignments of errors were based, as required by N.C.R.A.P., Rule 28(b)(5), the court deemed it appropriate, pursuant to this rule, to dispose of the appeal on the merits. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Although defendant did not identify the record page on which each exception appeared as required under N.C.R.A.P., Rules 10(c) and 28(b)(5), these omissions were not so egregious as to invoke dismissal. Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

Although defendant failed to include the exact words "plain error" in his brief, he succeeded in presenting and arguing the issue fully and in establishing conclusively fundamental error meeting the standard of plain error; therefore, the court considered defendant's contention under a plain error analysis. State v. Gregory, 342 N.C. 580, 467 S.E.2d 28 (1996).

Although the issue of a trial court's failure to appoint a guardian ad litem for a father in an action to terminate parental rights was not raised by the father in his appeal of the termination order, as was required by N.C. R. App. P. 10(a), the appellate court suspended the requirements of Rule 10(a) and sua sponte considered the issue pursuant to N.C. R. App. P. 2 in order to prevent manifest injustice to the father. In re S.B., 166 N.C. App. 488, 602 S.E.2d 691, 2004 N.C. App. LEXIS 1776 (2004).

Denial of Request to Review Admission of Prior Orders. — Appellate court refused to review the admission during a termination of parental rights proceeding of the orders entered in a neglect and dependency proceeding under N.C. R. App. P. 2 as the mother never appealed the orders, despite being represented by counsel, and did not contest the admission of the orders in the termination of parental rights proceeding as required by N.C. R. App. P. 10. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

The Court of Appeals would review the merits of the state's appeal, even though it failed to set forth the legal basis on which the trial court allegedly erred in dismissing criminal charges, as the assignment informed the defendants of the issues to be raised and thus allowed them to protect their interests in assessing the sufficiency of the proposed record on appeal. State v. Baggett, 133 N.C. App. 47, 514 S.E.2d 536 (1999).

Acceptance of Brief in Spite of Purported Settlement. — Where in spite of the fact that appellee and estate purported to have settled their differences, and in spite of the fact that appellee was no longer represented by attorneys, such attorneys filed a brief opposing appellant, titled "Appellee's Brief," appellate court would use this rule to treat this brief as an amicus brief because of the extraordinary procedural posture of the case. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. denied, 331 N.C. 749, 417 S.E.2d 236 (1992).

Review in Spite of Improper Hybrid Appeal. — Where defendant's attorney improperly appealed by presenting argument on a single assignment of error and also requested that the court conduct a "full examination of the record on appeal for possible prejudicial error," the court exercised its discretion and elected to consider defendant's pro se brief pursuant to this section. State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000).

Where plaintiff in workers' compensation case, proceeding in forma pauperis, failed to present any assignments of error within the record, and neither the exceptions nor assignments of error which plaintiff relied on were set forth at the conclusion of the record on appeal, the Court of Appeals, in order to prevent any manifest injustice to plaintiff, would nonetheless review the merits of his appeal. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), appeal dismissed and cert. denied, 316 N.C. 385, 342 S.E.2d 908 (1986).

Consideration of Judgment as to Attorneys' Fees Despite Failure to Present and Argue Issue. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under G.S. 7A-32(c) or pursuant to this rule, could consider on its own initiative the question of the attorneys' fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

The trial court's failure to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance did not rise to the level of plain error. State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996).

Where denial of Rule 60(b) motion was in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21 the appeal was treated as a writ of certiorari. Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

Extension of Time to Serve Proposed Record on Appeal. — Suspension of the Rules of Appellate Procedure to allow plaintiff's appeal was not warranted, where the plaintiffs failed to serve their proposed record on appeal until 44 days after an extension granted by the trial court, and such service also was 36 days after the Court of Appeals had denied plaintiffs' motion to extend the time for service. Webb v. McKeel, 132 N.C. App. 816, 513 S.E.2d 596 (1999).

Unpreserved Issue Raised in Amicus Brief. — By choosing to assign error only to the trial court's denial of his motion to suppress, the juvenile had not raised on appeal the issue of whether a fatal variance existed between the petition and the evidence; this issue was presented by the appellate defender's N.C. R. App. P. 28(i) amicus curiae brief and, under N.C. R. App. P. 2, the appellate court considered the "fatal variance" issue. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

Appellants' appeal was dismissed where they committed numerous egregious violations of the North Carolina Rules of Appellate Procedure by the late filing of their brief and by their brief's failure to comply with N.C. R. App. P. 28, there were no exceptional circumstances, significant issues, or manifest injustices that would have been corrected by appellate review, so that there was no reason to waive their numerous violations. Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Purported assignment of error that simply stated that the appellant assigned "as error the following entry: Entry of the Order for Modification of alimony filed October 7, 2004," with no record references and no statement of legal basis for the assignment of error, did not comply with N.C. App. Proc., Rule 10; suspending the rules pursuant to N.C. App. Proc., Rule 2 would have involved the court in creating the appeal, and would not have been fair to the appellee. Broderick v. Broderick, 175 N.C. App. 501, 623 S.E.2d 806, 2006 N.C. App. LEXIS 188 (2006).

When viewed in toto, the nature and number of appellate rules violations in a husband's appellate brief, combined with the absence of any compelling justification for suspending the rules pursuant to N.C. R. App. P. 2, justified dismissal of his appeal; further, it was unnecessary to invoke Rule 2 to prevent manifest injustice to a party, or to expedite decision in the public interest. Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Appellant was not entitled to certiorari review of a trial court's interlocutory order denying its motion to dismiss for lack of subject matter jurisdiction, as it did not comply with the requirements for a petition for writ of certiorari set out in N.C. R. App. P. 21(c), and did not point to any "manifest injustice" or compelling need "to expedite decision in the public interest," as required for suspension of the requirements of Rule 21 under N.C. R. App. P. 2. Burton v. Phoenix Fabricators & Erectors, Inc., 185 N.C. App. 303, 648 S.E.2d 235, 2007 N.C. App. LEXIS 1741 (2007).

Significant Procedural Violations Render Rule's Invocation Improper. — Defendant's notice of appeal did not reference the order denying his motion to suppress as required under N.C. R. App. P. 3(d), and given the significant violations of the court's rules, invoking N.C. R. App. P. 2 to address the issue would have amounted to creating an appeal for defendant. State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007).

Non-Egregious Errors in Record Do Not Require Dismissal. In an appeal by insureds from a summary judgment granted to their homeowners' insurance carrier in an action arising out of the homeowners' policy, an insufficiently detailed index, missing pages, and errors in pagination in the record on appeal violated N.C. R. App. P. 9(a)(1)(a), but because the appellate court could determine the issues on appeal, the violations were not substantive nor egregious enough to warrant dismissal; the appellate court invoked N.C. R. App. P. 2 and addressed the merits of the appeal. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Subcontractor's violations of N.C. R. App. 28(b)(4) and (b)(6) and 10(c) were not so egregious as to require dismissal of the appeal, and the subcontractor was ordered to pay the costs of printing the appeal under N.C. R. App. P. 34(b), as N.C. R. App. P. 2 had to be applied cautiously; therefore, its application inherently was limited, State v. Hart, 644 S.E.2d 201 (2007), suggested no similar limitation on the application of N.C. R. App. P. 25 and N.C. R. App. P. 34, and there was no reason to engraft any limitation beyond the language contained within the rules. McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Manifest Injustice Not Found. — Defendant's assignment of error as to defendant's reasons for being in jail when a search was conducted failed to state legal grounds for the challenge as required by N.C. R. App. P. 10(c)(1) and was dismissed, as no "manifest injustice" for purposes of N.C. R. App. P. 2 resulted from the refusal to suspend the appellate rules. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Merits of Claim of An Incorrect Sentence Calculation Were Considered Despite Failure to Properly Set Forth Assignment of Error. — Because of the potential impact on defendant's sentence from an incorrect prior record level calculation and because of the substantial delay defendant had endured in having his appeal heard, the appellate court choose to invoke N.C. R. App. P. 2 notwithstanding defendant's failure to properly set forth his assignment of error. State v. Mullinax, 180 N.C. App. 439, 637 S.E.2d 294, 2006 N.C. App. LEXIS 2384 (2006).

Applied in Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981); Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982); State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Woodruff, 70 N.C. App. 561, 321 S.E.2d 1 (1984); State v. Sanders, 312 N.C. 318, 321 S.E.2d 836 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985); Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738 (1985); Wilkins v. Green, 76 N.C. App. 340, 332 S.E.2d 507 (1985); Sessoms v. Sessoms, 76 N.C. App. 338, 332 S.E.2d 511 (1985); In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985); N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985); State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985); State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414 (1986); Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460 (1986); State v. Hamlet, 316 N.C. 41, 340 S.E.2d 418 (1986); Carefree Carolina Communities, Inc. v. Cilley, 79 N.C. App. 742, 340 S.E.2d 529 (1986); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986); In re Johnson, 315 N.C. 388, 338 S.E.2d 104 (1986); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); State v. White, 82 N.C. App. 358, 346 S.E.2d 243 (1986); State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986); Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986); State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986); State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987); State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250 (1987); State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); Phelps v. Duke Power Co., 86 N.C. App. 455, 358 S.E.2d 89 (1987); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987); Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988); Clark v. Inn West, 89 N.C. App. 275, 365 S.E.2d 682 (1988); Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988); Truesdale v. University of N.C., 91 N.C. App. 186, 371 S.E.2d 503 (1988); In re Teague, 91 N.C. App. 242, 371 S.E.2d 510 (1988); Kimmel v. Brett, 92 N.C. App. 331, 374 S.E.2d 435 (1988); State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989); Gray v. Hoover, 94 N.C. App. 724, 381 S.E.2d 472 (1989); Tate v. Action Moving & Storage, Inc., 95 N.C. App. 541, 383 S.E.2d 229 (1989); State v. Morgan, 95 N.C. App. 639, 383 S.E.2d 452 (1989); State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989); State v. Richardson, 96 N.C. App. 270, 385 S.E.2d 194 (1989); In re Barnes, 97 N.C. App. 325, 388 S.E.2d 237 (1990); State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990); Liberty Fin. Co. v. North Augusta Computer Store, Inc., 100 N.C. App. 279, 395 S.E.2d 709 (1990); State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990); Blankley v. Martin, 101 N.C. App. 175, 398 S.E.2d 606 (1990); State v. Foster, 101 N.C. App. 153, 398 S.E.2d 664 (1990); Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104 (1991); State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991); Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176 (1991); State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991); In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995); State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995); State v. Myers, 123 N.C. App. 189, 472 S.E.2d 598 (1996); King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996); Crescent Elec. Membership Corp. v. Duke Power Co., 126 N.C. App. 344, 485 S.E.2d 312 (1997), cert. denied, 346 N.C. 545, 488 S.E.2d 798 (1997); State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684, 1999 N.C. App. LEXIS 1311 (1999); State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999); State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61, 2000 N.C. App. LEXIS 266 (2000); State v. Gray, 137 N.C. App. 345, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000); State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000); State v. Lemons, 352 N.C. 87, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000), cert. denied, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001); Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000); Lynn v. Burnette, 138 N.C. App. 435, 531 S.E.2d 275, 2000 N.C. App. LEXIS 618 (2000); State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001), cert. denied, 532

U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 (2001); Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 533 S.E.2d 501, 2000 N.C. App. LEXIS 890 (2000); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000); Lewis v. Orkand Corp., 147 N.C. App. 742, 556 S.E.2d 685, 2001 N.C. App. LEXIS 1250 (2001); State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002), cert. granted, 356 N.C. 170, 568 S.E.2d 852 (2002); In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003); State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); LaValley v. LaValley, 151 N.C. App. 290, 564 S.E.2d 913, 2002 N.C. App. LEXIS 717 (2002); Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002); State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002); In re Wilson, 153 N.C. App. 196, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002); Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004); In re Baker, 158 N.C. App. 491, 581 S.E.2d 144, 2003 N.C. App. LEXIS 1194 (2003); State v. Williams, 163 N.C. App. 353, 593 S.E.2d 123, 2004 N.C. App. LEXIS 365 (2004); State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004); In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004); State v. Brice, 167 N.C. App. 72, 604 S.E.2d 356, 2004 N.C. App. LEXIS 2054 (2004); State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889, 2004 N.C. App. LEXIS 1136 (2004); State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005); State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381, 2005 N.C. App. LEXIS 334 (2005); Howie v. Walsh, 168 N.C. App. 694, 609 S.E.2d 249, 2005 N.C. App. LEXIS 393 (2005); Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); Brown v. City of Winston-Salem, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005); In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005); In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005); State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006); State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006); State v. Holt, 181 N.C. App. 328, 639 S.E.2d 65, 2007 N.C. App. LEXIS 22 (2007); State v. Lasiter, 361 N.C. 299, 643 S.E.2d 909, 2007 N.C. LEXIS 408 (2007); WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 644 S.E.2d 245, 2007 N.C. App. LEXIS 1039 (2007); In re Z.J.T.B., 183 N.C. App. 380, 645 S.E.2d 206, 2007 N.C. App. LEXIS 1161 (2007); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007); State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007); State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008); Mason v. Dwinnell, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 908 (May 6, 2008); State v. McAllister, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 832 (May 6, 2008).

Quoted in Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993); Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997); Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222, 2001 N.C. App. LEXIS 14 (2001).

Stated in Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981); In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983); Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999); Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815, 2000 N.C. App. LEXIS 812 (2000); State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 142 N.C. App. 127, 542 S.E.2d 247, 2001 N.C. App. LEXIS 39 (2001); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001); State v. Hardison, 143 N.C. App. 114, 545 S.E.2d 233, 2001 N.C. App. LEXIS 222 (2001); Thigpen v. Ngo, 143 N.C. App. 223, 552 S.E.2d 641, 2001 N.C. App. LEXIS 274 (2001), cert. granted, 353 N.C. 734, 552 S.E.2d 635 (2001)

Cited in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Hargrove, 60 N.C. App. 174, 298 S.E.2d 402 (1982); State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983); Plymouth Fertilizer Co. v. Selby, 67 N.C. App. 681, 313 S.E.2d 885 (1984); Stanley v. Nationwide Mut. Ins. Co., 71 N.C. App. 266, 321 S.E.2d 920 (1984); State v. Reilly, 313 N.C. 499, 329 S.E.2d 381 (1985); Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986); Ellis v. Williams, 319 N.C. 413, 355 S.E.2d 479 (1987); State v. Reid, 322 N.C. 309, 367 S.E.2d 672 (1988); Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988); State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989); Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990); In re North Carolina Hazardous Waste Mgt. Comm'n, 327 N.C. 632, 397 S.E.2d 76 (1990); State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991); State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991); State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992); District Bd. of Metro. Sewerage Dist. v. Blue Ridge Plating Co., 110 N.C. App. 386, 430 S.E.2d 282 (1993); Bryant v. Thalhimer Bros., 113 N.C. App. 1, 437 S.E.2d 519 (1993); Barbee v. Atlantic Marine Sales & Serv., Inc., 113 N.C. App. 80, 437 S.E.2d 682 (1993); Adams v. Jones, 114 N.C.

App. 256, 441 S.E.2d 699 (1994); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994); State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (1994); Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994); Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17 (1994); Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796 (1994); State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995); Ritter v. Department of Human Resources, 118 N.C. App. 564, 455 S.E.2d 901 (1995); Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995); McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995); Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996); Adams v. Kelly Springfield Tire Co., 123 N.C. App. 681, 474 S.E.2d 793 (1996); Edwards v. Hardy, 126 N.C. App. 69, 483 S.E.2d 724 (1997); Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997); Liberty Mut. Ins. Co. v. Ditillo, 125 N.C. App. 701, 482 S.E.2d 743 (1997), rev'd in part, 348 N.C. 247, 499 S.E.2d 764 (1998); Strader v. Sunstates Corp., 129 N.C. App. 562, 500 S.E.2d 752 (1998), cert. denied, 349 N.C. 240, 514 S.E.2d 274 (1998); PHC, Inc. v. North Carolina Farm Bureau Mut. Ins. Co., 129 N.C. App. 801, 501 S.E.2d 701 (1998), cert. denied, 348 N.C. 694, 511 S.E.2d 648 (1998); Barber v. Constien, 130 N.C. App. 380, 502 S.E.2d 912 (1998); Scott v. United Carolina Bank, 130 N.C. App. 426, 503 S.E.2d 149 (1998); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); Branch Banking & Trust Co. v. Tucker, 131 N.C. App. 132, 505 S.E.2d 179 (1998); Darryl Burke Chevrolet, Inc. v. Aikens, 131 N.C. App. 31, 505 S.E.2d 581 (1998), aff'd, 350 N.C. 83, 511 S.E.2d 639 (1999); Terrell v. Lawyers Mut. Liab. Ins., 131 N.C. App. 655, 507 S.E.2d 923 (1998); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999); State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999); Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999); Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999); Vogl v. LVD Corp., 132 N.C. App. 797, 514 S.E.2d 113 (1999); State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000); State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000), cert. denied, 532 U.S. 964, 121 S. Ct. 1499, 149 L. Ed. 2d 384 (2001); State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000); Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001); Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668, 2001 N.C. App. LEXIS 97, cert. denied, 353 N.C. 450, 548 S.E.2d 524 (2001); Zenobile v. McKecuen, 144 N.C. App. 104, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001), cert. denied, 354 N.C. 75, 553 S.E.2d 214 (2001); Groves v. Community Hous. Corp. of Haywood County, 144 N.C. App. 79, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); Harllee v. Harllee, 151 N.C. App. 40, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002); State v. Dudley, 151 N.C. App. 711, 566 S.E.2d 843, 2002 N.C. App. LEXIS 888 (2002); Anthony v. City of Shelby, 152 N.C. App. 144, 567 S.E.2d 222, 2002 N.C. App. LEXIS 904 (2002); State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262, 2002 N.C. App. LEXIS 1170 (2002); State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002); Alford v. Lowery, 154 N.C. App. 486, 573 S.E.2d 543, 2002 N.C. App. LEXIS 1459 (2002); State v. Hinton, 155 N.C. App. 561, 573 S.E.2d 609, 2002 N.C. App. LEXIS 1578 (2002); State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002); State v. Hatcher, 156 N.C. App. 391, 576 S.E.2d 704, 2003 N.C. App. LEXIS 107 (2003); State v. Holden, 160 N.C. App. 503, 586 S.E.2d 513, 2003 N.C. App. LEXIS 1818 (2003), aff'd, 359 N.C. 60, 602 S.E.2d 360 (2004); Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004); Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004); State v. Moore, 167 N.C. App. 495, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); In re D.S.C., 168 N.C. App. 168, 607 S.E.2d 43, 2005 N.C. App. LEXIS 172 (2005); State v. Hames, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005); Viar v. N.C. DOT, 359 N.C. 400, 610 S.E.2d 360, 2005 N.C. LEXIS 360 (2005); State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005), cert. dismissed, — N.C. —, 630 S.E.2d 447 (2006), cert. denied, — N.C. —, 630 S.E.2d 447 (2006); State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006); State v. Love, 177 N.C. App. 614, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006); State v. Locklear, 180 N.C. App. 115, 636 S.E.2d 284, 2006 N.C. App. LEXIS 2248 (2006); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. Denny, 361 N.C. 662, 652 S.E.2d 212, 2007 N.C. LEXIS 1095 (2007); State v. Coleman, — N.C. App. —, 655 S.E.2d 450, 2008 N.C. App. LEXIS 67 (2008); State v. Lee, — N.C. App. —, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (Apr. 1, 2008); Frey v. Best, — N.C. App. —, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008); Odom v. Clark, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1554 (Aug. 19, 2008).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3. Appeal in civil cases — How and when taken.

(a) *Filing the notice of appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) Juvenile matters, G.S. 7B-2602.

(2) Appeals pursuant to G.S. 7B-1001 shall be subject to the provisions of N.C.R. App. P. 3A.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

(c) *Time for taking appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C.R. App. 27(b) and N.C.R. Civ. P. 6(e) shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of notice of appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of notice of appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules. (Adopted June 13, 1975; Amended April 14, 1976; Amended December 8, 1988 — 3(a), (b), (c), (d) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended June 8, 1989 — 3(b) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 28, 1994 — 3(c) — effective October 1, 1994; Amended March 6, 1997 — 3(c) — effective upon adoption March 6, 1997; Amended October 18, 2001 — 3(c) — effective October 31, 2001; Amended May 1, 2003 — 3(b); Amended May 6, 2004 — 3(b) — effective May 12, 2004; Amended April 27, 2006 — 3(b) — effective May 1, 2006, and applicable to cases filed on or after that date.)

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Construction with Other Rules. — Construing Rules 3, 27(c) and 21(a)(1) together, the court concluded that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Anderson v. Hollifield, 345 N.C. 480, 480 S.E.2d 661 (1997).

Subsection (a) is almost identical to G.S. 1-279(a). Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

This rule is jurisdictional, and if the requirements of this rule are not complied with, the appeal must be dismissed. Currin-Dillehay Bldg. Supply, Inc. v. Frazier, 100 N.C. App. 188, 394 S.E.2d 683, appeal dismissed and cert. denied, 327 N.C. 633, 399 S.E.2d 326 (1990).

This rule, except as qualified by statute, is jurisdictional and cannot be waived. Johnson & Laughlin, Inc. v. Hostetler, 101 N.C. App. 543, 400 S.E.2d 80 (1991); Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994), appeal dismissed, 339 N.C. 593, 453 S.E.2d 162 (1995).

The provisions of this Rule are jurisdictional, and failure to follow the requirements require dismissal of an appeal. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Oral notice of appeal to the trial court is insufficient to confer jurisdiction on the Court of Appeals, since the requirements of this rule are jurisdictional. Melvin v. St. Louis, 132 N.C. App. 42, 510 S.E.2d 177, 1999 N.C. App. LEXIS 7 (1999), cert. denied, 350 N.C. 309, 534 S.E.2d 594 (1999).

Mother's Notice of Appeal, filed 42 days after the trial court's order granting her motion for additional findings, was untimely as to that order, and the appellate court was therefore without jurisdiction to address the mother's challenge of that order. Sillery v. Sillery, 168 N.C. App. 231, 606 S.E.2d 749, 2005 N.C. App. LEXIS 167 (2005).

Appellate court lacked jurisdiction to consider an appeal on the merits of a will contest under N.C. R. App. P. 3(a) as caveator beneficiary did not file a notice of appeal of the judgment on the merits until over two months after the judgment was entered; there was appellate jurisdiction over an appeal of a judgment as to attorneys fees and costs as a timely notice of appeal was filed as to those issues. In re Will of Harts, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1491 (Aug. 5, 2008).

The provisions of G.S. 1-279 and this rule are jurisdictional, and unless these statutes are complied with, the appellate court acquires no jurisdiction of the appeal and it must be dismissed. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both G.S. 1-279 and this rule and N.C.R.A.P., Rule 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Failure to give timely notice of appeal in compliance with G.S. 1-279 and this rule, is jurisdictional, and an untimely attempt to appeal must be dismissed. Booth v. Utica Mut. Ins. Co., 308 N.C. 187, 301 S.E.2d 98 (1983); Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987).

G.S. 1-279 and this rule require both filing and service of notice of appeal within 10 (now 30) days after entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Where the appeal is taken more than 10 (now 30) days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in this rule and in G.S. 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

Subject Matter Jurisdiction. — Because there was no civil judgment in the record ordering defendant in a criminal case to pay attorney fees, the North Carolina Court of Appeals had no subject matter jurisdiction over the issue pursuant to N.C. R. App. P. 3(a) and N.C. R. App. P. 9(a)(1)(h). State v. Jacobs, 361 N.C. 565, 648 S.E.2d 841, 2007 N.C. LEXIS 814 (2007).

Rule set the time at thirty days from entry of judgment, or within thirty days of the judgment's service where service was not perfected within three days from entry of judgment as required by G.S. 1A-1, N.C. R. Civ. P. 58, for filing and serving a notice of appeal; and failure to serve the notice of appeal at or before the time of filing was not a jurisdictional requirement that automatically required dismissal. Henlajon, Inc. v. Branch Hwys., Inc., 149 N.C. App. 329, 560 S.E.2d 598, 2002 N.C. App. LEXIS 187 (2002).

This rule affords no avenue of appeal to either entities or persons who are nonparties to a civil action. Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000).

Aggrieved Party. — Consumer was not entitled by law to file an appeal under N.C.R. App. P.3(a) because he lacked standing to appeal a North Carolina court's refusal to grant full faith and credit to an Illinois judge's settlement of a class action against a merchant where the consumer was not a "party aggrieved" by the denial. The consumer presumably received his settlement from the merchant in the Illinois case and was in compliance with that judge's order directing him to dismiss his North Carolina lawsuit; his rights were not directly or injuriously affected merely because the merchant remained open to claims from other consumers. Moody v. Sears Roebuck & Co., — N.C. App. —, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

The Court of Appeals is without authority to entertain appeal of a case which lacks entry of judgment. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Trial court's failure to enter an order that complied with G.S. 7B-807(b) and 7B-905(a) can only be addressed by filing a petition for a writ of mandamus pursuant to N.C. R. App. P. 22(a). The error cannot be addressed by filing an appeal; an appeal cannot be had without the entry of a judgment as contemplated by N.C. R. App. P. 3(c)(1). In re T.H.T., — N.C. —, — S.E.2d —, 2008 N.C. LEXIS 686 (Aug. 27, 2008).

Announcing of the court's decision in open

court constitutes "entry" for purposes of determining when notice of appeal must be filed, even if the formal written order is not written until a later date, since G.S. 1A-1, Rule 58, provides that the rendering of judgment in open court constitutes entry of judgment for purposes of those rules. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Rendition of judgment occurs when the court announces its decision in open court. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Announcement of judgment in open court merely constitutes "rendering" of judgment, not entry of judgment. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Notation as Entry of Judgment. — Where judgment was rendered in open court, and nothing in the record suggested that it was necessary for the trial judge to direct notations in the minutes or that the case was governed by paragraph two of G.S. 1A-1, Rule 58, where the jury verdict clearly awarded a sum certain for $50,000.00, providing the parties with oral notice of judgment, and where the clerk made the notation "jury verdict" in the official minutes of court at such time, such notation did not constitute entry of judgment. Use of the word "such" in Rule 58 imports the recording of sufficient detail regarding the judgment to give notice of its essential character and content. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Stipulation Did Not Supplant Subsection (d) Requirements. — Parties' stipulation to a notice of appeal could not supplant subsection (d) requirements to confer jurisdiction on the reviewing court. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

Extension Did Not Apply. — The 10-day extension provided by this rule did not apply, where plaintiff filed her motion for appeal of the denial of her motion for sanctions within 10 days of the defendant's appeal of the denial of his motion for sanctions, but more than 30 days after denial of her motion, since the two motions were independent of each other. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

Subsection (d) Requirements Fairly Inferred. — Notices of appeal would be considered to be appeals from the original order of the Utilities Commission, even though joint appellants' notices stated that they were appealing from denial of their petition for reconsideration, a non-appealable order, where it could be fairly inferred that they intended to appeal from the original orders and the appellee was not misled. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Defect in plaintiffs' notice of appeal, which designated the state's highest court as "the court to which appeal (was) taken," did not deprive the intermediate court of jurisdiction as the intent to appeal to the intermediate court could be fairly inferred from the notice of appeal and the notice achieved the functional equivalent of such an appeal; further, defendants were not misled by the mistake and failures to comply with N.C. R. App. P. 3(d) were not always fatal to an appeal. Stephenson v. Bartlett, 177 N.C. App. 239, 628 S.E.2d 442, 2006 N.C. App. LEXIS 870 (2006).

Extended Response Time Only for Other Parties to Same Appeal. — This rule merely contemplates an additional, extended time period for a response only from other parties to that same appeal. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

No Certificate of Service. — When the father in a child support case failed to include in the record a certificate of service of the notice of appeal, this was a violation of N.C. R. App. P. 3 and N.C. R. App. P. 26, and the appeal was dismissed; the mother had not waived the father's failure to include the proof of service, and such a failure was not inconsequential. Ribble v. Ribble, 180 N.C. App. 341, 637 S.E.2d 239, 2006 N.C. App. LEXIS 2293 (2006).

Father's appeal of an order adjudicating his son as neglected and his daughter as abused and neglected was dismissed as the father failed to attach to the notice of appeal a certificate of service acknowledging service of all parties to the action as required by N.C. R. App. P. 3 and N.C. R. App. P. 26; a department of social services and a guardian ad litem did not waive the father's failure to include proof of service of his notice of appeal. In re C.T., 182 N.C. App. 166, 641 S.E.2d 414, 2007 N.C. App. LEXIS 501 (2007).

Where Oral Motions Considered, Plaintiffs Not Entitled to Make Later Written Motions to Toll Period for Filing Appeal. — Plaintiffs who entered their written notice of appeal within 10 days after the entry of a June 6 order denying their April 22 written motions for judgment notwithstanding the verdict and for a new trial were not entitled to make these written motions or to a hearing on these motions, because they had previously made oral motions for judgment notwithstanding the verdict and for a new trial in open court on April 14, 1988, and were afforded an opportunity to be heard, which they declined. Their G.S. 1A-1, Rule 50(b) and Rule 59 motions having been denied in open court at that time, plaintiffs were not entitled to file written motions requesting the same relief and thereby toll the period for filing written notice of appeal. Since their June 13, 1988 written notice of appeal was not filed within 10 days of entry of judgment, which by the terms of the judgment was April 14, 1988, their appeal was untimely. Middleton v. Middleton, 98 N.C. App. 217, 390 S.E.2d 453, cert. denied, 327 N.C. 637, 399 S.E.2d 123 (1990).

Withdrawal of G.S. 1A-1, Rule 59 motion did not entitle defendants to 10 days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of section (c) of this rule, and circumvent G.S. 1A-1, Rule 58, i.e., to give all interested parties a definite fixed time of a judicial determination that they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Motion under G.S. 1A-1, Rule 59 to amend judgment, filed 10 days after judgment by defendant, tolled the time for filing and serving a cross-notice of appeal until entry of an order on the motion pursuant to section (c) of this rule. However, where defendants later withdrew their Rule 59 motion, the 10 (now 30) day time limit to give notice of appeal under section (c) was not tolled, because there was never a judicial determination on defendants' motion. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Appeal may be taken by giving oral notice of appeal at trial, but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

An appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

However, where defendants' G.S. 1A-1, Rule 12(b)(6) defense was converted and merged automatically into their G.S. 1A-1, Rule 56 motion, plaintiff's failure to mention specifically in her notice of appeal that portion of the trial court's order sustaining defendant's defense under Rule 12(b)(6) did not deprive the Court of Appeals of jurisdiction to hear plaintiff's appeal. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Failure to Appeal Underlying Judgment. — Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for appellate review. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

Order granting a property owner summary judgment on an individual's claim seeking reconveyance of property was not properly before the appellate court where the individual's notice of appeal only referenced the order denying her G.S. 1A-1-59 motion and in the absence of proper notice of appeal, the appellate court lacked jurisdictio to review the order of summary judgment. Sellers v. Ochs, 180 N.C. App. 332, 638 S.E.2d 1, 2006 N.C. App. LEXIS 2305 (2006).

Where an initial custody order awarded custody of a child to the paternal grandmother and the mother's motion to modify custody was denied, the appellate court could not consider the mother's challenge to the initial custody order because the mother's notice of appeal from the denial of the motion to modify made no reference to the initial order and did not properly present the underlying judgment for review. Warner v. Brickhouse, — N.C. App. —, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (Apr. 1, 2008).

Subsection (c) of this rule tolls the time for giving notice of appeal when a timely motion for new trial has been made. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

Notice of appeal which covered only judgments dismissing appellants' complaints and enjoining them from violating an ordinance did not give the Court of Appeals jurisdiction to consider the denial of their motions to dismiss and to amend replies. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

Filing a JNOV motion tolls running of the time for appeal of a judgment which has been entered. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Only a "party aggrieved" may appeal from an order or judgment of the trial division. An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

"Aggrieved Party" Entitled to Appeal; Nonmovant Status Irrelevant. — Where the jury announced its verdict in open court, it "rendered judgment" according to subsection (a) of this rule and G.S. 1A-1, Rule 58, and oral notice of appeal was a proper procedure. As a party against whom the jury rendered the verdict, plaintiff was an "aggrieved party" who was entitled by law to orally appeal from the judgment, and its nonmovant status was irrelevant. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128, cert. denied, 327 N.C. 144, 393 S.E.2d 909 (1990).

Executor as Aggrieved Party. — Executor possessed standing to appeal from an order denying the probate of a will because, as the named executor under that will, the executor was an aggrieved party under N.C. R. App. P. 3(a). In re Will of Jones, — N.C. App. —, 655 S.E.2d 407, 2008 N.C. App. LEXIS 93 (2008).

Letter to Clerk Not Written Notice of Appeal. — In an action challenging a divorce judgment where the defendant wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, the letter was not a written notice of appeal of a divorce judgment showing that the defendant sought a review by the Court of Appeals but was a G.S. 1A-1, Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Matters Not Referenced In Notice of Appeal. — When a notice of appeal referenced only a finding that defendants were in civil contempt, defendants had appealed only from the civil contempt determination, not from matters regarding their summary ejectment trial. Carter v. Hill, — N.C. App. —, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

Improper Appeal Criticized, But Acceptable Where Actual Notice Was Had. — While notice of appeal of a judgment rendered out of session was required by section (b) of this rule to be filed with the clerk and served on the other parties, steps taken by appellant in an attempt to perfect its appeal were minimally acceptable where the respondents were in fact put on actual notice of applicant's intent to appeal from any adverse decision where applicant stated in open court that it would appeal if it lost, and the applicant in open court requested that the proposed judgment to be submitted by respondents contain appeal entries so that applicant's notice of appeal would be perfected if the court should sign the proposed judgment; this procedure should not be repeated, however, as this rule clearly states the proper procedures to be strictly followed. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

When Time Begins to Run. — The rendering of judgment establishes the point from which a party may appeal under this rule, and the entry of judgment marks the beginning of the period during which a party must file written notice of appeal. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Assault victims' appeal of dismissal of their negligence cause of action against a county education board was dismissed as untimely because the victims appealed the dismissal of their claim and then voluntarily dismissed their other claims while that appeal was ongoing; therefore, when the appellate court dismissed the victims' first appeal as an interlocutory appeal, the victims failed to timely appeal that claim on their second appeal because the voluntary dismissal of their remaining claims had the effect of making the trial court's grant of partial summary judgment a final order. Stein v. Asheville City Bd. of Educ., 168 N.C. App. 243, 608 S.E.2d 80, 2005 N.C. App. LEXIS 263 (2005), rev'd on other grounds, 360 N.C. 321, 626 S.E.2d 263 (2006).

Where neither a skier's parents nor the injured party filed a notice of appeal within the 30 days following the entry of a judgment granting summary judgment to a church youth director and church on the skier's parents' third-party complaint against them for indemnification or contribution, the appellate court had to grant the church youth director and church's motion to dismiss the appeal that the injured party filed regarding the ruling on the third-party complaint since the appellate court did not have jurisdiction to consider the arguments raised in the appeal. Frank v. Funkhouser, 169 N.C. App. 108, 609 S.E.2d 788, 2005 N.C. App. LEXIS 515 (2005).

Plaintiffs' appeal from a trial court order that granted summary judgment to them permitting them to review the financial records of an incorporated homeowners' association and others but that denied their requests for judgments declaring that they could attend board meetings and non-owners could not be on association committees was dismissed as untimely because the notice of appeal was not filed within 30 days after the order was entered; the order resolved all issues in the complaint and counterclaim and was therefore final, not interlocutory. Rosenstadt v. Queens Towers Homeowners' Ass'n, 177 N.C. App. 273, 628 S.E.2d 431, 2006 N.C. App. LEXIS 844 (2006).

Time for Appeals in Juvenile Matters. — N.C. R. App. P. 3(b) provides that the time to take appeals in juvenile matters is governed by G.S. 7A-666, and appeals in termination of parental rights cases are governed by G.S. 7A-289.34, but both referenced sections have been repealed and replaced by other provisions, and appeals in child custody cases are now governed by G.S. 7B-1001, and appeals in termination of parental rights cases are governed by G.S. 7B-1113. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Though clerk's notation in minutes of court is ordinarily date from which time for notice of appeal under subsection (c) of this rule runs, where the trial judge directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, the clerk should not have noted an entry of judgment on the date of the hearing. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

When Notice of Appeal Is Timely. — Notice of appeal is timely if filed after judgment is rendered in court, and before the expiration of the 30-day period after judgment is entered. The date of rendition and the date of entry are therefore critical to a determination of whether an appeal is timely. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Notice of appeal must be served on the opposing party either before the notice is filed or on the same day the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

In calculating whether notice of appeal is timely given, the 10th (now 30th) day is not considered if it is a Saturday, Sunday, or legal holiday. In such case, the 10 (now 30) day period runs at the end of the next day that is not a Saturday, Sunday, or legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Notice Held Timely. — Notice of appeal filed on July 5, 1983, was timely, where the 10th day fell on Sunday, July 3, 1983, and the next day, July 4, 1983, was a legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Defendant's notice of appeal of a personal injury verdict was held timely despite defendant's initial failure to properly file a notice of appeal with the Clerk of Superior Court within 30 days from the date of the judgement as required by N.C.R. App. P. 3(a); although defendant had initially improperly filed the notice of appeal with the Court of Appeals and did not correct the error by properly filing with the Clerk of Superior Court until after the 30-day deadline had passed, plaintiff's failure to fully comply with the service requirements of Rule 58 of the North Carolina Rules of Civil Procedure (G.S. 1A-1, Rule 58) by timely filing a certificate of service tolled the running of the time for filing and serving a notice of appeal pursuant to N.C.R. App. P. 3. Davis v. Kelly, 147 N.C. App. 102, 554 S.E.2d 402, 2001 N.C. App. LEXIS 1072 (2001).

Oral Notice of Appeal Held Timely. — Although a mother's oral notice of appeal in a termination case was timely under N.C. R. App. P. 3, and thus the trial court used invalid grounds for its order dismissing the mother's appeal, because valid grounds existed on which the trial court's order could have been based, N.C. R. App. P. 25(a) authorized the trial court's actions, and the error was harmless. In re J.L., 184 N.C. App. 750, 646 S.E.2d 861, 2007 N.C. App. LEXIS 1598 (2007).

Tolling of Time for Appeal. — In order for the exception to the 30-day requirement under this rule to have any effect, when a party makes a motion enumerated in the rule, the opposing party's time for appeal is tolled. If the motion is withdrawn, the opposing party has 30 days from the withdrawal to file an appeal. Landingham Plumbing & Heating of N.C., Inc. v. Funnell, 102 N.C. App. 814, 403 S.E.2d 604 (1991).

Time for Filing Not Tolled by Motion for Attorney Fees. — The defendant's motion for attorney fees, which was filed several days after judgment on the verdict, was a separate proceeding that did not toll the time in which the plaintiff had to give notice of appeal, and thus, plaintiff's appeal was untimely, where it was filed more than a year after entry of judgment. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

Time for Notice of Appeal Not Tolled by Improper Motion to Alter or Amend. — Trial court properly held that a motion to alter or amend violated G.S. 1A-1-7(b)(1) and was not a proper G.S. 1A-1-59(e) motion because the motion did not make reference to any of the grounds of that rule, did not use any of the language from the rule which gave notice of reliance on any of those grounds, and did not reveal the basis of the motion in terms of that rule; further, because the time for filing an appeal was not tolled by the improper G.S. 1A-1-59 motion, the notice of appeal was not a timely appeal of the order dismissing the petition. N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp., 183 N.C. App. 466, 645 S.E.2d 105, 2007 N.C. App. LEXIS 1105 (2007).

Notice of Appeal Improperly Filed. — When a homeowner's association fined homeowners for doing construction which the association's architectural committee disapproved, but the trial court which granted the association judgment for the amount of these fines did not award the association reasonable attorney fees under G.S. 47F-3-116(e), an appellate court could not review the trial court's decision because, when the association sought to file a cross-appeal after the homeowners appealed the trial court's judgment on other matters, the association did not file a notice of the association's cross-appeal with the trial court, as required by N.C. R. App. P. 3(a), so the appellate court had no jurisdiction over the cross-appeal. Reidy v. Whitehart Ass'n, 185 N.C. App. 76, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Applicability of Tolling Provision to Second Motion Under G.S. 1A-1-59. — The plaintiff's appeal was timely filed under the tolling provision of this rule, where the plaintiff filed a timely second motion asserting four additional grounds for a new trial after the first motion was orally denied at the end of a medical malpractice trial, and the plaintiff's appeal was filed within 30 days of the date the court entered an order ruling on the second motion. Sherrod v. Nash Gen. Hosp., 348 N.C. 526, 500 S.E.2d 708 (1998).

Tolling Provisions Not Applicable. — Plaintiff who filed her motion for a new trial before the entry of the judgment was not entitled to benefit from the tolling provisions of this rule; plaintiff's oral motions were not relevant to the issue of whether her notice of appeal was timely filed. Stevens v. Guzman, 140 N.C. App. 780, 538 S.E.2d 590, 2000 N.C. App. LEXIS 1273 (2000), cert. granted, 353 N.C. 397, 547 S.E.2d 437 (2001), review dismissed, 354 N.C. 214, 552 S.E.2d 140 (2001).

Untimely Appeal Dismissed. — Notices of appeal filed more than five months after the entry of a contempt order and a child custody order were untimely, requiring dismissal of the appeal. Row v. Row, 185 N.C. App. 450, 650 S.E.2d 1, 2007 N.C. App. LEXIS 1803 (2007).

Motion to Dismiss Appeal Denied. — Court denied an estate administrator's motion to dismiss the healthcare providers' appeal from a denial of their motion to dismiss a wrongful death complaint because, even if the notice of appeal was untimely filed, the healthcare providers petitioned for a writ of certiorari that was granted. Reid v. Cole, — N.C. App. —, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

Trial court did not err in concluding the date indicating the date of service on the appellant's notice of appeal was sufficient to withstand the appellees' motion to dismiss based on the later date on the envelopes for the notice of appeal so that the trial court could find that the appeal was timely filed within the allotted time limit. Sellers v. Morton, — N.C. App. —, 661 S.E.2d 915, 2008 N.C. App. LEXIS 1167 (June 17, 2008).

Notice of Appeal Insufficient. — Notice of appeal, even when liberally construed, was not sufficient to give the court jurisdiction to review order denying plaintiffs' Rule 59 motion and instead presented for review only the underlying judgment entered in accordance with the verdict. Chee v. Estes, 117 N.C. App. 450, 451 S.E.2d 349 (1994).

In plaintiff grading company's action for breach or contract and to enforce a lien, where the company's arguments on appeal all related to an order which granted defendant church's summary judgment motion, but the company only gave notice of appeal as to a later order which denied the company's motion for a new trial or for relief from judgment, the arguments pertaining to the earlier order for summary judgment were not properly before the appellate court and the appeal was dismissed. Atchley Grading Co. v. W. Cabarrus Church, 148 N.C. App. 211, 557 S.E.2d 188, 2001 N.C. App. LEXIS 1286 (2001).

Appellate court did not consider the cross-appellant's appeal because the court did not acquire jurisdiction of the appeal since the notice of appeal was insufficient; the notice of appeal only stated that cross-appellant was appealing from the trial court's grant of a summary judgment, and did not indicate whether the cross-appellant wished to appeal from the trial court's denial of his request for special instructions or a peremptory instruction. Monin v. Peerless Ins. Co., 159 N.C. App. 334, 583 S.E.2d 393, 2003 N.C. App. LEXIS 1522 (2003).

Where neither the injured party nor a skier's parents filed a notice of appeal that challenged the trial court's summary judgment grant to a church youth director and the church on the skier's parents' third-party complaint for indemnification or contribution against them, the appellate court did not acquire jurisdiction over that part of the case; thus, it had to grant the church youth director and church's motion to dismiss the injured skier's appeal of the granting of summary judgment in their favor on the third-party complaint. Frank v. Funkhouser, 169 N.C. App. 108, 609 S.E.2d 788, 2005 N.C. App. LEXIS 515 (2005).

When, in a dependency proceeding, a trial court orally granted foster parents' oral motion to intervene, a department of social services could not appeal the granting of that oral motion because: (1) its notice of appeal did not reference the intervention order, as required by N.C. App. R. 3(d); and (2) once the trial court entered a written order indicating its grant of the foster parents' request, after the department had filed its notice of appeal, the department did not file another notice of appeal regarding the written order. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Where a father failed to include in his notice of appeal an order granting a continuance in a child abuse proceeding brought against him, the appellate court dismissed the assignment of error as to that issue pursuant to N.C. R. App. P. 3(d). In re C.B., 180 N.C. App. 221, 636 S.E.2d 336, 2006 N.C. App. LEXIS 2237 (2006).

Defendant's notice of appeal did not reference the order denying his motion to suppress as required under N.C. R. App. P. 3(d), and given the significant violations of the court's rules, invoking N.C. R. App. P. 2 to address the issue would have amounted to creating an appeal for defendant. State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007).

When defendant, a juvenile, designated error in his notice of appeal only as to an adjudication order, not as to the disposition order, this violation of N.C. R. App. P. 3(d) was a jurisdictional defect that could not be waived. Thus, the court did not have jurisdiction to review the disposition order. In re A.V., — N.C. App. —, 654 S.E.2d 811, 2008 N.C. App. LEXIS 80 (2008).

Creditor's notice of appeal was insufficient and required dismissal of the appeal where the creditor appealed from the denial of the creditor's motion in aid of enforcement of execution. The notice of appeal (1) purported to be bringing the appeal pursuant to N.C. R. App. P. 4 governing criminal appeals when no criminal appeal was involved, (2) did not designate the court to which the appeal was taken as required by N.C. R. App. P. 3(d), and (3) did not contain a certificate of service appearing on or affixed to the N.C. R. App. P. 3 notice of appeal in the record on appeal as required by N.C. R. App. P. 26(d). McQuillin v. Perez, — N.C. App. —, 657 S.E.2d 924, 2008 N.C. App. LEXIS 532 (Mar. 18, 2008).

Because a notice of appeal was filed prior to the entry of a final order, it could not reference that subsequent order. The appealing party was, therefore, required to file another notice of appeal regarding that order under N.C. R. App. P. 3(d). Mason v. Dwinnell, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 908 (May 6, 2008).

Failure to Give Notice of Appeal. — Where, in notice of appeal, defendant designated only the order denying the motion for JNOV, but did not give notice of appeal from the judgment itself, the notice of appeal failed to properly present the underlying judgment for the court's review. Boger v. Gatton, 123 N.C. App. 635, 473 S.E.2d 672 (1996).

Appellate court refused to consider a condominium association's claim that the trial court erred when it taxed the association with the costs of an action it filed against a subcontractor, seeking recovery of costs it incurred to repair two buildings that were damaged during a rainstorm, because the association failed to file a notice of appeal from the trial court's order taxing costs to the association. Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004).

Appellate court was without jurisdiction to hear a father's appeal of a termination of parental rights case under circumstances in which the father failed to satisfy the jurisdictional requirement of filing a notice of appeal and including the same in the record on appeal. In re Me.B., 181 N.C. App. 597, 640 S.E.2d 407, 2007 N.C. App. LEXIS 364 (2007).

Where the record on appeal did not show that the town and town adjustment board's purported notice of appeal was filed with the county clerk of the trial court, the purported appeal did not comply with N.C. R. App. P. 3 and had to be dismissed. Blevins v. Town of W. Jefferson, — N.C. App. —, 643 S.E.2d 465, 2007 N.C. App. LEXIS 803 (2007).

In a termination of parental rights proceeding, a father was not entitled to a writ of certiorari because he failed to serve a copy of the notice of appeal on a county department of social services as required under N.C. R. App. P. 3 and N.C. R. App. P. 26, and the provisions which would permit review under N.C. R. App. P. 21(a)(1) did not apply. In re A.C., — N.C. App. —, 643 S.E.2d 470, 2007 N.C. App. LEXIS 747 (2007).

Appellate court lacked jurisdiction to review an owner's assigned error to the trial court's orders granting summary judgment in favor of two sets of competitors as to the owner's claim of unfair and deceptive trade practices under N.C. R. App. 3(a), as the record contained no notice of appeal that designated those orders. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Civil judgments entered against defendant in defendant's criminal case to recover attorney and attorney appointment fees had to be appealed according to N.C. R. App. P. 3(a). Although defendant raised an issue on appeal regarding the judgments, defendant did not file a notice of appeal with the clerk of the trial court and timely serve copies thereof upon all other parties; thus, the appellate court was unable to review defendant's contention on appeal. State v. Smith, — N.C. App. —, 656 S.E.2d 695, 2008 N.C. App. LEXIS 256 (2008).

Motion to Appeal in Forma Pauperis. — The late filing of appeal entries had no bearing on the question of the requirement that a motion to appeal in forma pauperis be made within 10 (now 30) days after the expiration of the session at which judgment is rendered; appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Review of Intermediate Order. — On appeal of resale of land being foreclosed, Court of Appeals was not barred from considering validity of order withdrawing an upset bid and directing a resale of the foreclosed property, merely because the appellants did not appeal from it within the time required by this rule, as G.S. 1-278 permits the Court, incident to an appeal from a final judgment or order, to review intermediate orders "involving the merits and necessarily affecting the judgment," and the order striking the upset bid and requiring a resale was such an order. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

In a termination of parental rights case, even though a notice of appeal did not comply with G.S. 7B-1113 and N.C. R. App. P. 3, the court treated the petition as a request for a writ of certiorari because a mistake regarding the order appealed from was merely a scrivener's error. In re I.S., 170 N.C. App. 78, 611 S.E.2d 467, 2005 N.C. App. LEXIS 888 (2005).

Failure to Appeal Earlier Order. — Because a daughter did not timely file a notice of appeal from the trial court's earlier order dismissing an earlier appeal, based on the lack of jurisdiction to review or vacate an ex parte order of commissions and approval of final accounts, the appellate court was without jurisdiction to review those findings and conclusions. In re Estate of Rand, — N.C. App. —, 645 S.E.2d 174, 2007 N.C. App. LEXIS 1091 (2007).

While protective order did not deny plaintiff access to certain evidence, it did not resolve any substantive legal issues related to his negligence claim, nor did it deny him his right to pursue his negligence claim, or to prove his negligence claim through introduction of other evidence and examination of witnesses; therefore, the protective order did not involve the merits and necessarily affect the judgment. The court lacked jurisdiction under either N.C. R. App. P. 3(d) or G.S. 1-278 to consider whether the trial court erred by granting defendants' motion for a protective order. Yorke v. Novant Health, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1620 (Sept. 2, 2008).

Applied in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Harrington v. Harrington, 38 N.C. App. 610, 248 S.E.2d 460 (1978); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Hamlin v. Austin, 49 N.C. App. 196, 270 S.E.2d 558 (1980); Ramsey v. Rudd, 49 N.C. App. 670, 272 S.E.2d 162 (1980); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); Henderson v. Provident Life & Accident Ins. Co., 62 N.C. App. 476, 303 S.E.2d 211 (1983); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); McLaurin v. Winston-Salem Southbound Ry., 87 N.C. App. 413, 361 S.E.2d 95 (1987); Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990); Pate v. Eastern Insulation Serv. of New Bern, Inc., 101 N.C. App. 415, 399 S.E.2d 338 (1991); Long v. Long, 102 N.C. App. 18, 401 S.E.2d 401 (1991); Crowell Constructors, Inc. v. State ex rel. Cobey, 328 N.C. 563, 402 S.E.2d 407 (1991); Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992); Brewer v. Spivey, 108 N.C. App. 174, 423 S.E.2d 95 (1992); Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476 (1993); Beaver v. Hampton, 333 N.C. 455, 427 S.E.2d 317 (1993); Farm Credit Bank v. Van Dorp, 110 N.C. App. 759, 431 S.E.2d 222 (1993); Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603, 1999 N.C. App. LEXIS 1147 (1999); Southern Furn. Hdwe., Inc. v. Branch Banking & Trust Co., 136 N.C. App. 695, 526 S.E.2d 197, 2000 N.C. App. LEXIS 143 (2000); Scarvey v. First Fed. Sav. & Loan Ass'n., 146 N.C. App. 33, 552 S.E.2d 655, 2001 N.C. App. LEXIS 790 (2001); White v. Davis, 163 N.C. App. 21, 592 S.E.2d 265, 2004 N.C. App. LEXIS 256 (2004); In re Hudson, 165 N.C. App. 894, 600 S.E.2d 25, 2004 N.C. App. LEXIS 1506 (2004), appeal dismissed, cert. denied, 359 N.C. 189, 607 S.E.2d 271 (2004); Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005); Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008); In re E.X.J., — N.C. App. —, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (June 17, 2008).

Quoted in Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573 (1990); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993); Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 441 S.E.2d 177 (1994); Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660, 2000 N.C. App. LEXIS 1036 (2000), cert. denied and appeal dismissed, 353 N.C. 262, 546 S.E.2d 401 (2000), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001), cert. denied, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001).

Stated in Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999)

Cited in In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843 (1982); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Prevatte v. Prevatte, 74 N.C. App. 582, 329 S.E.2d 413 (1985); Brown v. Brown, 91 N.C. App. 335, 371 S.E.2d 752 (1988); State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988); York ex rel. York v. Northern Hosp. Dist., 96 N.C. App. 456, 386 S.E.2d 99 (1989); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96 (1991); Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992); Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994); Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); State v. Woods, 345 N.C. 294, 480 S.E.2d 647 (1997), cert. denied, 522 U.S. 875, 118 S. Ct. 194, 139 L. Ed. 2d 132 (1997); Sherrod v. Nash Gen. Hosp., 126 N.C. App. 755, 487 S.E.2d 151 (1997), rev'd on other grounds, 348 N.C. 526, 500 S.E.2d 708 (1998); Fenz ex rel. Gladden v. Davis, 128 N.C. App. 621, 495 S.E.2d 748 (1998); Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998); Watson v. Dixon, 130 N.C. App. 47, 502 S.E.2d 15 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998); Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999); Stem v. Richardson, 350 N.C. 76, 511 S.E.2d 1 (1999); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000); In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000); City of Charlotte v. Noles, 143 N.C. App. 181, 544 S.E.2d 585, 2001 N.C. App. LEXIS 217 (2001); Merrick v. Peterson, 143 N.C. App. 656, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001); McInerney v. Pinehurst Area Realty, Inc., 162 N.C. App. 285, 590 S.E.2d 313, 2004 N.C. App. LEXIS 123 (2004); In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004); Advanced Wall Sys. v. Highlande Builders. LLC, 167 N.C. App. 630, 605

S.E.2d 728, 2004 N.C. App. LEXIS 2320 (2004); McConnell v. Beck, 427 F. Supp. 2d 578, 2006 U.S. Dist. LEXIS 20218 (M.D.N.C. 2006); In re Will of McFayden, 179 N.C. App. 595, 635 S.E.2d 65, 2006 N.C. App. LEXIS 2053 (2006); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006); In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007); Strezinski v. City of Greensboro, — N.C. App. —, 654 S.E.2d 263, 2007 N.C. App. LEXIS 2562 (2007); State v. Coleman, — N.C. App. —, 655 S.E.2d 450, 2008 N.C. App. LEXIS 67 (2008); Perry v. Baxley Dev., Inc., — N.C. App. —, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008); Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008); In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. *— The cases cited below were decided under former Rule 5, Rules of Practice in the Supreme Court of North Carolina.*

Docketing Rules Mandatory. — The rule of the Supreme Court requiring the docketing of the appeal within a certain time is mandatory. State v. Farmer, 188 N.C. 243, 124 S.E. 562 (1924); State ex rel. Mills v. National Sur. Co., 192 N.C. 52, 133 S.E. 172 (1926); Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

The rules of the Supreme Court regulating appeals are mandatory. And must be equally observed, or the case will be dismissed. Womble v. Moncure Mill & Gin Co., 194 N.C. 577, 140 S.E. 230 (1927); Covington v. Hanes Hosiery Mills Co., 195 N.C. 478, 142 S.E. 705 (1928); Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928).

The rules may not be disregarded by the legislature, the judge of a superior court, or by litigants or counsel. The Supreme Court has found it necessary to enforce them uniformly. Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928); State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

This rule regulating the time within which appeals must be docketed in the Supreme Court is mandatory and cannot be abrogated by consent or otherwise. Jones v. Jones, 232 N.C. 518, 61 S.E.2d 335 (1950).

When case is not docketed within time prescribed by this rule and no application for writ of certiorari is made, appeal will be dismissed, the rules of practice in the Supreme Court being mandatory and not directory. State v. Presnell, 226 N.C. 160, 36 S.E.2d 927 (1946).

And Dismissal Results Where Agreement of Parties Prohibits Compliance Therewith. — Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of this rule, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

This rule may not be varied, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the court for a certiorari. State v. Trull, 169 N.C. 363, 85 S.E. 133 (1915).

Legislature Cannot Change Rule. — The power of the legislature to permit an extension of the time for settling the case on appeal does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof within a prescribed time. State v. Butner, 185 N.C. 731, 117 S.E. 163 (1923).

Nor Can Rule Be Changed by Parties or Trial Judge. — The rules of the Supreme Court regulating the time of docketing appeals are uniformly enforced by the court, without authority to the judges or parties to the action to change them by agreement or otherwise. Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922); Finch v. Commissioners of Nash County, 190 N.C. 154, 129 S.E. 195 (1925); Stone v. Ledbetter, 191 N.C. 777, 133 S.E. 162 (1926).

Failure to Docket. — The motion for a certiorari in the Supreme Court by appellant who has failed to docket his case in time under the requirements of this rule may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927).

Failure to Docket Entire Record. — Though the court, without appellant's fault, fails to settle the case, appellant must within the time allowed by this rule docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as to why the entire record cannot be docketed; otherwise the appeal will be dismissed. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912).

Extension of Time Granted for Settling Case on Appeal. — When by consent of the appellant, or by order of the judge, such a long extension of time is granted for settling a case on appeal as to put it beyond the power of appellant to have the case ready for hearing, as required by the rules, the appellant runs the risk of losing his right of appeal. In such instances, unless the appellant gets his appeal docketed in time, as required by the rules of the court, notwithstanding the time allowed, or dockets the record proper and moves for a writ of certiorari, the right of appeal will be lost. State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

Neglect of Counsel. — The negligence of counsel sending up, docketing, and printing the transcript is that of the client. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910); Howard v. Speight, 180 N.C. 653, 104 S.E. 35 (1920). See also Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Agreements of Counsel. — The requirement of this rule will be enforced uniformly regardless of an agreement to the contrary that the attorneys for the parties may have made in any particular case. State v. Farmer, 188 N.C. 243, 124 S.E. 562 (1924).

Pending Negotiations for Compromise of Action. — The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal. British & Am. Mtg. Co. v. Long, 116 N.C. 77, 20 S.E. 964 (1895).

Filing of Original Papers by Appellant. — Where the appellant fails to file a transcript of the record, but attempts to file the original papers from the trial court, his motion for reinstatement after dismissal of appeal will be denied for laches. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

Transcript Mailed in Reasonable Time. — Where the transcript of a record is deposited in the post office in ample time to reach the Supreme Court within the time required by this rule, but by some delay in the mails does not reach its destination until after the time has expired, the excuse is reasonable, and the appeal will not be dismissed. Walker v. Scott, 104 N.C. 481, 10 S.E. 523 (1889).

Fees Must Be Paid Before Transcript Docketed. — The clerk of the Supreme Court is not required to docket a transcript of an appeal before appellant has paid him the required fee therefor. Dunn v. Clerk's Office, 176 N.C. 50, 96 S.E. 738 (1918). But see. West v. Reynolds, 94 N.C. 333 (1886). See G.S. 6-33 and notes thereto.

Failure to Pay Costs. — Where a transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, as he is bound to do, the appellee may move to docket and dismiss the appeal. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

Delay of Clerk. — Failure to docket the transcript on appeal within the time required by this rule cannot be excused by delay of the clerk, in which case appellant should docket the title of the case with affidavit as to the cause of delay. Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920).

It is no sufficient excuse for the appellant's failure to docket his appeal under this rule that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript. Hewitt v. Beck, 152 N.C. 757, 67 S.E. 586 (1910).

The mere fact that appellant tendered payment to the superior court clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment is no sufficient legal excuse for the failure to docket under this rule. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

Case Not Settled. — It is no excuse for failure to docket the appeal that the case was not settled by the judge until too late to docket the case at the proper term, it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript. Pittman v. Kimberly, 92 N.C. 562 (1885); State v. Telfair, 139 N.C. 555, 51 S.E. 911 (1905); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Renewing of Withdrawn Appeal. — A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statutes and rules for perfecting appeals. State v. Chastain, 104 N.C. 900, 10 S.E. 519 (1889).

Case Is Dismissed If Moot Question Presented. — Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed. Rousseau v. Bullis, 201 N.C. 12, 158 S.E. 553 (1931).

Rule 3A. Appeal in qualifying juvenile cases — How and when taken, special rules.

(a) *Filing the notice of appeal.* Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the general Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) *Special provisions.* For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) *Transcripts.* Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the administrative Office of the Courts of the date the notice of appeal was filed and the

names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcript to the case.

Where there is an order establishing the indigency of the appellant, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the Clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.

Where there is no order establishing the indigency of the appellant, the appellant shall have 10 days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the Clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.

Where there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.

Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) *Record on Appeal.* Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted inaccordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal; or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this Rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) *Briefs.* Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) *Calendaring priority.* Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument. (Added April 27, 2006 — effective May 1, 2006, and applicable to cases filed on or after that date; Amended effective December 1, 2008.)

CASE NOTES

Signatures of the guardian ad litem were not sufficient signatures by the "appellant" as required by N.C. R. App. P. 3A(a). In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

Motion to Dismiss Granted. — Guardian ad litem's motion to dismiss a mother's appeal of an order adjudicating her son neglected was granted because the notice of appeal contained in the record on appeal was not signed by the mother; however, the court of appeals found that pursuant to N.C. R. App. P. 21(a)(1), the case was an appropriate one in which to exercise its discretion and allow the mother's petition for writ of certiorari. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Rule 4. Appeal in criminal cases — How and when taken.

(a) *Manner and time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order. Appeals from district court to superior court are governed by G.S. 15A-1431 and -1432.

(b) *Content of notice of appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of notice of appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) *To which appellate court addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals. (Adopted June 13, 1975; Amended October 4, 1978 — 4(a)(2) — effective January 1, 1979; July 13, 1982 — 4(d); Amended September 3, 1987 — 4(d) — effective for all judgments of the superior court entered on or after July 24, 1987; Amended December 8, 1988 — 4(a) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended June 8, 1989 — 4(a) — December 8, 1988 amendment rescinded prior to effective date; Amended October 18, 2001 — 4(a)(2), (d) (subsection (d) amended to conform with G.S. 7A-27) — effective October 31, 2001; Amended May 1, 2003 — 4(a)(2).)

Editor's note. — An amendment to Rule 4(a) adopted December 8, 1988, to become effective for judgments of the trial division entered on or after July 1, 1989, was rescinded by order of the Supreme Court dated June 8, 1989.

Cross References. — As to the appeal bond, see G.S. 1-285 et seq. As to costs on appeal generally, see G.S. 6-33 et seq. As to appeals in criminal actions generally, see G.S. 15A-1441 et seq. and note thereto.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Basis for Appeal. — Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875, appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

Notice of appeal stating that an appeal was taken pursuant to N.C. R. App. P. 4, governing criminal appeals, where the appeal was taken from a civil judgment rendered the notice of appeal deficient pursuant to N.C. R. App. P. 3. That defect, along with other violations of the appellate rules, required dismissal of the appeal. McQuillin v. Perez, — N.C. App. —, 657 S.E.2d 924, 2008 N.C. App. LEXIS 532 (Mar. 18, 2008).

Defendant Not Entitled to Blakely Review. — Defendant's case was not pending on direct review when Blakely was decided, and was "final" before that decision, and defendant thus was not entitled to Blakely review upon a writ of certiorari; defendant failed to perfect an appeal from the final judgment, and thus the time for appeal expired 14 days after judgment finally was entered. State v. Coleman, 181 N.C. App. 568, 640 S.E.2d 784, 2007 N.C. App. LEXIS 256 (2007).

Defendant could not, based on Blakely, challenge his aggravated suspended sentences by appealing the order revoking his probation and activating the sentences because it was an impermissible collateral attack on the original judgments, from which defendant did not timely give a notice of appeal under G.S. 15A-1342(f), G.S. 15A-1444, and N.C. R. App. P. 4(a). State v. Holmes, 361 N.C. 410, 646 S.E.2d 353, 2007 N.C. LEXIS 594 (2007).

No Right to Appeal from Extension Orders. — On appeal from an order revoking probation, defendant did not waive his right to appeal because he had no right to appeal the extension orders. State v. Satanek, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 997 (May 20, 2008).

Requirement Where Appellate Review of Criminal Convictions Provided. — While the State has no duty to provide for appellate review of criminal convictions, when it does, it must assure indigent defendants an adequate opportunity to present their claims. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Jurisdiction. — Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. State v. McCoy, 171 N.C. App. 636, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

Because the record on appeal contained no evidence that defendant filed timely notice of appeal from an order denying his motion for appropriate relief, the court lacked jurisdiction to review defendant's assignment of error to the extent it challenged the denial of his motion for appropriate relief. State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Time Limitations. — A defendant is required to give oral notice of appeal at trial or file a written notice of appeal within 14 days after entry of the judgment in order to preserve his right of appeal under N.C. R. App. P. 4(a). State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103, 2003 N.C. App. LEXIS 1178 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003), cert. denied, — U.S. —, 124 S. Ct. 30, 156 L. Ed. 2d 692 (2003).

Failure to Give Notice Within Fourteen Days. — Because defendant failed to give oral or written notice of his appeal within fourteen days of his conviction, and failed to show good cause for the appeals court to entertain the appeal, the appeals court lacked jurisdiction to address that appeal, mandating dismissal of the appeal. State v. Webber, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 994 (May 20, 2008).

Applied in Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603, 1999 N.C. App. LEXIS 1147 (1999); Faulconer v. Wysong & Miles Co., 155 N.C. App. 598, 574 S.E.2d 688, 2002 N.C. App. LEXIS 1572 (2002); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

Quoted in State v. McMillian, 101 N.C. App. 425, 399 S.E.2d 410 (1991); State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Higson, 310 N.C. 418, 312 S.E.2d 437 (1984); State v. Payne, 311 N.C. 291, 316 S.E.2d 64 (1984); State v. Watson, 311 N.C. 252, 316 S.E.2d 293 (1984); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986); State v. Parker, 319 N.C. 444, 355 S.E.2d 489 (1987); State v. Carver, 319 N.C. 665, 356 S.E.2d 349 (1987); State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988); State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (1994); United States v. Howard, 115 F.3d 1151 (4th Cir. 1997); McConnell v. Beck, 427 F. Supp. 2d 578, 2006 U.S. Dist. LEXIS 20218 (M.D.N.C. 2006); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006); In re L.B., — N.C. App. —, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007); In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — *The cases cited below were decided under former Rules 5 and 6, Rules of Practice in the Supreme Court of North Carolina.*

Case Subject to Dismissal on Motion or by Court Ex Mero Motu. — The defendant not having docketed his case on appeal within the time prescribed by this rule, nor having docketed the record proper and moved for a writ of certiorari before the expiration of time allowed docketing criminal appeals, the case is subject to dismissal either upon motion of the Attorney General or ex mero motu by the court. State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

Appeal Abandoned Where Defendant Breaks Jail. — When the defendant in a criminal action appeals to the Supreme Court, but, pending appeal, breaks jail and flees the jurisdiction of the court, this is an abandonment of the appeal; and, upon motion of the Attorney General, the appeal will be dismissed, or case continued, or judgment affirmed, in the discretion of the court. State v. Keebler, 145 N.C. 560, 59 S.E. 872 (1907).

Rule 5. Joinder of parties on appeal.

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e). (Adopted June 13, 1975.)

CASE NOTES

Applied in Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

Rule 6. Security for costs on appeal.

(a) *In regular course.* Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) *In forma pauperis appeals.* An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) *Filed with record on appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) *Dismissal for failure to file or defect in security.* For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) *No security for costs in criminal appeals.* Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division. (Adopted June 13, 1975; Amended November 27, 1984 — 6(e) — effective February 1, 1985; Amended July 26, 1990 — 6(c) — effective October 1, 1990.)

CASE NOTES

Secured Performance Bond Not Prerequisite to Appeal. — An appeal must be dismissed when a party does not provide the appeal bond ordered by the trial judge. However, posting a "secured performance bond" is not a condition precedent to appeal under statute or appellate rules. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

Cited in Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980); Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

Rule 7. Preparation of the transcript; Court reporter's duties.

(a) *Ordering the transcript.*

(1) *Civil cases.* Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy

of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within 14 days after the service of the written documentation of the appellant, shall arrange for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) *Criminal cases.* In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall arrange for the transcription of the proceedings as in civil cases.

Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) *Production and delivery of transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the Appellate Entries as the "Date order delivered to transcriptionist," that person shall have 65 days to produce and deliver the transcript in non-capital cases and 125 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these Rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, (t)he trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript, with accompanying ASCII disk or its functional equivalent, to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of

such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation. (Adopted June 13, 1975; Repealed July 1, 1978 (See note following Rule 17); Re-adopted December 8, 1988 — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended June 8, 1989 — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 26, 1990 — 7(a)(1), (a)(2), and (b)(1) — effective October 1, 1990; Amended November 21, 1997 — effective February 1, 1998; Amended April 14, 1999 — 7(b)(1), para. 5; Amended October 18, 2001 — 7(b)(1), para. 4 — effective October 31, 2001; Amended August 15, 2002 — 7(a)(1), para. 2; January 25, 2007 — 7(b)(1), paras. 3, 5; 7(b)(2) — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Editor's note. — A former version of Rule 7 was repealed by amendment effective July 1, 1978, adopted June 19, 1978.

The order repealing this rule provided:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

Legal Periodicals. — For note on the problems and potential pitfalls of Rule 7 of North Carolina Rules of Appellate Procedure, see 34 Wake Forest L. Rev. 1224 (1999).

CASE NOTES

Submission of Transcript to Court of Appeals. — In the interests of judicial economy and a timely resolution of appeals and in the absence of a rule from the Supreme Court requiring a written transcript in cases that are appealed to the Court of Appeals, appellants are encouraged to submit, from the outset, a written transcript of the entire proceedings. Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991).

Under N.C. R. App. P. 7 and N.C. R. App. P. 9(a)(1)(e), without the transcript, the appellate court was unable to review a mother's argument that the trial court erred in making findings of fact that were unsupported by the evidence. Hicks v. Alford, 156 N.C. App. 384, 576 S.E.2d 410, 2003 N.C. App. LEXIS 129 (2003).

Mother's failure to submit a factual record under N.C. R. App. P.7(a)(1) meant the appellate court had no basis for reversing findings that the mother's adulterous relationship with a man to whom she then married placed undue stress on the children and was the primary cause of the older child's emotional problems; nor was there abuse of the trial court's discretion to base custody decisions on its own training and experience in custody matters. Faulkenberry v. Faulkenberry, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

Submission of Videotapes. — Videotapes, four in number, were submitted to the Court of Appeals as part of the record on appeal. No written transcript accompanied the briefs and record, except for selected excerpts of some of the testimony included as appendices in the parties' briefs. Although there may be many substantial benefits in videotaping trial proceedings under the rules to govern the use of video court reporting system during the test/evaluation period, done by order of the Supreme Court in conference on February 3, 1988, the use of videotapes for appellate review greatly frustrates effective review of the trial proceedings, especially in cases where questions of sufficiency of the evidence are determinative. Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991).

Delivery Within 60-Day Period. — Rule 11(a) provides that the time in which the record of a case on appeal must be filed runs from the date of the court reporter's certification of delivery of the transcript and if the court reporter fails to certify that the transcript has been delivered within the 60-day period permitted by section (b) of this Rule, the 35-day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript; therefore, since the court reporter had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the appeal, the defendant's 35-day period to serve the record on appeal never began to run. Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994), cert. granted in part and denied in part, writ of supersedeas allowed, 338 N.C. 311, 450 S.E.2d 487 (1994).

Plaintiff's letter to the court reporter within the 10-day deadline set forth in this Rule constituted "substantial compliance" with the requirement of a contract between the litigant and the court reporter. Anuforo v. Dennie, 119 N.C. App. 359, 458 S.E.2d 523 (1995).

Court reporter's notation that plaintiff "ordered" transcript, coupled with her certification the transcript was "mailed," indicating, however erroneously, that the transcript was prepared and delivered within 60 days, constituted excusable neglect justifying relief from the trial court's order dismissing plaintiff's appeal for the failure of counsel to seek an extension of time for production of the transcript under subdivision 7(b)(1). Anuforo v. Dennie, 119 N.C. App. 359, 458 S.E.2d 523 (1995).

Failure to deliver a copy of the transcript to defendant until six years after he made his first request did not deny defendant his right to meaningful and effective appellate review since the delay was in part due to defendant's failure to assert his right to a speedy trial or seek a court order compelling production of the transcript. State v. Berryman, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), aff'd, — N.C. —, 624 S.E.2d 350 (2006).

Substantial Compliance. — Defendant's actions in conferring with the Clerk of Superior Court and the Administrative Office of the Courts, purchasing copies of audio tapes, employing a transcriptionist, and obtaining a transcript of proceeding within sixty days of the defendant's notice of appeal constituted "substantial compliance" with this Rule. Pollock v. Parnell, 126 N.C. App. 358, 484 S.E.2d 864 (1997).

Appellant substantially complied with the requirements of N.C. R. App. P. 7 that he file a written arrangement for transcription of the record within 14 days of his notice of appeal and that he file the transcript within 74 days of his notice, when he immediately requested copies of the audiotapes of the trial court proceedings, upon filing his notice of appeal, and was in contact with a transcriptionist, and filed his contract with the transcriptionist as soon as he received copies of the audiotapes, but did not file the contract within 14 days nor the transcript within 74 days, due to a substantial delay in providing him with copies of the audiotapes. Spencer v. Spencer, 156 N.C. App. 1, 575 S.E.2d 780, 2003 N.C. App. LEXIS 30 (2003).

Trial court's denial of appellee's motion to dismiss an appeal 36 days after the notice of appeal was filed, under N.C. R. App. P. 11, for a failure to settle the record in accordance with N.C. R. App. P. 9 within 35 days of the notice, was proper because the appellant substantially complied with the requirements of N.C. R. App. P. 7 regarding filing a transcript of the trial court proceedings. Spencer v. Spencer, 156 N.C. App. 1, 575 S.E.2d 780, 2003 N.C. App. LEXIS 30 (2003).

Patient substantially complied with N.C. R. App. P. 7 where he filed a corrected notice of appeal with the correct case number, the notice of appeal identified the sole issue on appeal, and the trial court ordered the patient to comply with the rules regarding service of the transcript within two days; the appellate court refused to disturb the trial court's order on appeal and to the extent that the errors cast any doubt on the appellate court's jurisdiction, it exercised its discretion and granted certiorari to review the patient's claims on their merits pursuant to N.C. R. App. P. 21. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Statement of Grounds. — The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of subdivision 7(b)(1) Smith v. Johnson, 125 N.C. App. 603, 481 S.E.2d 415 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 554 (1997).

Basis of Motion Required. — A motion, to satisfy the requirements of subdivision (b)(1), must supply information revealing the basis of the motion. Smith v. Johnson, 125 N.C. App. 603, 481 S.E.2d 415 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 554 (1997).

Burden of Proof on Defendant. — Defendant, who was appealing from a criminal conviction, bore the burden of proceeding and of ensuring that the record on appeal and verbatim transcript were complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines. State v. Berryman, 360 N.C. 209, 624 S.E.2d 350, 2006 N.C. LEXIS 8 (2006).

Costs Assessed on Attorney. — Because this rule was violated, in that a timely written request for the transcript was not made, the cost of appeal was assessed on upon plaintiffs' attorney personally, pursuant to Rule 35. Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995).

Motion to Extend Time. — All motions made to extend time, except for motions to extend the time for service of the proposed record on appeal under N.C.R. App. P. 27(c)(1), and motions to extend the time to produce the transcript under subdivision (b)(1) of this rule, must be made to the court to which appeal has been taken. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

The defendant's motion to dismiss plaintiff's appeal was properly denied where the court reporter failed to deliver a copy of the completed transcript until long after the expiration of the 60-day period allowed by this rule. However, the better practice is for appellant to request an extension of time from the appropriate court, setting forth the reasons for the reporter's delay in delivering the transcript and the probable date of delivery, an initial application for an extension of time being made to the trial court and subsequent motions for extensions of time to produce the transcript being made only to the appellate court to which appeal has been taken. Harvey v. Stokes, 137 N.C. App. 119, 527 S.E.2d 336, 2000 N.C. App. LEXIS 264 (2000).

Dismissal for Failure to Comply. — Where the trial court's purported extension of time to file the records on appeal was ineffective, and where the records on appeal were not filed within the times mandated by the Rules of Appellate Procedure, each parties' appeals were dismissed for failure to comply with the rules. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

The defendant's appeal was dismissed, where he failed to supervise his appeal in an auto accident case and to request an extension of time, even though an extension became necessary for the court reporter's completion and delivery of the transcript within the time limits of this rule. Chamberlain v. Thames, 130 N.C. App. 324, 502 S.E.2d 631 (1998).

Applied in Ferguson v. Williams, 101 N.C. App. 265, 399 S.E.2d 389 (1991).

Cited in Burrell v. Sparkkles Reconstruction Co., — N.C. App. —, 657 S.E.2d 712, 2008 N.C. App. LEXIS 422 (2008).

Rule 8. Stay pending appeal.

(a) *Stay in civil cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the writ of supersedeas may be made to the appellate court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in criminal cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas. (Adopted June 13, 1975; Amended November 27, 1984 — 8(b), effective February 1, 1985; Amended March 6, 1997 — 8(a), effective July 1, 1997.)

Legal Periodicals. — For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

Applied in RPR & Assocs. v. Univ. of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 2002 N.C. App. LEXIS 1191 (2002), cert. dismissed, 357 N.C. 166, 579 S.E.2d 882 (2003), cert. denied, 357 N.C. 166, 579 S.E.2d 882 (2003).

Cited in In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

Rule 9. The record on appeal.

(a) *Function; Composition of record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d). Parties may cite any of these items in their briefs and arguments before the appellate courts.

(1) *Composition of the record in civil actions and special proceedings.* The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. assignments of error set out in the manner provided in Rule 10; and

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal.

(2) *Composition of the record in appeals from superior court review of administrative boards and agencies.* The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) *Composition of the record in criminal actions.* The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. assignments of error set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device; and

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal.

(4) *Exclusion of Social Security Numbers from Record on Appeal.* Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal.

(b) *Form of record; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of unnecessary matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing dates and signatures on papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel identified.* The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p____)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall benumbered consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(S p____)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) *Additions and amendments to record on appeal.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(6) *Appeals from Termination of Parental Rights and Juvenile Matters.* The record on appeal shall comply with the provisions to protect the confidentiality of juveniles by redacting the juvenile's name and other identifying information as set out in Rule 3(b) from any documents included in the record on appeal.

(c) *Presentation of testimonial evidence and other proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. Verbatim transcripts in an appeal of a termination of parental rights or a juvenile matter, as identified by Rule 3(b), shall be submitted to the appellate court in a signed, sealed envelope or other appropriate container on which is noted a case caption that complies with the confidentiality provisions of Rule 3(b), including the District Court case number. The transcript shall be available to the public only with permission from the appellate court.

(1) *When testimonial evidence narrated — How set out in record.* Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best

calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) *Designation that verbatim transcript of proceedings in trial tribunal will be used.* Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) *Verbatim transcript of proceedings — Settlement, filing, copies, briefs.* Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record on appeal, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) *Presentation of discovery materials.* Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) *Electronic Recordings.* When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) *Models, diagrams, and exhibits of material.*

(1) *Exhibits.* Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal. Social security numbers shall be deleted or redacted from exhibits prior to filing the exhibits in the appellate court.

(2) *Transmitting exhibits.* Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court. When an original non-documentary exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to

the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) *Removal of exhibits from appellate court.* All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to the Clerk may seem best. (Adopted June 13, 1975; Amended June 10, 1981 — 9(c)(1) — applicable to all appeals docketed on or after October 1, 1981; Amended January 12, 1982 — 9(c)(1) — applicable to all appeals docketed after March 15, 1982; Amended November 27, 1984 — applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985; Amended December 8, 1988 — 9(a), (c) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended June 8, 1989 — 9(a) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 26, 1990 — 9(a)(3)h and 9(d)(2) — effective October 1, 1990; Amended March 6, 1997 — 9(b)(5) — effective upon adoption March 6, 1997; Amended November 21, 1997 — 9(a)(1)(j)((1), 9(a)(3)(i)-(k), 9(c)(5) — effective February 1, 1998; Amended October 18, 2001 — 9(d)(2) — effective October 31, 2001; Amended May 6, 2004 — 9(a)-(d) — effective May 12, 2004; January 25, 2007 — added 9(a)(1)(m) & 9(a)(3)(*l*); amended 9(b)(4) — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Cross References. — As to power of trial judge to settle record on appeal, see G.S. 1-283 and notes thereto. As to appeal bond generally, see G.S. 1-285 et seq. As to costs on appeal generally, see G.S. 6-33 et seq.

Legal Periodicals. — For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.
  A. In General.
  B. Assignment of Error.
  C. Composition of Record.
  D. Criminal Actions.
  E. Evidence.

I. IN GENERAL.

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Where defendant's violations of N.C.R.A.P., Rules 9(b)(1) and (c)(1) and 28(b)(5) precluded the possibility of effective appellate review of the questions presented, its appeal would be dismissed. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

Compliance Universally Mandatory. — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

But the Court May Suspend Requirements Pursuant to N.C.R.A.P., Rule 2. — The court elected to suspend the requirement for the clerk's date stamp, pursuant to its discretionary authority accorded by N.C. R. App. P. Rule 2, where neither party objected to the absence of the stamp. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

Substantial Compliance. — Trial court's denial of appellee's motion to dismiss an appeal 36 days after the notice of appeal was filed, under N.C. R. App. P. 11, for a failure to settle the record in accordance with N.C. R. App. P. 9 within 35 days of the notice, was proper because the appellant substantially complied with the requirements of N.C. R. App. P. 7 regarding filing a transcript of the trial court proceedings. Spencer v. Spencer, 156 N.C. App. 1, 575 S.E.2d 780, 2003 N.C. App. LEXIS 30 (2003).

Lack of Subject Matter Jurisdiction. — Because there was no civil judgment in the record ordering defendant in a criminal case to pay attorney fees, the North Carolina Court of Appeals had no subject matter jurisdiction over the issue pursuant to N.C. R. App. P. 3(a) and N.C. R. App. P. 9(a)(1)(h). State v. Jacobs, 361 N.C. 565, 648 S.E.2d 841, 2007 N.C. LEXIS 814 (2007).

Trial court's findings of facts were deemed to be supported by competent evidence because a husband challenging the trial court's ruling on the husband's motion to modify the husband's alimony obligation presented the appellate court with only a partial transcript of the trial court's proceedings, which did not allow the appellate court to review the husband's assignments of error alleging the trial court erred in making findings of fact that were not supported by competent evidence. Dodson v. Dodson, 185 N.C. App. 265, 647 S.E.2d 638, 2007 N.C. App. LEXIS 1683 (2007).

Partial Transcript Inadequate. — When a husband sought review of a trial court's ruling on the husband's motion to modify the husband's alimony obligation, the partial transcript the husband filed pursuant to N.C.R.A.P. 9(c)(2) was inadequate because the transcript prevented the appellate court from determining the context of some of the responses in the selected transcript, even though the sections of transcript provided properly addressed some assignments of error, because without access to all the evidence presented in the trial court, it was impossible for the appellate court to understand all the errors assigned. Dodson v. Dodson, 185 N.C. App. 265, 647 S.E.2d 638, 2007 N.C. App. LEXIS 1683 (2007).

Defendant was entitled to a new trial because a verbatim transcript of the evidentiary phase of defendant's trial was unavailable to defendant in preparing for defendant's appeal, as was required by G.S. 7A-452(e), and defendant demonstrated the absence of available alternatives to the missing transcripts under N.C. R. App. P. 9(c)(1) by his appellate counsel contacting defendant's trial counsel, the prosecutor, and the presiding judge in an unsuccessful attempt to reconstruct the record. State v. Hobbs, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 893 (May 6, 2008).

An appellate court cannot assume or speculate that there was prejudicial error, when none appears on the record before it. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

The defendant appellant has the duty to see that the record on appeal is properly made up. State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978); Tucker v. General Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980); West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

It is the appellant's duty and responsibility to see that the record is in proper form and complete. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Defendant, who was appealing from a criminal conviction, bore the burden of proceeding and of ensuring that the record on appeal and verbatim transcript were complete, properly settled, in correct form, and filed with the appropriate appellate court by the applicable deadlines. State v. Berryman, 360 N.C. 209, 624 S.E.2d 350, 2006 N.C. LEXIS 8 (2006).

Husband's appeal was subject to dismissal under circumstances in which a one-page letter sent by the husband to the wife's counsel, listing certain pleadings, did not comply with N.C. R. App. P. 9 and N.C. R. App. P. 11, and was not in fact his proposed record on appeal; the record on appeal filed with the appellate court was never in fact served on the wife as a proposed record on appeal. Day v. Day, 180 N.C. App. 685, 637 S.E.2d 906, 2006 N.C. App. LEXIS 2496 (2006).

It is an appellants' duty to make sure the record contains all evidence relevant to the appellants' appeal, and the appellants' duty to direct the appellate court to that evidence in the appellant's brief pursuant to N.C. R.App. P. 9 and 28(b)(6). Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1546 (Aug. 19, 2008).

The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where the defendants did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

This rule contemplates that all charging documents must be copied and presented verbatim in the record on appeal. Mere references to such documents in the trial transcript could not suffice for verbatim copies of the documents themselves, nor could such references substitute for such copies when the copies were missing from the record. State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

The appellant's failure to settle the record on appeal was sufficient reason to dismiss the appeal. Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999).

Failure to Settle Record. — Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

Failure to File Transcript. — Poker club owner's assignment of error was insufficient because, pursuant to N.C.R.A.P. 9(c)(2), the owner designated in the record that testimonial evidence would be presented in a verbatim transcript; however, he failed to file the appropriate transcript as required by N.C.R.A.P. 9(c)(3)(b). Joker Club, L.L.C. v. Hardin, 183 N.C. App. 92, 643 S.E.2d 626, 2007 N.C. App. LEXIS 838 (2007).

Failure to Include Videotape as Exhibit to Record. — Defendant abandoned the challenge defendant made to a videotaped interview between the victim and a clinical social worker by failing to include the videotape as an exhibit to the record on appeal. State v. Davis, — N.C. App. —, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (Aug. 5, 2008).

Plaintiff's counsel violated N.C. R. App. P. Rule 9(a)(1)(e) and 9(c)(3)(b) by failing to provide a transcript of the summary judgment hearing with the record on appeal, and also violated Rule 9(a)(1)(c) and 9(b)(3), N.C.R. App. P. 10(c)(1), and N.C. R. App. P. 28(b)(3), (5), and (6). Due to the number and nature of the rules violations, the appellate court considered them "gross" or "substantial" and taxed costs to plaintiff's attorney under N.C.R. App. P. 25 and 34. Azar v. Presbyterian Hosp., — N.C. App. —, 663 S.E.2d 450, 2008 N.C. App. LEXIS 1313 (2008).

Failure to Object to Summary Judgment Motion. — When, in a personal injury case, no evidence in the record showed any response by alleged injured parties to their opponents' summary judgment motions other than an objection and motion to strike consideration of certain affidavits, review was solely upon the record on appeal and the verbatim transcript of proceedings, so summary judgment was affirmed. Walden v. Morgan, — N.C. App. —, 635 S.E.2d 616, 2006 N.C. App. LEXIS 2169 (2006).

Failure to Give Oral or Written Notice Within Fourteen Days. — Because a review of the record showed that defendant failed to give oral or written notice of his appeal within fourteen days of his conviction, and failed to show good cause for the appeals court to entertain said appeal, the appeals court lacked jurisdiction to address that appeal, mandating dismissal of the appeal. State v. Webber, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 994 (May 20, 2008).

Failure to show specific prejudice arising from a missing verbatim transcript. — Where the record lacked any indication of the content of the proceeding as it pertained to defendant's waiver of counsel, and defendant failed to show specific prejudice arising from the missing verbatim transcript, defendant's argument that he was prejudiced by the court reporter misplacing the notes and transcript of the probation revocation hearing was without merit. State v. Quick, 179 N.C. App. 647, 634 S.E.2d 915, 2006 N.C. App. LEXIS 2026 (2006).

Where the defendant failed to cooperate with the trial court to provide the appellate court with a reconstructed record of the state's closing argument, which the trial court had failed to record, the appellate court was precluded from reviewing the defendant's argument that the state made improper remarks and referred to matters outside the trial record. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

Where appellant failed to include portions of the record dealing with whether a suit against an employee of the Board of Education should have been allowed to proceed despite the Board's governmental and official immunity defenses, the appellate court would not engage in speculation as to the employee's status, and affirmed the trial court's directed verdict for employee. Pharr v. Worley, 125 N.C. App. 136, 479 S.E.2d 32 (1996).

Defendant's objection to trial court's finding of factors in aggravation was dismissed for failure to include Form AOC-CR-303, Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment, in the record on appeal. State v. Weary, 124 N.C. App. 754, 479 S.E.2d 28 (1996).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Appellant's brief is not a part of the record on appeal. West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981).

Objection When Ruling Made. — Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Waiver of Objections. — Where plaintiffs failed to object at trial to the failure of defendant to state specific grounds for its motion for a directed verdict, plaintiffs could not raise such objection on appeal. Waters v. North Carolina Phosphate Corp., 50 N.C. App. 252, 273 S.E.2d 517, cert. denied, 302 N.C. 402, 279 S.E.2d 357 (1981).

Contractor failed to preserve its claim as to the quashing of a subpoena as it failed to include a copy of the documents withheld by the recipient of the subpoena as required by N.C.R.A.P. 9(a)(1)(j). Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc., 183 N.C. App. 66, 644 S.E.2d 16, 2007 N.C. App. LEXIS 837 (2007).

A judgment is a necessary part of the record on appeal of a criminal action. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

The Appellate Court will dismiss an appeal if the judgment or order does not appear in the record on appeal. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by G.S. 1-180 (now repealed). State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it. State v. Harrell, 50 N.C. App. 531, 274 S.E.2d 353 (1981); State v. Taylor, 61 N.C. App. 589, 300 S.E.2d 890 (1983).

Where the appellant's narrative summary of the evidence was insufficient to permit the appellate court to determine whether competent evidence supported certain findings of fact, the court would presume that it did. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Where Record on Appeal Does Not Include Transcript. — Under N.C. R. App. P. 7 and N.C. R. App. P. 9(a)(1)(e), without the transcript, the appellate court was unable to review a mother's argument that the trial court erred in making findings of fact that were unsupported by the evidence. Hicks v. Alford, 156 N.C. App. 384, 576 S.E.2d 410, 2003 N.C. App. LEXIS 129 (2003).

Appellate court was unable to review the contents of a second doctor's testimony in determining whether the trial court properly granted a surgeon's motion for directed verdict because the only transcripts constituted in accordance with N.C. R. App. P. 9 and properly presented for review by the appellate court were those from the depositions of a witness, a first doctor, and the surgeon. Kerr v. Long, — N.C. App. —, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (Mar. 18, 2008).

Where the record did not include a tran-

script containing the defendants' objection and where the defendants failed to make a timely motion to ensure that witness testimony supporting their theory of the case be made available to the jury, the defendants failed to carry their burden of demonstrating that prejudice resulted from the jury's erroneous receipt, in spite of defendants' objections, during deliberations of an unredacted copy of the police report. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479, 1999 N.C. App. LEXIS 1176 (1999).

Where record on appeal did not indicate that the trial court considered plaintiff's motions, as required by this rule, the court could not review plaintiff's assignment of error pursuant to N.C.R.A.P. Rule 10(b)(1). Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869, 1999 N.C. App. LEXIS 657 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

Where the record on appeal contains two conflicting narratives of the evidence, the appeal should be dismissed for failure to bring forward a "settled" record as required under this rule and N.C.R.A.P., Rule 11; however, where defendant did not assert that the trial court's findings quoted were unsupported by sufficient evidence at the custody hearing below, but instead asserted the trial court's conclusions were erroneous or were not supported by the findings actually made, under these limited circumstances, a narrative of evidence or a verbatim transcript was not necessary to understand defendant's assignment of error; therefore, the appellate court addressed the merits of his assignments of error. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Subsection (c) provides an alternative to narrating evidence into the record; that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (N.C.R.A.P., Rule 9 or Rule 28), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Narration of the evidence as specified in subsection (c) is mandatory. — Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977), decided prior to the 1981 amendment which added the third paragraph of subsection (c)(1).

N.C.R.A.P., Rule 28(b)(4) serves the same function as subdivision 9(c)(1) of this rule serves with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

N.C.R.A.P., Rule 28(b)(4) Must Be Followed When Stenographic Transcript Used. — It is imperative that defendants using the stenographic transcript alternative allowed by subdivision (c)(1) of this rule carefully follow the requirements of N.C.R.A.P., Rule 28(b)(4) in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780, 1982 N.C. App. LEXIS 2840 (1982), cert. denied, 342 S.E.2d 907 (1986).

Appendix as Part of Record. — In an action regarding the termination of state employment, an appendix to the employee's brief was stricken because it violated N.C. R. App. P. 9 and 28, as it was not part of the record, nor agreed on by the parties to be part of the record, nor submitted pursuant to a motion to amend the record. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

When Appendix Required. — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of N.C.R.A.P., Rule 28 is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

N.C.R.A.P., Rule 28 only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Items Arranged Chronologically. — Each item in the record on appeal should be arranged chronologically, in the same order in which it occurred at trial. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied and appeal dismissed, 303 N.C. 183, 280 S.E.2d 455 (1981).

Subdivision (a)(3)(ix) was broadly worded so as to include any proceeding in any court which would be material to the consideration of the case on appeal. If there is a question as to the relevancy of the proceedings from other courts, the parties may settle the dispute according to the procedures provided in N.C.R.A.P., Rule 11. The trial judge properly ordered the inclusion of the voir dire of a previous trial into the record. State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

Counsel's failure to timely file the record on appeal in a criminal prosecution amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Counsel Taxed with Costs for Filing Redundant Records. — Because counsel representing one codefendant and counsel representing the other defendants filed two records instead of one and because they included unnecessary material in each of the records filed, each counsel will be personally taxed with a portion of the costs. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Because of the filing of an unnecessary record on appeal and because unnecessary matter was included in the records filed, counsel for defendants will be personally taxed with a portion of the costs. State v. Ashe, 30 N.C. App. 74, 226 S.E.2d 398, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

Record in Improper Form. — Where appellants' record was not in proper form for appeal, appellants' counsel was personally taxed with the costs of printing the memoranda of law filed in the trial court and unnecessarily included in the record on appeal. Smallwood v. Eason, 123 N.C. App. 661, 474 S.E.2d 411 (1996), rev'd on other grounds, 346 N.C. 171, 484 S.E.2d 526 (1997).

As a necessary predicate to an evaluation of an order confirming an arbitration award, the record on appeal was required to reflect what evidence was presented to the arbitration panel; appellate court was unable to evaluate whether the arbitration panel "manifestly disregarded the law" and whether the trial court, in turn, erred by failing to conclude the same, where the appellate court was not provided a transcript of the arbitration hearing, a narrative of the proceedings, a listing of the witnesses proffered by the parties and a summary of their testimonies, or an identification of the exhibits actually presented to the arbitration panel. Global Circuits of N.C., Inc. v. Chandak, 174 N.C. App. 797, 622 S.E.2d 643, 2005 N.C. App. LEXIS 2593 (2005).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Minutes Are Not Substitute for Copy of Judgment. — The "minutes" of the trial court in a criminal action included in the record on appeal are not a substitute for a copy of the judgment. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Omission of Jury Instructions. — Errors assigned to jury instructions not considered on appeal where defendant failed to include a transcript of the entire jury charge in the record. State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997).

Although the record that defendants presented to the appellate court did not contain an instruction that defendants requested and the trial court refused to give, or the charge that the trial court gave to the jury, the appellate court elected, pursuant to N.C. R. App. P. 2, to consider defendants' claim that the trial court erred when it instructed the jury. However, the appellate court rejected defendants' claims that the trial court erred when it gave the jury an instruction on sudden emergency arising from a motor vehicle accident, or when it decided to instruct the jury on reasonable and prudent speed instead of instructing the jury that plaintiff had a duty to decrease his speed to avoid a collision. Campbell v. McIlwain, 163 N.C. App. 553, 593 S.E.2d 799, 2004 N.C. App. LEXIS 399 (2004).

It is mandatory under N.C. R. App. P. 9(a)(3)(f) that jury instructions be included in the record on appeal when error is assigned to the giving or omission of jury instructions. This defect is not cured by filing the trial transcript with the appellate court. State v. Turner, 177 N.C. App. 423, 628 S.E.2d 464, 2006 N.C. App. LEXIS 979 (2006), cert. denied, 361 N.C. 226, 643 S.E.2d 398 (2007).

Omission of Exhibits. — Where Board of Education failed to include certain exhibits presented to the trial court in the record on appeal, the court could not consider those portions of the exhibits not included in the record. Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997).

In a juvenile dependency matter, the appellate court struck an affidavit from a Department of Social Services (DSS) social worker as an exhibit, which was cited in DSS' brief, because the affidavit was not included in the settled record and, therefore, it was inappropriate for DSS to provide and then rely on that document. In re L.B., 181 N.C. App. 174, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007).

Omission of Necessary Part of Record. — When a necessary part of the record on appeal of a criminal action has been omitted, the appeal will be dismissed. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Ex-wife's claim that trial court had found that husband failed to notify her of an offer to purchase a parcel of real property, and that the husband was collaterally estopped from relitigating the same issue, was not addressed because the ex-wife failed to include a copy of the trial court's order in the record on appeal. County of Jackson v. Nichols, 175 N.C. App. 196, 623 S.E.2d 277, 2005 N.C. App. LEXIS 2749 (2005).

Property owner's record on appeal did not include several of the exhibits he asserted were erroneously admitted, which constituted a violation of N.C.R.A.P., Rule 9 because they were needed for an understanding of the errors assigned by him; therefore, when viewed in tandem with the owner's other failures to comply with the North Carolina Rules of Appellate Procedure, the nature and significance of the owner's rules violations warranted dismissal of his appeal. Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007).

Although on appeal defendant challenged the trial court's denial of his motion to suppress, the appellate court declined to address the issue due to the numerous violations of its appellate rules and dismissed the assignment of error; specifically, the record on appeal did not include the complete order denying defendant's motion to suppress in violation of N.C. R. App. P. 9(a)(3)(g). State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007), discretionary review granted, 361 N.C. 689, 653 S.E.2d 152 (2007); rev'd, in part, remanded 362 N.C. 224, 657 S.E.2d 351 (2008, State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007).

Because defendant failed to provide the appellate court a copy of an audiotape played to the jury by the state or the accompanying transcript as required under N.C. R. App. P. 9(d)(2), the record was insufficient for the court to determine whether the evidence was prejudicial, as defendant contended. State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007), discretionary review granted, 361 N.C. 689, 653 S.E.2d 152 (2007); rev'd, in part, remanded 362 N.C. 224, 657 S.E.2d 351 (2008, State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007).

Failure to include non-discoverable materials that the trial court placed under seal in the record on appeal precluded the appellate court from determining whether the trial court erred in classifying certain material as non-discoverable under G.S. 15A-904. State v. Hall, — N.C. App. —, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007).

Since copies of plaintiff's petitions, grievances, and prior actions were not included with the record on appeal and since appellants did not make are quest for judicial notice of the petitions, grievances and prior actions, a reviewing court declined to base its review on matters outside the record, as that would require deviation from the North Carolina Rules of Appellate Procedure. Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

Where record was, at best, a haphazard arrangement of pleadings, orders and parts of prior records on appeal, spanning an almost ten-year period of litigation, the appeal would be dismissed for violation of subdivision (b)(1) of this rule. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

Weapon Added to Record on Appeal. — Where the court admitted the weapon (a box cutter) itself into evidence, while a verbal description supplemental to introduction of the weapon would have been preferable, its omission was not fatal; pursuant to subsection (b)(5) of this rule, the appellate court would order the box cutter sent up and added to the record on appeal. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

Trial Court's Ruling Presumed Correct. — Where the defendant failed to include in the appeal record a copy of an investigative report that he contended was work product, and the record showed that the trial court reviewed the report, weighed its contents, and considered the appropriate evidentiary rule, the appellate court was required to presume that the trial court properly ordered the defendant to produce the report. State v. Reaves, 132 N.C. App. 615, 513 S.E.2d 562 (1999).

Court of appeals rejected the contention by petitioner nurse aide that the respondent North Carolina Department of Health and Human Services, Division of Facility Services, erred in making a certain finding that was allegedly not made by the administrative law judge in the case and that the superior court, therefore, erred in affirming that finding, because the nurse aide violated N.C. R. App. P. 9(a)(2) by failing to include the administrative law judges's recommended decision in the record on appeal; since the record showed that the superior court reviewed the official record and weighed its contents in affirming the department's determination, the court of appeals would not assume error where none appeared in the record. Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

Since an underinsured motorist carrier did not provide any proof in the record on appeal that a motorist received a benefit from a rehabilitative center that was paid through workers' compensation, since the carrier had the burden, as the appealing party, to provide a complete appellate record demonstrating all the errors, and since the lack of such evidence in the appellate record allowed the appellate court to assume there was sufficient evidence to support the lower court's findings, the lower court properly excluded the amounts paid to the center from its calculation of how much credit the carrier was entitled to against the motorist's personal injury recovery. Walker v. Penn Nat'l Sec. Ins. Co., 168 N.C. App. 555, 608 S.E.2d 107, 2005 N.C. App. LEXIS 349 (2005).

Record Silent as to Jurisdiction of Lower Court. — When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Court's violation of G.S. 7A-198 did not relieve appellant of her burden of complying with paragraph (a)(1)(v) of this rule and showing prejudicial error. Miller v. Miller, 92 N.C. App. 351, 374 S.E.2d 467 (1988).

Motion to Amend Record. — After the case has been docketed in the appellate court, the proper method to request amendment of the record, when the inclusion of a document has not been addressed by a trial court order settling the record on appeal, is to make a motion in the appellate court to amend the

record under subdivision (b)(5). Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, 1996 N.C. App. LEXIS 240 (1996), cert. denied, 472 S.E.2d 8 (1996).

A motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297, 2000 N.C. App. LEXIS 892 (2000).

Motion to Amend Record Should Be Supported with Explanation. — Defendant ex-wife's bare assertion that portions of certain depositions should be added to the record as "necessary to an understanding of the errors assigned" was insufficient to support her motion to amend, because she provided no explanation as to why they were necessary or why they were not included in the record, given that they were included in the first Record on Appeal. Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815, 2000 N.C. App. LEXIS 812 (2000).

Motion to Amend Denied. — Motion for leave to amend the record on appeal to include material relating to a superseding indictment was denied where the records in question originated after the trial court's order to compel was entered and after notice of appeal was given. Staton v. Brame, 136 N.C. App. 170, 523 S.E.2d 424, 1999 N.C. App. LEXIS 1303 (1999).

Appellate court denied a motion to supplement the record on appeal by adding an affidavit providing the basis for service by publication or posting because there was no indication in the trial court's order imposing sanctions or in the record on appeal that the affidavit was part of the trial court record; however, because the case was to be remanded for further proceedings, the trial court could consider whether the affidavit was in the court file at the time the plaintiff filed his complaint and its relevance to whether a violation of G.S. 1A-1, N.C. R. Civ. P. 11 occurred. Adams v. Bank United of Tex. FSB, 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004), cert. denied, 359 N.C. 410, — S.E.2d — (2005).

Improper Documents in Appendix. — It is improper for a party to attach a document not in the record and not permitted under Rule 28 of the Rules of Appellate Procedure in an appendix to its brief. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, 1996 N.C. App. LEXIS 240 (1996), cert. denied, 472 S.E.2d 8 (1996).

Noncompliance Resulting in Sanctions Against Plaintiff's Attorneys. — Given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with Rules 9, 28, and 37, the court imposed sanctions against plaintiff's attorneys in the form of costs associated with the appeal. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

Record on Appeal Held Incomplete. — Where appellant father failed to produce a transcript of trial testimony as a part of the record on appeal, the appellate court presumed that the findings of the trial court were supported by competent evidence; the trial court's determination of the father's child support obligation was affirmed where the trial court followed the Child Support Guidelines in computing the father's income and his obligation, and there was no indication that the father imputed income to him. Guilford County ex rel. Armwood v. Council, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2092 (May 21, 2002).

Record on an appeal from a judgment in favor of a city in a declaratory judgment action filed by two landowners, who sought a declaration that the city did not have authority to condemn their property, was incomplete because the landowners did not provide a transcript from which the reviewing court could consider their contention that the trial court improperly denied one of them the chance to orally rebut affidavits presented by the city. Tucker v. City of Kannapolis, 159 N.C. App. 174, 582 S.E.2d 697, 2003 N.C. App. LEXIS 1442 (2003).

When a finance company sued to set aside an execution sale and the trial court denied the parties' cross-motions for summary judgment, the denial of summary judgment was not appealable because (1) the parties proceeded to a bench trial, and the denial of a summary judgment motion was not reversible error when the case proceeded to trial and was determined on the merits by the trier of facts, and (2) the record did not contain a copy of the trial court's order denying summary judgment, as was required by N.C. App. R. 9(a)(1)(viii). Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

Where a taxpayer submitted insufficient evidence to meet a burden of proof under G.S. 105-345.2(b) to show that a county board of equalization and review's decision to use the cost valuation assessment method for appraising the taxpayer's property was improper, the taxpayer's appeal was rejected. In re Schwartz & Schwartz, Inc., 166 N.C. App. 744, 603 S.E.2d 852, 2004 N.C. App. LEXIS 2022 (2004).

Non-Egregious Errors in Record Do Not Require Dismissal. — In an appeal by insureds from a summary judgment granted to their homeowners' insurance carrier in an action arising out of the homeowners' policy, an insufficiently detailed index, missing pages, and errors in pagination in the record on appeal violated N.C. R. App. P. 9(a)(1)(a), but because the appellate court could determine the issues on appeal, the violations were not substantive nor egregious enough to warrant dismissal; the appellate court invoked N.C. R. App. P. 2 and addressed the merits of the appeal. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Sanctions Imposed for Multiple Errors. — Homeowners' attorney was ordered to pay double the printing costs of an appeal under N.C. R. App. P. 34(b) due to the violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5), which was substantial under N.C. R. App. P. 25, but not so gross as to warrant dismissal against an insurance agent. Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Appeal Not Treated as Petition for Certiorari. — Notice of appeal was ineffective as to an insurer, and was not treated as a petition for a writ of certiorari under N.C. R. App. P. 21(a)(1), in part, due to the homeowners' violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5). Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Applied in Johnson v. Hooks, 27 N.C. App. 584, 219 S.E.2d 664 (1975); State v. McMorris, 290 N.C.

286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); Williams v. Williams, 31 N.C. App. 747, 230 S.E.2d 428 (1976); State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Dixon, 33 N.C. App. 78, 234 S.E.2d 37 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); State v. Spruill, 33 N.C. App. 731, 236 S.E.2d 717 (1977); State v. Hugenberg, 34 N.C. App. 91, 237 S.E.2d 327 (1977); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981); Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); West v. Slick, 60 N.C. App. 345, 299 S.E.2d 657 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983); Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); Sessoms v. Sessoms, 76 N.C. App. 338, 332 S.E.2d 511 (1985); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985); Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204 (1987); Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987); Paschall v. North Carolina Dep't of Cor., 88 N.C. App. 520, 364 S.E.2d 144 (1988); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990); Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990); Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991); Edelstein v. Pinnacle Inn & Country Club Condominium Owners' Ass'n, 103 N.C. App. 86, 403 S.E.2d 927 (1991); Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991); Smith v. Smith, 103 N.C. App. 488, 405 S.E.2d 912 (1991); Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604 (1993); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Jackson v. Carolina Hardwood Co., 120 N.C. App. 870, 463 S.E.2d 571 (1995); Graham v. Hardee's Food Sys., 121 N.C. App. 382, 465 S.E.2d 558 (1996); Graham v. Rogers, 121 N.C. App. 460, 466 S.E.2d 290 (1996); Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998); Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999); State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849, 2000 N.C. App. LEXIS 601 (2000); Collins v. Talley, 146 N.C. App. 600, 553 S.E.2d 101, 2001 N.C. App. LEXIS 987 (2001); Russell v. Lab. Corp. of Am., 151 N.C. App. 63, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002), cert. denied, 356 N.C. 304, 570 S.E.2d 111 (2002); State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002), appeal dismissed, 356 N.C. 442, 573 S.E.2d 162 (2002); Ellis v. White, 156 N.C. App. 16, 575 S.E.2d 809, 2003 N.C. App. LEXIS 34 (2003); State v. Lynn, 157 N.C. App. 217, 578 S.E.2d 628, 2003 N.C. App. LEXIS 533 (2003); Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 208, 580 S.E.2d 732, 2003 N.C. App. LEXIS 1047 (2003), aff'd, without op., 358 N.C. 131, 591 S.E.2d 521 (2004); Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1, 2004 N.C. App. LEXIS 18 (2004); Columbus County v. Davis, 163 N.C. App. 64, 592 S.E.2d 225, 2004 N.C. App. LEXIS 244 (2004); In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004); State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004); Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005); State v. Berryman, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), aff'd, — N.C. —, 624 S.E.2d 350 (2006); Boyd v. Robeson County, 169 N.C. App. 460, 621 S.E.2d 1, 2005 N.C. App. LEXIS 2352 (2005); State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007); In re R.L.C., 361 N.C. 287, 643 S.E.2d 920, 2007 N.C. LEXIS 417 (2007); Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); State v. Kirby, — N.C. App. —, 653 S.E.2d 174, 2007 N.C. App. LEXIS 2450 (2007); State v. Cunningham, — N.C. App. —, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008).

Quoted in Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977); Wright v. Asheville Pool & Gunite Co., 44 N.C. App. 80, 259 S.E.2d 797 (1979); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981); Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000); Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232, 2000 N.C. App. LEXIS 1267 (2000).

Stated in Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); State v. Grimes, 47 N.C. App. 476, 267 S.E.2d 387 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Earnhardt, 56 N.C. App. 748, 290 S.E.2d 376 (1982); State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Oxendine v. Moss, 64 N.C. App. 205, 306 S.E.2d 831 (1983); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250 (1987); McLendon v. Woodard, 719 F. Supp. 441 (W.D.N.C. 1989); Buncombe County ex rel. Child Support Enforcement Agency ex rel. Andres v. Newburn, 111 N.C. App. 822, 433 S.E.2d 782 (1993); King v. King, 112 N.C. App. 92, 434 S.E.2d 669 (1993); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000); Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc., 353

N.C. 343, 543 S.E.2d 844, 2001 N.C. LEXIS 273 (2001)

Cited in State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850 (1980); State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980); In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980); State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981); Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982); State v. Woodrup, 60 N.C. App. 205, 298 S.E.2d 439 (1982); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983); State v. Sigmon, 74 N.C. App. 479, 328 S.E.2d 843 (1985); Burriss v. Heavner, 83 N.C. App. 538, 350 S.E.2d 897 (1986); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987); State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344 (1987); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); Bridges v. Bridges, 85 N.C. App. 524, 355 S.E.2d 230 (1987); Neal v. Craig Brown, Inc., 86 N.C. App. 157, 356 S.E.2d 912 (1987); State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987); State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988); Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988); State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988); Helms Ins. Agency, Inc. v. Redshaw, Inc., 94 N.C. App. 716, 381 S.E.2d 187 (1989); State v. McMillian, 101 N.C. App. 425, 399 S.E.2d 410 (1991); Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991); State v. Stone, 104 N.C. App. 448, 409 S.E.2d 719 (1991); State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993); State v. Griffin, 109 N.C. App. 131, 425 S.E.2d 722 (1993); District Bd. of Metro. Sewerage Dist. v. Blue Ridge Plating Co., 110 N.C. App. 386, 430 S.E.2d 282 (1993); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994); Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); State v. Price, 344 N.C. 583, 476 S.E.2d 317 (1996); State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998); State v. Saunders, 126 N.C. App. 524, 485 S.E.2d 853 (1997); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); State v. Dayberry, 131 N.C. App. 406, 507 S.E.2d 587 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999); May v. City of Durham, 136 N.C. App. 578, 525 S.E.2d 223, 2000 N.C. App. LEXIS 109 (2000); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); State v. Alston, 139 N.C. App. 787, 534 S.E.2d 666, 2000 N.C. App. LEXIS 1027 (2000); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002), cert. denied, 356 N.C. 691, 578 S.E.2d 597 (2003); State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), appeal dismissed, cert. denied, 356 N.C. 693, 579 S.E.2d 98, cert. denied, 540 U.S. 843, 124 S. Ct. 113, 157 L. Ed. 2d 78 (2003); Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003); In re Clark, 159 N.C. App. 75, 582 S.E.2d 657, 2003 N.C. App. LEXIS 1444 (2003); Eagle v. Johnson, 159 N.C. App. 701, 583 S.E.2d 346, 2003 N.C. App. LEXIS 1514 (2003); Boyd v. Robeson County, — N.C. App. —, 615 S.E.2d 296, 2005 N.C. App. LEXIS 520 (2005), cert. denied, — N.C. —, 615 S.E.2d 866 (2005); In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005); Carson v. Carson, 177 N.C. App. 277, 628 S.E.2d 439, 2006 N.C. App. LEXIS 873 (2006); Steward v. Green, — N.C. App. —, 657 S.E.2d 719, 2008 N.C. App. LEXIS 423 (2008).

II. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's note. *— The cases cited below were decided under former Rules 19 and 20, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 19, Rules of Practice in the Court of Appeals of North Carolina.*

The purpose of this rule which requires that each assignment of error itself disclose with particularity the specific matters alleged as error without requiring "a voyage of discovery" through an often voluminous record, is twofold: (1) To enable the members of the Supreme Court, in their preargument examination of the record, to ascertain the questions involved in the appeal and thus to obtain maximum benefits from the arguments; (2) to reduce the possibility that an error in the trial below will escape detection. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The primary purpose of this rule is to save the time of the Supreme Court in reviewing the evidence and to reduce printing costs. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Rules Mandatory. — This rule and the rule relating to assignments of error and exceptions, are mandatory. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

This rule is mandatory, and failure to comply limits the appeal to errors presented by the record proper, and in the absence of such error, the appeal will be dismissed. Laughinghouse v. Farm Bureau Mut. Auto. Ins. Co., 239 N.C. 678, 80 S.E.2d 457 (1954); State v. McNeill, 239 N.C. 679, 80 S.E.2d 680 (1954); Whiteside v. Ralston Purina Co., 242 N.C. 591, 89 S.E.2d 159 (1955); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957); State v. Womack, 251 N.C. 342, 111 S.E.2d 332 (1959); Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111 S.E.2d 538 (1959).

And this rule may not be waived by the

parties. Huie v. Templeton, 246 N.C. 86, 97 S.E.2d 455 (1957); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957).

The appellate court is bound by the contents of the record on appeal. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The record on appeal imports verity. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The omission of the essential parts of a transcript, as required by this rule, is fatal to the appeal. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

Impertinent Matter Stricken. — Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Supreme Court, to be stricken out at the expense of the party introducing it. Powell v. Cobb, 56 N.C. 1 (1856).

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue. Powell v. Cobb, 56 N.C. 1 (1856).

Exceptions not filed in the record are deemed abandoned. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Record Too Incomplete to Present Constitutional Question. — The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the questions will not be decided. J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930).

When Party May Amend Pleadings. — The Supreme Court on appeal may allow a party to amend so as to make his pleadings conform to the stipulations of the parties and the theory upon which the case was tried in the lower court, but the Supreme Court will not allow an amendment which would not make the record conform to the facts developed on the trial but would present matter relating to a theory different from that upon which the trial court proceeded. Kayler v. Gallimore, 269 N.C. 405, 152 S.E.2d 518 (1967).

The Supreme Court may in its discretion allow plaintiff to amend his complaint so that the pleadings conform to the proof where it appears that the defendant was not taken by surprise by such proof and that he failed to object to the admission thereof. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

Defendants, property owners and a water company, as part of their effort to support a trial court's grant of summary judgment in their favor in a suit they claimed an easement over the property of plaintiff property owner, appended to their brief a letter from plaintiff dated after the order on appeal; pursuant to N.C. R. App. P. 9(a), as the court was reviewing the correctness of the decision below, it could consider only those materials submitted to the trial judge. Woodring v. Swieter, 180 N.C. App. 362, 637 S.E.2d 269, 2006 N.C. App. LEXIS 2387 (2006).

Motion to Reinstate Appeal. — A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of the court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error in accordance with the manner specified, will be denied, when the granting of the motion would not cure the defects. Redding v. Dunn, 185 N.C. 311, 117 S.E. 26 (1923).

Jurisdiction of Trial Court Should Appear. — In order to sustain an appeal to the Supreme Court it is essential that the jurisdiction of the trial court should be made to appear. State v. Patterson, 222 N.C. 179, 22 S.E.2d 267 (1942).

Where the record fails to disclose jurisdiction in the court below, the Supreme Court acquires no jurisdiction by appeal, and the appeal must be dismissed. State v. Banks, 241 N.C. 572, 86 S.E.2d 76 (1955).

Submission of Controversy Without Action. — Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits are necessary parts of the record proper. Consolidated Realty Corp. v. Koon, 215 N.C. 459, 2 S.E.2d 360 (1939).

Where two separate actions which cannot be joined in the same action are tried together for convenience but not consolidated by the trial court into one action, separate appeals should be taken and separate records filed by the respective applicants, and this rule is not applicable. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Supreme Court May Decide Merits Where Rules Not Followed. — The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits even though the procedure prescribed by the rules of practice as necessary to present such questions has not been followed. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960).

Although case on appeal was not prepared in accordance with this rule the appeal was allowed, as a dismissal would have been a denial of justice. Messick v. City of Hickory, 211 N.C. 531, 191 S.E. 43 (1937).

Appeal in Forma Pauperis. — That the action is in forma pauperis, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

B. Assignment of Error.

Assignment of Error Necessary. — Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error. Hobbs v. Hobbs, 218 N.C. 468, 11 S.E.2d 311 (1940).

Where the record contains no assignments of error, this is ground for dismissal for failure to comply with this rule. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960); Williams v. Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

This rule and Rule 10 require that asserted error must be based on an appropriate exception, and must be properly assigned. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

Exceptions Not Set Out Deemed Abandoned. — This rule provides that all exceptions not set out are deemed abandoned. State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946).

Exceptions not brought forward as separate assignments of error and not discussed in the brief are deemed abandoned. Keith v. Wilder, 241 N.C. 672, 86 S.E.2d 444 (1955).

Effect of Absence of Assignments of Error. — Where the record and brief contain no assignments of error as required by this rule, only the face of the record proper is presented for review. Bumgarner & Bowman Bldg., Inc. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

A sole assignment of error to the signing of a judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

Assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 10. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

This rule and Rule 10 require that asserted error must be based on an appropriate exception, and must be properly assigned. These rules of practice in the Supreme Court are mandatory and will be enforced. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

An assignment of error is worthless unless it is based upon an exception duly taken in apt time during the trial and preserved as required by this rule and Rule 10. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Or Judgment Below Will Be Sustained. — Where the case on appeal contains no assignments of error as required by this rule, unless error appears on the face of the record proper, or the issues are insufficient to support the judgment entered, the judgment will be sustained. Anson Bank & Trust Co. v. Henry, 267 N.C. 253, 148 S.E.2d 7 (1966).

In the absence of assignments of error in the record or brief, the judgment below will be sustained in the absence of error appearing on the face of the record proper. State v. Williams, 268 N.C. 295, 150 S.E.2d 447 (1966).

Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error relating to restrictions placed on cross-examination does not comply with this rule and Rule 10 if it does not contain any question put to any witness on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

Not Sufficient to Show Exceptions in Record. — This rule is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed. Jones v. Atlantic Coast Line R.R., 153 N.C. 419, 69 S.E. 427 (1910). See State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946).

This rule and Rule 10 require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Assignments Not Supported by Exceptions Therein Noted Will Not Be Considered. — Assignments of error not supported by exceptions therein noted cannot be considered. The Supreme Court will not search through a record in an effort to determine whether or not it contains an exception or exceptions that will sustain the assignments. State v. Worley, 246 N.C. 202, 97 S.E.2d 837 (1957).

The Supreme Court will not consider assignments not based on specific exceptions and which do not comply with its rules. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

Reason for Requiring Designation of Exceptions. — The reason which requires appellant in the case on appeal to assign or designate the exceptions on which he will rely is apparent. Appellee is entitled to know which of the exceptions taken appellant intends to rely on, so that there may be included in the record such parts as may be necessary to show that there was in fact no error. Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960).

What the Supreme Court requires is that exceptions which are presented to the court for decision shall be stated clearly and intelligibly by the assignment of error, and not by referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the court is not sent scurrying through the entire record to find the matters complained of. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced ex mero motu. Bulman v. Southern Baptist Convention, 248 N.C. 392, 103 S.E.2d 487 (1958).

Purported exceptions appearing nowhere except in the assignments of error will not be considered on appeal. Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962).

Assignments Must Point Out the Error Relied upon. — Purported assignments of error will not be considered by the court where they do not throw the slightest light on the questions the court is asked to pass upon. State v. Reel, 254 N.C. 778, 119 S.E.2d 876 (1961).

The error relied upon should be definitely and clearly presented, and the court should not be compelled to go beyond the assignment itself to learn what the question is. Allen v. Allen, 244 N.C. 446, 94 S.E.2d 325 (1956); State v. Mills, 244 N.C. 487, 94 S.E.2d 324 (1956); Tillis v. Calvine Cotton Mills, Inc., 244 N.C. 587, 94 S.E.2d 600 (1956); Armstrong v. Howard, 244 N.C. 598, 94 S.E.2d 594 (1956);

Nichols v. McFarland, 249 N.C. 125, 105 S.E.2d 294 (1958); Phillips v. North Carolina R.R., 257 N.C. 239, 125 S.E.2d 603 (1962); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); State v. Oliver, 268 N.C. 280, 150 S.E.2d 445 (1966).

This rule and Rule 10 require the assignment of error to show what question is intended to be presented for consideration without the necessity of paging through the record to find the asserted error. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Hunt v. Davis, 248 N.C. 69, 102 S.E.2d 405 (1958); Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

This rule and Rule 10 require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the court going beyond the assignment of error itself "on a voyage of discovery" through the record to find the asserted error and the precise question involved. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Assignments of error do not comply with the requirements of this rule and are insufficient where they do not present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are, and the particular portions of the charge objected to are not specifically set out. Hill v. Logan, 262 N.C. 488, 137 S.E.2d 822 (1964).

Assignments of error, when properly prepared, pinpoint the controversy. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

An assignment of error to the admission or exclusion of evidence must include so much of that testimony as will enable the Supreme Court to understand the question sought to be presented without the necessity of going beyond the assignment itself. Grimes v. Home Credit Co., 271 N.C. 608, 157 S.E.2d 213 (1967).

The assignment must be so specific that the court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error which are insufficient to present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are do not comply with this rule. Jones v. Saunders, 257 N.C. 118, 125 S.E.2d 350 (1962); Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966); Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966); State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970).

A mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not a compliance with this rule. Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Lack of Definiteness. — Where the charge covered 36 pages of the record, and all except 15 lines were made the subject of the 72 exceptions taken, and some of the exceptions related to two or more pages of the charge, the exceptions did not point up with the definiteness required by this rule. State v. Stevens, 244 N.C. 40, 92 S.E.2d 409 (1956).

The exceptions which are bona fide shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Appeal Itself Treated as Exception to Judgment. — Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. Ellis v. Atlantic Coast Line R.R., 241 N.C. 747, 86 S.E.2d 406 (1955).

When Only One Exception Taken. — An appeal will not be dismissed for noncompliance with this rule, requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where the appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly. Wall v. Holloman, 156 N.C. 275, 72 S.E. 369 (1911).

When Error Plainly Apparent. — Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied if the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N.C. 337, 51 S.E. 941 (1905).

When Only Correctness of Judgment Questioned. — When the appeal calls in question only the correctness of the judgment, no summary of exceptions is required because it is error on the face of the record. Wilson v. Beaufort County Lumber Co., 131 N.C. 163, 42 S.E. 565 (1902); Ullery v. Guthrie, 148 N.C. 417, 62 S.E. 552 (1908).

Discretion of Supreme Court to Dispose of Case. — Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. Aydlett v. Keim, 232 N.C. 367, 61 S.E.2d 109 (1950).

While not in strict compliance with this rule, plaintiff's assignments of error are specific and definite. Since the rules of the Supreme Court are made for the court's convenience and in dispatch of its appellate jurisdiction, the Supreme Court will consider appellant's assignment of error. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

An exception "to each conclusion of law embodied in the judgment" is a broadside exception and does not comply with this rule and G.S. 1-186. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

An assignment of error which attempts to present several questions of law is broadside and ineffective. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S. Ct. 253, 27 L. Ed. 2d 252 (1970).

Exception Held Ineffectual. — An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" was ineffectual as a broadside exception in that it failed to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. Poniros v. Nello L. Teer Co., 236 N.C. 145, 72 S.E.2d 9 (1952).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

C. Composition of Record.

Requirements of Rule Strictly Adhered to. — The requirement that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904); Pegram v. Hester, 152 N.C. 765, 68 S.E. 8 (1910).

The record on appeal should consist of a plain, accurate, and concise statement of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to this rule. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The pages of the record in an appeal in forma pauperis must be numbered. Pearce v. Hewitt, 261 N.C. 408, 134 S.E.2d 662 (1964).

The absence of the complaint from the record makes it necessary to dismiss the appeal. Williams v. Asheville Contracting Co., 259 N.C. 232, 130 S.E.2d 340 (1963).

Filing Date of Every Document Required. — This rule requires, inter alia, that the filing date of every pleading, motion, affidavit or other document in the transcript on appeal shall appear. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

Causes of Action Must Be Separately Stated. — Where plaintiff brings suit on two causes of action, each must be separately stated. Bannister & Sons v. Williams, 261 N.C. 586, 135 S.E.2d 572 (1964).

Where two or more cases are consolidated and tried together as one case and there are two or more appeals arising from the action, ordinarily only one copy of the record and the proceedings of the trial in the trial tribunal should be filed in the Court of Appeals. State v. Tyler, 4 N.C. App. 682, 167 S.E.2d 509 (1969).

Referring to Prior Paragraphs by Number Insufficient. — A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. Guy v. Baer, 234 N.C. 276, 67 S.E.2d 47 (1951); Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1952).

Stenographer's Notes. — The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury, always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge who is alone authorized and empowered by the Constitution to try the cause, and who alone if counsel disagree can settle for the court what occurred during the trial. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's Notes Insufficient. — When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare a concise statement of the case as required by this rule, and his appeal will be dismissed, when upon examination no error is found in the record proper. Buckner v. South & W. Ry., 157 N.C. 443, 73 S.E. 137 (1911); Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

Only one copy of the stenographic transcript is required to be filed. Bryant v. Snyder, 3 N.C. App. 65, 164 S.E.2d 35 (1968).

A statement of case on appeal is not an essential part of the record on appeal. Moss v. Southern Ry., 2 N.C. App. 50, 162 S.E.2d 633 (1968).

A brief is not a part of the record on appeal. Civil Serv. Bd. v. Page, 2 N.C. App. 34, 162 S.E.2d 644 (1968); Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Order of Proceedings and Documents. — The record does not comply with this rule where the proceedings are not set forth therein in the order of time in which they occurred and are not arranged so as to follow each other in the order in which they were filed, and the documents included in the record do not plainly show the date on which they were filed. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Proceedings Not Set Forth in Order of Time. — Where the transcript does not set forth the proceedings in the order of time in which they occur, and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912).

An index of exhibits solely by the alphabetical designation of such exhibits does not comply with this rule of practice. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939).

Failure to Index. — Appeals will be dismissed where no index is sent up in the record and printed and no marginal references prepared. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904). See also Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897); Pretzfelder v. Merchants Ins. Co., 123 N.C. 164, 31 S.E. 470 (1898).

Pleadings, Issues and Judgment Part of Record. — The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the court, consequently, not being informed as to the nature of the action, is dismissed. Waters v. Waters, 199 N.C. 667, 155 S.E. 564 (1930). See Goodman v. Goodman, 208 N.C. 416, 181 S.E. 328 (1935); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943).

The pleadings are an essential part of the record in order that the Supreme Court may be advised as to the nature of the action or proceeding. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. State v. Ravensford Lumber Co., 207 N.C. 47, 175 S.E. 713 (1934); Griffin v. Barnes, 242 N.C. 306, 87 S.E.2d 560 (1955).

Where the pleadings and the referee's report have been omitted from the record, the appeal must be dismissed as not conforming to this rule. Payne v. Brown, 205 N.C. 785, 172 S.E. 348 (1934).

Verified Answer Attached to Motion to Set Aside Default Judgment. — On appeal from an order setting aside a default judgment upon the court's finding of surprise and a meritorious defense, the verified answer of defendant, which was attached to and made a part of the motion to set aside the judgment, is a necessary part of the record proper, and on failure to send it up the appeal will be dismissed, since in the absence of the answer it cannot be determined whether the finding of a meritorious defense was supported by evidence. Mooneyham v. Mooneyham, 249 N.C. 641, 107 S.E.2d 66 (1959).

Copy of Judgment Omitted. — Where on appeal no printed copy of the judgment accompanies the record, the appeal will be dismissed under this rule. Wiley v. Bessemer City Mining Co., 117 N.C. 489, 23 S.E. 448 (1895).

Dismissal of Appeal. — The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of court regulating appeals. Bridgers v. Griffin, 195 N.C. 862, 142 S.E. 221 (1928); In re Anderson, 251 N.C. 176, 110 S.E.2d 832 (1959).

Under this rule the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. Schwarberg v. Howard, 197 N.C. 126, 147 S.E. 741 (1929); J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930); Thrush v. Thrush, 245 N.C. 63, 94 S.E.2d 897 (1956); Williams v. Asheville Contracting Co., 259 N.C. 232, 130 S.E.2d 340 (1963).

Where on appeal the record contains only a synopsis of the complaint, the appeal will be dismissed. J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930).

Where the record does not show either the organization of the court below or the authority of the special judge who signed the judgment, nor disclose that the judgment was entered at term, the appeal is dismissible under this rule. Vail v. Stone, 222 N.C. 431, 23 S.E.2d 329 (1942).

D. Criminal Actions.

Essential Parts of Transcript in Criminal Cases. — On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and the judgment appealed from are essential parts of the transcript. State v. Jenkins, 234 N.C. 112, 66 S.E.2d 819 (1952); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965), aff'd, 266 N.C. 295, 145 S.E.2d 899 (1966).

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. State v. Jackson, 226 N.C. 760, 40 S.E.2d 417 (1946).

Where two defendants are jointly tried for the same offense upon a joint indictment, only a single transcript should be docketed upon their respective appeals. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Case Decided on False Record. — Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record. State v. Marsh, 134 N.C. 184, 47 S.E. 6 (1903).

In Capital Case. — Where defendant's exceptions are not brought forward and grouped as required by this rule, the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fail to disclose prejudicial error. State v. Thompson, 224 N.C. 661, 32 S.E.2d 24 (1944); State v. West, 229 N.C. 416, 50 S.E.2d 3 (1948).

E. Evidence.

Assignments of error as to the admission of evidence shall state with particularity the alleged incompetent evidence, and not require a search through the record to find the challenged evidence. Bridges v. Graham, 246 N.C. 371, 98 S.E.2d 492 (1957).

Failure to State Evidence in Narrative Form. — An appeal is dismissed for failure of the defendants to state the evidence in narrative form. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Record Not Containing Evidence. — When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Insufficient Statement of Evidence. — Where it is impossible for the court to determine from whom the evidence was being elicited, who was examining the witnesses, whether there was cross-examination, the purpose for which the witnesses were being examined, and exactly what the evidence was, the recital, rather than being a narration of the evidence, is a recitation of the events surrounding the arrest of the defendants. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Omission of Necessary Part of Record. — In a homeowners association's appeal of the trial court's denial of its motion to amend and dismissal of its complaint, the record was incomplete under N.C. R. App. P. 9(a)(1)(e) because the focus of the parties' arguments was the association's failure to exhaust administrative remedies required in the applicable zoning ordinances, and those zoning ordinances were absent from the record on appeal. Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C., 163 N.C. App. 325, 593 S.E.2d 120, 2004 N.C. App. LEXIS 366 (2004).

Exclusion of Evidence. — Assignment of error relating to the exclusion of evidence did not comply with this rule in that appellant did not incorporate therein the excluded evidence and thus disclose the alleged error. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The assignments of error should set forth, within itself, the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify. Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion, is a broadside exception and ineffectual because of noncompliance with this rule and Rule 10. Columbus County v. Thompson, 249 N.C. 607, 107 S.E.2d 302 (1959).

An assignment of error that the court failed to declare the law arising on the evidence, is a broadside exception and ineffectual. Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967).

When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Requirements Cannot Be Waived. — The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by the parties. Buckner v. South & W. Ry., 157 N.C. 443, 73 S.E. 137 (1911); First Nat'l Bank v. Fries, 162 N.C. 516, 77 S.E. 678 (1913); State v. McNeill, 239 N.C. 679, 80 S.E.2d 680 (1954); Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111 S.E.2d 538 (1959).

Effect of Failure to Comply. — Where the appellant has failed to make a concise statement of the evidence according to the rules of practice, but gives the entire evidence in the form of questions to and answers of witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. Casey v. East Carolina Ry., 198 N.C. 432, 152 S.E. 38 (1930); Rhoades v. City of Asheville, 220 N.C. 443, 17 S.E.2d 500 (1941).

An appeal will not be dismissed under this rule, unless the narration of the evidence is fatally defective. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Where the evidence in the case on appeal is set out entirely in questions and answers instead of in narrative form as required by this rule, the Supreme Court considers only errors presented by the record proper. Anson Bank & Trust Co. v. Henry, 267 N.C. 253, 148 S.E.2d 7 (1966).

Objection to Noncompliance Presented by Counter-Case or Exceptions to Case. — Objection that appellant, instead of reducing the testimony to narrative form as required by this rule, merely gave conclusions as to the meaning of the testimony should ordinarily be presented by counter-case or exceptions to the case on appeal. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Filing Copies of Plat. — Where a plat is referred to in the pleadings and evidence, and is necessary to the understanding of an appeal, the same number of copies of the plat must be filed as is required of the printed record and briefs, or the judgment below will be affirmed or appeal dismissed. Stephens v. McDonald, 132 N.C. 135, 43 S.E. 592 (1903).

This is also true of an exhibit made part of the case on appeal. Fleming v. McPhail, 121 N.C. 183, 28 S.E. 258 (1897); Hicks v. Royal, 122 N.C. 405, 29 S.E. 413 (1898).

But where the map or plat is irrelevant its exclusion will not be held error. Fulwood v. Fulwood, 161 N.C. 601, 77 S.E. 763 (1913).

Rule 10. Assigning error on appeal.

(a) *Function in limiting scope of review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving questions for appellate review.*

(1) *General.* In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) *Jury instructions; findings and conclusions of judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto

before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) *Sufficiency of the evidence.* A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of error.*

(1) *Form; Record references.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) *Jury instructions.* Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) *Sufficiency of evidence.* In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) *Assigning plain error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-assignments of error by appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

(Adopted June 13, 1975; Amended June 10, 1981 — 10(b)(2), applicable to every case the trial of which begins on or after October 1, 1981; Amended July 7, 1983 — 10(b)(3); Amended November 27, 1984 — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; Amended December 8, 1988 — effective for all judgments of the trial division entered on or after July 1, 1989.)

Legal Periodicals. — For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For recent development, "The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt," see 84 N.C. L. Rev. 2100 (2006).

For recent development, "The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt," see 84 N.C. L. Rev. 2100 (2006).

CASE NOTES

- I. In General.
- II. Limiting Scope of Review.
  - A. Generally.
  - B. Issues Not Requiring Objection or Motion.
- III. Preserving Questions for Appeal.
  - A. Generally.
  - B. Jury Instructions; Findings and Conclusions of Judge.
  - C. Sufficiency of Evidence.
- IV. Assignments of Error.
  - A. Form; Record References.
  - B. Jury Instructions.
  - C. Sufficiency of Evidence.
  - D. Plain Error.
- V. Cross-Assignments by Appellee.
- VI. Decisions Under Prior Law.
  - A. Exceptions.
  - B. Evidence.

I. IN GENERAL.

Editor's note. *— Many of the cases below were decided prior to the amendment effective July 1, 1989, deleting references to exceptions.*

Purpose of Rule. — N.C. R. App. P. 10(b)(1) is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal; the purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Applicability. — N.C. R. App. P. 10(b) did not apply to an appeal by certiorari to the superior court from a hearing before a county zoning board of adjustment because the North Carolina Rules of Appellate Procedure were inapplicable as there was no direct right of appeal from the board of adjustment to the appellate division; the board of adjustment was not a trial tribunal as defined by N.C. R. App. P. 1(c), and appeals from the board of adjustment were to the superior court, by certiorari pursuant to G.S. 153A-345(e). Cook v. Union County Zoning Bd. of Adjustment, 185 N.C. App. 582, 649 S.E.2d 458, 2007 N.C. App. LEXIS 1949 (2007).

Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Marsico v. Adams, 47 N.C. App. 196, 266 S.E.2d 696 (1980); Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

When a conflict arises between a subsection of G.S. 15A-1446 and this rule, the rule should control. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

To the extent that G.S. 15A-1446(d)(5) is inconsistent with subdivision (b)(3) of this rule, the statute must fail. State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Construction with G.S. 8C-1-103(a)(2). — Constitution of North Carolina vests the Supreme Court of North Carolina with exclusive authority to make rules of practice and procedure for the appellate division of the courts; while G.S. 8C-1-103(a)(2) permitted appellate review of an evidentiary ruling even though the party failed to object at trial, since G.S. 8C-1-103(a)(2) was inconsistent with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. State v. Tutt, 171 N.C. App. 518, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

Discretionary Review Allowed Under N.C.R.A.P., Rule 2 Even Though Issue Not Preserved for Appeal. — Defendant did not properly preserve for appeal either issue on which he now relies. However, court of appeals may hear appeals in its discretion under N.C.R.A.P., Rule 2. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

While defendant's assignment of error did not provide the legal basis pursuant to N.C.R.A.P. 10(c)(1) for an argument that the testimony violated G.S. 8C-1-701, the appellate court incorrectly concluded that it had no authority to apply N.C.R.A.P. 2; thus, the matter had to be remanded. State v. Hart, 361 N.C. 309, 644 S.E.2d 201, 2007 N.C. LEXIS 410 (2007).

Contesting Jurisdictional Issues. — Superior court properly determined that a New York judgment was not enforceable against a debtor because of a lack of personal jurisdiction over the debtor, and a creditor failed to challenge this conclusion of law. Hence, the superior court properly determined that the debtor rebutted the presumption that the North Carolina Courts should grant full faith and credit to the New York judgment. Orix Fin. Servs. v. Raspberry Logging, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1012 (May 20, 2008).

Appellate court in its discretion reviewed the issue of whether the mother in a termination of parental rights case received proper notice of the scheduling of her termination hearing where the mother raised the issue for the first time on appeal. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Court of appeals review of administrative agency's decision is governed by the Administrative Procedure Act, G.S. 150B-1, et seq., and court may reverse or modify agency's decision only if it violates one of five statutory grounds. Court will determine if agency's findings, inferences, conclusions, or decisions are affected by error of law or unsupported by substantial evidence admissible under G.S. 150B-29(a), G.S. 150B-30, or G.S. 150B-31 in view of entire record as submitted. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

This rule functions as an important vehicle to ensure that errors are not "built into" the record, thereby causing unnecessary appellate review. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of section (b) of this rule. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Purpose to Allow Appellee to Assess Sufficiency of Record. — One purpose of this rule is to identify for the appellee's benefit all the errors possible to be urged on appeal so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position. State v. Baggett, 133 N.C. App. 47, 514 S.E.2d 536 (1999).

Party may waive statutory or constitutional provisions by express consent or conduct inconsistent with a purpose to insist upon it. As a corollary to this rule, in order for an appellant to assert such right on appeal, the issue must have been presented to the trial court. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

The scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal. Koufman v. Koufman, 330 N.C. 93, 408 S.E.2d 729 (1991).

Use of Statements Precludes Objection. — Defendant waived any objection as to use of a witnesses' prior statements by using them extensively himself on cross-examination, and by failing to object to the use of the statements to refresh the witnesses' memory. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

Recordation of Trial. — In district court, where there are no official court reporters, a party seeking recordation of a hearing or trial must request a reporter or mechanical recordation; failure to make such a request prevents the issue from being raised on appeal. Holterman v. Holterman, 127 N.C. App. 109, 488 S.E.2d 265 (1997).

Specific identification of Challenged Evidence. — In a guardian ad litem's appeal from the dismissal of a petition alleging that a child was an abused and neglected juvenile, the guardian ad litem's assignment of error challenging the admissibility of certain dispositional evidence was dismissed under N.C. R. App. P. 10(c)(1) because the guardian ad litem did not identify the evidence with particularity; without specific identification, the appellate court could not evaluate the propriety of its admission or determine whether the guardian ad litem made timely objections to the admissibility of the evidence at trial. In re A.R.H., 177 N.C. App. 797, 629 S.E.2d 925, 2006 N.C. App. LEXIS 1183 (2006).

Summary judgment. — In insureds' appeal from a judgment granting their homeowner insurance carrier's motion for summary judgment in their action arising out of the insurance policy, the insureds' assignments of error did not fail to state plainly the legal basis on which error was assigned in violation of N.C. R. App. P. 10(c)(1); because an appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law, specific assignments of error are not required. Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Applied in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); Dawson Indus., Inc. v. Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266 (1976); Foy v. Bremson, 30 N.C. App. 662, 228 S.E.2d 88 (1976); Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976); Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976); Sturdivant v. Sturdivant, 31 N.C. App. 341, 229 S.E.2d 318 (1976); In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); Borg-Warner Acceptance Corp. v. David, 32 N.C. App. 559, 232 S.E.2d 867 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977); Productive Tool Corp. v. Pilot Freight Carriers, Inc., 33 N.C. App. 241, 234 S.E.2d 758 (1977); Moore v. Smith, 33 N.C. App. 275, 235 S.E.2d 102 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); Parker v. Williams, 34 N.C. App. 563, 239 S.E.2d 270 (1977); State v. Graham, 35 N.C. App. 700, 242 S.E.2d 512 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Abernathy, 36 N.C. App. 527, 244 S.E.2d 696 (1978); Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 259 S.E.2d 288 (1979); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); State v. Smith, 43 N.C. App. 727, 259 S.E.2d 805 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207 (1980); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520 (1980); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980); Hazard v. Hazard, 46 N.C. App. 280, 264 S.E.2d 908 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980); DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980); Thompson v. Lenoir Transf. Co., 48 N.C. App. 47, 268 S.E.2d 534 (1980); Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980); Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980); State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 291 S.E.2d 137 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581 (1982); State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Mackey, 56 N.C. App. 468, 291 S.E.2d 663 (1982); State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982); State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Crump v. Coffey, 59 N.C. App. 553, 297 S.E.2d 131 (1982); Scott v. Kiker, 59 N.C. App. 458, 297 S.E.2d 142 (1982); State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982); State v. Godwin, 59 N.C. App. 662, 297 S.E.2d 623 (1982); State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983); State v. Myrick, 60 N.C. App. 362, 299 S.E.2d 439 (1983); West v. Slick, 60 N.C. App. 345, 299 S.E.2d 657 (1983); State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819 (1983); State v. Setzer, 61 N.C. App. 500, 301 S.E.2d 107 (1983); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983); Martin-Kahill Ford Lincoln Mercury, Inc. v. Skidmore, 62 N.C. App. 736, 303 S.E.2d 392 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983); State v. Williams, 309 N.C. 170, 305 S.E.2d 519 (1983); In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983); State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983); State v. Kelley, 65 N.C. App. 159, 308 S.E.2d 720 (1983); State v. Squalls, 65 N.C. App. 599, 309 S.E.2d 558 (1983); Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); State v. Simmons, 65 N.C. App. 804, 310 S.E.2d 139 (1984); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. Queen, 65 N.C. App. 820, 310 S.E.2d 153 (1984); State v. Bunn, 66 N.C. App. 187, 310 S.E.2d 792 (1984); State v. Haight, 66 N.C. App. 104, 310 S.E.2d 795 (1984); B & H Supply Co. v. Insurance Co. of N. Am., 66 N.C. App. 580, 311 S.E.2d 643 (1984); State v. Cauthen, 66 N.C. App. 630, 311 S.E.2d 649 (1984); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); State v. Bradley, 67 N.C. App. 81, 312 S.E.2d 519 (1984); Housing Auth. v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984); State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984); State v. Joyner, 67 N.C. App. 134, 312 S.E.2d 681 (1984); State v. Williams, 67 N.C. App. 519, 313 S.E.2d 236 (1984); State v. Bennett, 67 N.C. App. 407, 313 S.E.2d 277 (1984); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); Texaco, Inc. v. Creel, 310 N.C. 695, 314 S.E.2d 506 (1984); State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984); State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Nelson, 69 N.C. App. 455, 317 S.E.2d 70 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); Smith-Douglass v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304 (1984); Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984); State v. Tarrant, 70 N.C. App. 449, 320 S.E.2d 291 (1984); State v. McGinnis, 70 N.C. App. 421, 320 S.E.2d 297 (1984); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984); State v. Woodruff, 70 N.C. App. 561, 321 S.E.2d 1 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); State v. Bethea, 71 N.C. 125, 321 S.E.2d 520 (1984); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Dorsey, 71 N.C. App. 435, 322 S.E.2d 405 (1984); State v. Goodman, 71 N.C. App. 343, 322 S.E.2d 408 (1984); State v. Southern, 71 N.C. App. 563, 322 S.E.2d 617 (1984);

Powe v. Odell, 312 N.C. 410, 322 S.E.2d 762 (1984); Clifford v. River Bend Plantation, Inc., 312 N.C. 460, 323 S.E.2d 23 (1984); State v. Baize, 71 N.C. App. 521, 323 S.E.2d 36 (1984); In re Will of Leonard, 71 N.C. App. 714, 323 S.E.2d 377 (1984); State v. Washington, 71 N.C. App. 767, 323 S.E.2d 420 (1984); Goforth Properties, Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984); State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984); In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985); Freeman v. St. Paul Fire & Marine Ins. Co., 72 N.C. App. 292, 324 S.E.2d 307 (1985); State v. Joyner, 312 N.C. 779, 324 S.E.2d 841 (1985); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985); Pittman v. First Protection Life Ins. Co., 72 N.C. App. 428, 325 S.E.2d 287 (1985); State v. Jones, 72 N.C. App. 610, 325 S.E.2d 309 (1985); State v. Hall, 73 N.C. App. 101, 325 S.E.2d 639 (1985); Phillips v. Boling Co., 71 N.C. App. 139, 326 S.E.2d 76 (1985); Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985); State v. Marlowe, 73 N.C. App. 443, 326 S.E.2d 351 (1985); Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985); State v. Barranco, 73 N.C. App. 502, 326 S.E.2d 903 (1985); State v. Myers, 73 N.C. App. 650, 327 S.E.2d 276 (1985); Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985); State v. Stone, 73 N.C. App. 691, 327 S.E.2d 644 (1985); In re Swisher, 74 N.C. App. 239, 328 S.E.2d 33 (1985); Keene v. Wake County Hosp. Sys., 74 N.C. App. 523, 328 S.E.2d 883 (1985); Watts v. Cumberland County Hosp. Sys., 74 N.C. App. 769, 330 S.E.2d 256 (1985); State v. Austin, 75 N.C. App. 338, 330 S.E.2d 661 (1985); State v. Mason, 76 N.C. App. 154, 331 S.E.2d 767 (1985); DOT v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985); Cla-Mar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985); Wilkins v. Green, 76 N.C. App. 340, 332 S.E.2d 507 (1985); Sessoms v. Sessoms, 76 N.C. App. 338, 332 S.E.2d 511 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); State v. Arnold, 314 N.C. 301, 333 S.E.2d 34 (1985); Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985); State v. Wright, 76 N.C. App. 673, 334 S.E.2d 84 (1985); State v. Green, 76 N.C. App. 642, 334 S.E.2d 263 (1985); McManus v. McManus, 76 N.C. App. 588, 334 S.E.2d 270 (1985); State v. Hensley, 77 N.C. App. 192, 334 S.E.2d 783 (1985); State v. Torres, 77 N.C. App. 345, 335 S.E.2d 34 (1985); Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 77 N.C. App. 475, 335 S.E.2d 335 (1985); State v. Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985); State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985); State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985); Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985); State v. Elliott, 77 N.C. App. 647, 335 S.E.2d 774 (1985); Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985); Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985); State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985); DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985); State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985); State v. Covington, 315 N.C. 352, 338 S.E.2d 310 (1986); State v. Litchford, 78 N.C. App. 722, 338 S.E.2d 575 (1986); Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809 (1986); State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986); Tatum v. Tatum, 79 N.C. App. 605, 339 S.E.2d 817 (1986); Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986); State v. Davis, 80 N.C. App. 143, 341 S.E.2d 101 (1986); State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986); State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986); Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986); State v. Frazier, 80 N.C. App. 547, 342 S.E.2d 534 (1986); State v. Taylor, 80 N.C. App. 500, 342 S.E.2d 539 (1986); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986); State v. Costner, 80 N.C. App. 666, 343 S.E.2d 241 (1986); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986); Cherry, Bekaert & Holland v. Worsham, 81 N.C. App. 116, 344 S.E.2d 97 (1986); State v. Sanders, 81 N.C. App. 438, 344 S.E.2d 592 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986); State v. Joplin, 318 N.C. 126, 347 S.E.2d 421 (1986); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986); Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986); State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986); La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., 83 N.C. App. 520, 350 S.E.2d 912 (1986); Hill v. Hill, 83 N.C. App. 661, 351 S.E.2d 108 (1986); State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987); White v. Lowery, 84 N.C. App. 433, 352 S.E.2d 866 (1987); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902 (1987); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239 (1987); Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269 (1987); State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344 (1987); State v. Harlee, 85 N.C. App. 159, 354 S.E.2d 348 (1987); Petty v. City of Charlotte, 85 N.C. App. 391, 355 S.E.2d 210 (1987); Hardy v. Integon Life Ins. Corp., 85 N.C. App. 575, 355 S.E.2d 241 (1987); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804 (1987); Taylor v. North Carolina DOT, 86 N.C. App. 299, 357 S.E.2d 439 (1987); McKnight v. Simpson's Beauty Supply, Inc., 86 N.C. App. 451, 358 S.E.2d 107 (1987); Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987); State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987); Whitehurst v. Crisp R.V. Ctr., Inc., 86 N.C. App. 521, 358 S.E.2d 542 (1987); State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987); State v. Suggs, 86 N.C. App. 588, 359 S.E.2d 24 (1987); Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987); State v. Meeks, 320 N.C. 615, 360 S.E.2d 79 (1987); State v. Daniels, 87 N.C. App. 287, 360 S.E.2d 470 (1987); State v. Wilson, 87 N.C. App. 399, 361 S.E.2d 105 (1987); Reliance Ins. Co. v. Lexington Ins. Co., 87 N.C. App. 428, 361 S.E.2d 403 (1987); State v. Morris, 87 N.C. App. 499, 361 S.E.2d 414 (1987); State v. McKnight, 87 N.C. App. 458, 361 S.E.2d 429 (1987); State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987); York v. Northern Hosp. Dist., 88 N.C. App. 183, 362

S.E.2d 859 (1987); Hinkle v. Bowers, 88 N.C. App. 387, 363 S.E.2d 206 (1988); State v. Peek, 89 N.C. App. 123, 365 S.E.2d 320 (1988); In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988); Schrock v. Schrock, 89 N.C. App. 308, 365 S.E.2d 657 (1988); McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988); State v. Adams, 90 N.C. App. 145, 367 S.E.2d 362 (1988); Butler & Sidbury, Inc. v. Green St. Baptist Church, 90 N.C. App. 65, 367 S.E.2d 380 (1988); State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988); State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988); Tay v. Flaherty, 90 N.C. App. 346, 368 S.E.2d 403 (1988); State v. Bogle, 90 N.C. App. 277, 368 S.E.2d 424 (1988); State v. Bruce, 90 N.C. App. 547, 369 S.E.2d 95 (1988); Walker v. Goodson Farms, Inc., 90 N.C. App. 478, 369 S.E.2d 122 (1988); State v. Chisholm, 90 N.C. App. 526, 369 S.E.2d 375 (1988); Riverview Property Owners Ass'n v. Hewett, 90 N.C. App. 753, 370 S.E.2d 53 (1988); State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988); In re Medical Ctr., 91 N.C. App. 107, 370 S.E.2d 597 (1988); State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988); State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988); Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988); Raymond U. v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701 (1988); State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988); Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988); State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988); Wilson v. State Farm Mut. Auto. Ins. Co., 92 N.C. App. 320, 374 S.E.2d 446 (1988); State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988); State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988); Bumgarner v. Tomblin, 92 N.C. App. 571, 375 S.E.2d 520 (1989); Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989); State v. McSwain, 324 N.C. 241, 376 S.E.2d 453 (1989); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Blackman, 93 N.C. App. 207, 377 S.E.2d 290 (1989); Brown v. MTA Sch., Inc., 94 N.C. App. 218, 379 S.E.2d 683 (1989); State v. Shamsid-Deen, 324 N.C. 437, 379 S.E.2d 842 (1989); Piedmont Ford Truck Sale, Inc. v. City of Greensboro, 324 N.C. 499, 380 S.E.2d 107 (1989); State v. Outlaw, 94 N.C. App. 491, 380 S.E.2d 531 (1989); State v. Turner, 94 N.C. App. 584, 380 S.E.2d 619 (1989); Gray v. Hoover, 94 N.C. App. 724, 381 S.E.2d 472 (1989); State v. Morgan, 95 N.C. App. 639, 383 S.E.2d 452 (1989); Town of Swansboro v. Odum, 96 N.C. App. 115, 384 S.E.2d 302 (1989); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989); State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989); Kwan-Sa You v. Roe, 97 N.C. App. 1, 387 S.E.2d 188 (1990); State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990); State v. Holley, 326 N.C. 259, 388 S.E.2d 110 (1990); Potter v. Homestead Preservation Ass'n, 97 N.C. App. 454, 389 S.E.2d 146 (1990); State v. Robinson, 97 N.C. App. 597, 389 S.E.2d 417 (1990); State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. McCarty, 326 N.C. 782, 392 S.E.2d 359 (1990); Tompkins v. Tompkins, 98 N.C. App. 299, 390 S.E.2d 766 (1990); State v. Arnold, 98 N.C. App. 518, 392 S.E.2d 140 (1990); State v. Robbins, 99 N.C. App. 75, 392 S.E.2d 449 (1990); State v. Scott, 99 N.C. App. 113, 392 S.E.2d 621 (1990); State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990); State v. Hunt, 100 N.C. App. 43, 394 S.E.2d 221 (1990); State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990); Liberty Fin. Co. v. North Augusta Computer Store, Inc., 100 N.C. App. 279, 395 S.E.2d 709 (1990); State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990); Christensen v. Christensen, 101 N.C. App. 47, 398 S.E.2d 634 (1990); Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990); State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991); State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991); Weston v. Carolina Medicorp, Inc., 102 N.C. App. 370, 402 S.E.2d 653 (1991); State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991); State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); State v. McPhail, 329 N.C. 636, 406 S.E.2d 591 (1991); Correll v. Division of Social Servs., 103 N.C. App. 562, 406 S.E.2d 633 (1991); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991); Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); State v. Gordon, 104 N.C. App. 455, 410 S.E.2d 4 (1991); State v. Mitchell, 104 N.C. App. 514, 410 S.E.2d 211 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Canady, 330 N.C. 398, 410 S.E.2d 875 (1991); State v. Huntley, 104 N.C. App. 732, 411 S.E.2d 155 (1991); News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992); State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); State v. Sluka, 107 N.C. App. 200, 419 S.E.2d 200 (1992); State v. Jeune, 332 N.C. 424, 420 S.E.2d 406 (1992); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); Lumsden v. Lawing, 107 N.C. App. 493, 421 S.E.2d 594 (1992); State v. Williamson, 333 N.C. 128, 423 S.E.2d 766 (1992); State v. Bronson, 333 N.C. 67, 423 S.E.2d 772 (1992); Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993); Albritton v. Albritton, 109 N.C. App. 36, 426 S.E.2d 80 (1993); Beaver v. Hampton, 333 N.C. 455, 427 S.E.2d 317 (1993); Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993); Aetna Cas. & Sur. Co. v. Continental Ins. Co., 110 N.C. App. 278, 429 S.E.2d 406 (1993); State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993); Northwestern Fin. Group, Inc. v. County of Gaston, 110 N.C. App. 531, 430 S.E.2d 689 (1993); State v. Ginyard, 334 N.C. 155, 431 S.E.2d 11 (1993); State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993); State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Owen, 111 N.C. App. 300, 432 S.E.2d 378 (1993); Coble Cranes & Equip. Co. v. B & W Utils., Inc., 111 N.C. App. 910, 433 S.E.2d 464 (1993); State v. Pittman, 111 N.C. App. 808, 433 S.E.2d 822 (1993); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993); State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993); Brown v. Brown, 112 N.C. App. 614, 436 S.E.2d 404 (1993); Barbee v. Atlantic Marine Sales & Serv., Inc., 113 N.C. App. 80, 437 S.E.2d 682 (1993); State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994); State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (1994); State v.

McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994); In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130 (1994); State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994); State v. Gray, 337 N.C. 772, 448 S.E.2d 794 (1994); State v. Howie, 116 N.C. App. 609, 448 S.E.2d 867 (1994); Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994); State v. Hamilton, 338 N.C. 193, 449 S.E.2d 402 (1994); State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994); Madden v. Carolina Door Controls, Inc., 117 N.C. App. 56, 449 S.E.2d 769 (1994); State v. Lilly, 117 N.C. App. 192, 450 S.E.2d 546 (1994); State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994); Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994); Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589 (1995); State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995); McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995); In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995); State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995); State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995); Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995); State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995); Huberth v. Holly, 120 N.C. App. 348, 462 S.E.2d 239 (1995); Town of Chapel Hill v. Fox, 120 N.C. App. 630, 463 S.E.2d 421 (1995); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State ex rel. Long v. Interstate Cas. Ins. Guar. Ass'n, 120 N.C. App. 743, 464 S.E.2d 73 (1995); Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995); Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996); Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996); State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996); Dorsey v. UNC-Wilmington, 122 N.C. App. 58, 468 S.E.2d 557 (1996); State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996); State v. Brewington, 343 N.C. 448, 471 S.E.2d 398 (1996); Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996); State v. Myers, 123 N.C. App. 189, 472 S.E.2d 598 (1996); State v. Bruton, 344 N.C. 381, 474 S.E.2d 336 (1996); State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996); State v. Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (1996); State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996); State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996); State v. Pyatt, 125 N.C. App. 147, 479 S.E.2d 218 (1997); State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (1997), cert. denied, 346 N.C. 551, 488 S.E.2d 813 (1997); Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998); Rogers v. Colpitts, 129 N.C. App. 421, 499 S.E.2d 789 (1998); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999); State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999); State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999); State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999); State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000); State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000); State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000); State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999); Holshouser v. Shaner Hotel Group Props. One, L.P., 134 N.C. App. 391, 518 S.E.2d 17, 1999 N.C. App. LEXIS 809 (1999), cert. denied, 351 N.C. 104, 540 S.E.2d 362 (1999), aff'd, 351 N.C. 330, 524 S.E.2d 568 (2000); In re Estate of Ferguson, 135 N.C. App. 102, 518 S.E.2d 796 (1999); State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514, 1999 N.C. LEXIS 1000 (1999), cert. denied, 529 U.S. 1102, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000); Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999); State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999); State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777, 1999 N.C. App. LEXIS 1235 (1999); State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, 543 S.E.2d 136 (2000); State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000); State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61, 2000 N.C. App. LEXIS 266 (2000); State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000); State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000); State v. Brogden, 137 N.C. App. 579, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000); Patterson ex rel. Jordan v. Patterson, 137 N.C. App. 653, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000); State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2000); State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000); State v. Farmer, 138 N.C. App. 127, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000); In re Biddix, 138 N.C. App. 500, 530 S.E.2d 70, 2000 N.C. App. LEXIS 639 (2000), cert. denied, 352 N.C. 674, 545 S.E.2d 418 (2000); State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000), cert. denied, 352 N.C. 678, 545 S.E.2d 434 (2000), cert. denied, 531 U.S. 1177, 121 S. Ct. 1153, 148 L. Ed. 2d 1015 (2001); State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001); State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001); State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001); State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S.

Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005); In re Hayes, 139 N.C. App. 114, 532 S.E.2d 553, 2000 N.C. App. LEXIS 820 (2000); Multifamily Mtg. Trust 1996-1 v. Century Oaks Ltd., 139 N.C. App. 140, 532 S.E.2d 578, 2000 N.C. App. LEXIS 802 (2000); Moss v. Improved Benevolent & Protective Order of Elks, 139 N.C. App. 172, 532 S.E.2d 825, 2000 N.C. App. LEXIS 810 (2000); State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000); State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258, 2000 N.C. App. LEXIS 811 (2000); State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000), cert. denied, 353 N.C. 269, 546 S.E.2d 114 (2000); Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000); State v. Fluker, 139 N.C. App. 768, 535 S.E.2d 68, 2000 N.C. App. LEXIS 1026 (2000); Bason v. Kraft Food Serv., Inc., 140 N.C. App. 124, 535 S.E.2d 606, 2000 N.C. App. LEXIS 1099 (2000); Lovekin v. Lovekin & Ingle, 140 N.C. App. 244, 535 S.E.2d 610, 2000 N.C. App. LEXIS 1108 (2000); State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518, 2000 N.C. App. LEXIS 1208 (2000); State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000); Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001); State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000); State v. Kimble, 141 N.C. App. 144, 539 S.E.2d 342, 2000 N.C. App. LEXIS 1277 (2000); State v. Barnett, 141 N.C. App. 378, 540 S.E.2d 423, 2000 N.C. App. LEXIS 1397 (2000), appeal dismissed and cert. denied, 353 N.C. 527, 549 S.E.2d 552 (2001); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Diehl, 353 N.C. 433, 545 S.E.2d 185, 2001 N.C. LEXIS 430 (2001); State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001); State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002), cert. denied, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002); Lewis v. Orkand Corp., 147 N.C. App. 742, 556 S.E.2d 685, 2001 N.C. App. LEXIS 1250 (2001); State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002); State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002); State v. Anderson, 355 N.C. 136, 558 S.E.2d 87, 2002 N.C. LEXIS 14 (2002); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002); Singleton v. Haywood Elec. Membership Corp., 151 N.C. App. 197, 565 S.E.2d 234, 2002 N.C. App. LEXIS 715 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002); State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002); State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002); In re Master's Mission, 152 N.C. App. 640, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002); In re Wilson, 153 N.C. App. 196, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002); State v. Williams, 153 N.C. App. 192, 568 S.E.2d 890, 2002 N.C. App. LEXIS 1081 (2002); In re Hodge, 153 N.C. App. 102, 568 S.E.2d 878, 2002 N.C. App. LEXIS 1086 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262, 2002 N.C. App. LEXIS 1170 (2002); Elec. World, Inc. v. Barefoot, 153 N.C. App. 387, 570 S.E.2d 225, 2002 N.C. App. LEXIS 1192 (2002); Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002); State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002); In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002); State v. Shook, 155 N.C. App. 183, 573 S.E.2d 249 (2002); Ellis v. White, 156 N.C. App. 16, 575 S.E.2d 809, 2003 N.C. App. LEXIS 34 (2003); In re Ivey, 156 N.C. App. 398, 576 S.E.2d 386, 2003 N.C. App. LEXIS 123 (2003); In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003); State v. Bartley, 156 N.C. App. 490, 577 S.E.2d 319, 2003 N.C. App. LEXIS 204 (2003); State v. Frink, 158 N.C. App. 581, 582 S.E.2d 617, 2003 N.C. App. LEXIS 1280 (2003); State v. May, 159 N.C. App. 159, 583 S.E.2d 302, 2003 N.C. App. LEXIS 1430 (2003); McGrady v. Olsten Corp., 159 N.C. App. 643, 583 S.E.2d 371, 2003 N.C. App. LEXIS 1520 (2003); State v. Riley, 159 N.C. App. 546, 583 S.E.2d 379, 2003 N.C. App. LEXIS 1521 (2003); Kennedy v. Kennedy, 160 N.C. App. 1, 584 S.E.2d 328, 2003 N.C. App. LEXIS 1675 (2003); State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257, 2003 N.C. App. LEXIS 1729 (2003); McClure Lumber Co. v. Helmsman Constr., Inc., 160 N.C. App. 190, 585 S.E.2d 234, 2003 N.C. App. LEXIS 1733 (2003); In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003); N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003); State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003); State v. Lynn, 157 N.C. App. 217, 578 S.E.2d 628, 2003 N.C. App. LEXIS 533 (2003); Lambeth v. Town of Kure Beach, 157 N.C. App. 349, 578 S.E.2d 688, 2003 N.C. App. LEXIS 638 (2003); State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003); State v. McHone, 158 N.C. App. 117, 580 S.E.2d 80, 2003 N.C. App. LEXIS 940 (2003); State v. Gillis, 158 N.C. App. 48, 580 S.E.2d 32, 2003 N.C. App. LEXIS 941 (2003); Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1, 2004 N.C. App. LEXIS 18 (2004); State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408, 2004 N.C. App. LEXIS 128 (2004); State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004); State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004); White v. Davis, 163 N.C. App. 21, 592 S.E.2d 265, 2004 N.C. App. LEXIS 256 (2004); State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004); Dreyer v. Smith, 163 N.C. App. 155, 592 S.E.2d 594, 2004 N.C. App. LEXIS 298 (2004); State v. Little, 163 N.C. App. 235, 593 S.E.2d 113, 2004 N.C. App. LEXIS 376 (2004); Anderson v. Lackey, 163 N.C. App. 246, 593 S.E.2d 87, 2004 N.C. App. LEXIS 381 (2004); State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004);

State v. Cook, 164 N.C. App. 139, 594 S.E.2d 819, 2004 N.C. App. LEXIS 741 (2004); State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004); Schenk v. HNA Holdings, Inc., 167 N.C. App. 47, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Shelton, 167 N.C. App. 225, 605 S.E.2d 228, 2004 N.C. App. LEXIS 2178 (2004); State v. Joyner, 167 N.C. App. 635, 606 S.E.2d 196, 2004 N.C. App. LEXIS 2318 (2004); In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004); State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004); Meehan v. Lawrance, 166 N.C. App. 369, 602 S.E.2d 21, 2004 N.C. App. LEXIS 1731 (2004); State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004); Goforth v. K-Mart Corp., 167 N.C. App. 618, 605 S.E.2d 709, 2004 N.C. App. LEXIS 2378 (2004); Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005); State v. Davis, 167 N.C. App. 770, 607 S.E.2d 5, 2005 N.C. App. LEXIS 14 (2005); White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005); State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005); State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005); Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005); State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381, 2005 N.C. App. LEXIS 334 (2005); State v. Wood, 168 N.C. App. 581, 608 S.E.2d 368, 2005 N.C. App. LEXIS 339 (2005); Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 2005 N.C. App. LEXIS 347 (2005); Howie v. Walsh, 168 N.C. App. 694, 609 S.E.2d 249, 2005 N.C. App. LEXIS 393 (2005); Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005); Taylor v. Carolina Rest. Group, Inc., 170 N.C. App. 532, 613 S.E.2d 510, 2005 N.C. App. LEXIS 1079 (2005); State v. Howell, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005); State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005); State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005); Eley v. Mid/East Acceptance Corp. of N.C., Inc., 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005); State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005); In re P.M., 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005); Scoggins v. Jacobs, 169 N.C. App. 411, 610 S.E.2d 428, 2005 N.C. App. LEXIS 684 (2005); State v. Buff, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005); Welch Contr., Inc. v. N.C. DOT, 175 N.C. App. 45, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005); Alexander v. Cumberland County Bd. of Educ., 171 N.C. App. 649, 615 S.E.2d 408, 2005 N.C. App. LEXIS 1366 (2005); Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C., 172 N.C. App. 156, 615 S.E.2d 719, 2005 N.C. App. LEXIS 1575 (2005); State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006); In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005); State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005); State v. Stokes, 174 N.C. App. 447, 621 S.E.2d 311, 2005 N.C. App. LEXIS 2495 (2005); State v. Cummings, 174 N.C. App. 772, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005); Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp., 175 N.C. App. 474, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006); Broadbent v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006); Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006); State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006); State v. Jones, 176 N.C. App. 678, 627 S.E.2d 265, 2006 N.C. App. LEXIS 589 (2006); Abbott v. N.C. Bd. of Nursing, 177 N.C. App. 45, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006); In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006); In re Nantz, 177 N.C. App. 33, 627 S.E.2d 665, 2006 N.C. App. LEXIS 718 (2006); State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006); City of Charlotte v. Hurlahe, 178 N.C. App. 144, 631 S.E.2d 28, 2006 N.C. App. LEXIS 1296 (2006); State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006); McKyer v. McKyer, 179 N.C. App. 132, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006); In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006); State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006); In re R.R., 180 N.C. App. 628, 638 S.E.2d 502, 2006 N.C. App. LEXIS 2506 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); In re W.L.M., 181 N.C. App. 518, 640 S.E.2d 439, 2007 N.C. App. LEXIS 250 (2007); In re L.C., 181 N.C. App. 278, 638 S.E.2d 638, 2007 N.C. App. LEXIS 83 (2007); Watts v. N.C. Dep't of Env't & Natural Res., 182 N.C. App. 178, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007); In re R.L.C., 361 N.C. 287, 643 S.E.2d 920, 2007 N.C. LEXIS 417 (2007); In re K.S, 183 N.C. App. 315, 646 S.E.2d 541, 2007 N.C. App. LEXIS 1164 (2007); State v. Kitchengs, 183 N.C. App. 369, 645 S.E.2d 166, 2007 N.C. App. LEXIS 1165 (2007); State v. Wiggins, 185 N.C. App. 376, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007); Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007); Davidson County Broad., Inc. v. Rowan County Bd. of Comm'rs, 186 N.C. App. 81, 649 S.E.2d 904, 2007 N.C. App. LEXIS 1977 (2007); Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007); State v. Graham, — N.C. App. —, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Young, — N.C. App. —, 651 S.E.2d 576, 2007 N.C. App. LEXIS 2197 (2007); Weaver v. Sheppa, — N.C. App. —, 651 S.E.2d 395, 2007 N.C. App. LEXIS 2206 (2007); Morris v. Moore, — N.C. App. —, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007); State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007); Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); State v. Johnson, — N.C. App. —, 652 S.E.2d 341, 2007 N.C. App. LEXIS 2254 (2007); Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, — N.C. App. —, 652 S.E.2d 378, 2007 N.C. App. LEXIS 2269 (2007); Adams Creek Assocs. v. Davis, — N.C. App. —, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007); State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007); State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007); Hughes v. Rivera-Ortiz, — N.C. App. —, 653 S.E.2d 165, 2007 N.C. App. LEXIS 2372 (2007); In re K.A.D., — N.C. App. —, 653 S.E.2d 427, 2007 N.C. App. LEXIS 2437 (2007); State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008); In re T.R.M., — N.C. App. —, 656 S.E.2d 626, 2008 N.C. App. LEXIS 275 (2008); Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008); N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008); State v. Beatty, — N.C. App. —, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (Apr. 1, 2008); State v. Applewhite, — N.C. App. —, 660 S.E.2d 240, 2008 N.C. App. LEXIS 822 (2008); Hinson v. Jarvis, — N.C. App. —, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008); Azar v. Presbyterian Hosp., — N.C. App. —, 663 S.E.2d 450, 2008 N.C. App. LEXIS 1313 (2008); Helms v. Helms, — N.C. App. —, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (June 17, 2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1555 (Aug. 19, 2008); State v. Rodriguez, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1542 (Aug. 19, 2008); Yorke v. Novant Health, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1620 (Sept. 2, 2008).; In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008); State v. Tollison, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1002 (May 20, 2008); State v. Little, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1502 (Aug. 5, 2008); State v. Davis, — N.C. App. —, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (Aug. 5, 2008); State v. Bollinger, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1518 (Aug. 19, 2008); Kitchin v. Halifax County, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1624 (Sept. 2, 2008); State v. Washington, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1625 (Sept. 2, 2008).

Quoted in Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977); Sellers v. City of Asheville, 33 N.C. App. 544, 236 S.E.2d 283 (1977); Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.C. 1978); Norwood v. Sherwin-Williams Co., 303 N.C. 462, 279 S.E.2d 559 (1981); Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982); State v. Haskins, 60 N.C. App. 199, 298 S.E.2d 188 (1982); Wright v. Fiber Indus., Inc., 60 N.C. App. 486, 299 S.E.2d 284 (1983); Industrial & Textile Piping, Inc. v. Industrial Rigging Servs., Inc., 69 N.C. App. 511, 317 S.E.2d 47 (1984); Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984); State v. George, 77 N.C. App. 470, 336 S.E.2d 93 (1985); Seawell v. Continental Cas. Co., 84 N.C. App. 277, 352 S.E.2d 263 (1987); State v. McClain, 86 N.C. App. 219, 356 S.E.2d 826 (1987); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); Blankley v. Martin, 101 N.C. App. 175, 398 S.E.2d 606 (1990); Shaw v. Stringer, 101 N.C. App. 513, 400 S.E.2d 101 (1991); Belmont Land & Inv. Co. v. Standard Fire Ins. Co., 102 N.C. App. 745, 403 S.E.2d 924 (1991); Edelstein v. Pinnacle Inn & Country Club Condominium Owners' Ass'n, 103 N.C. App. 86, 403 S.E.2d 927 (1991); State v. White, 104 N.C. App. 165, 408 S.E.2d 871 (1991); Schwartzbach v. Apple Baking Co., 109 N.C. App. 216, 426 S.E.2d 438 (1993); Creative Homes & Millwork, Inc. v. Hinkle, 109 N.C. App. 259, 426 S.E.2d 480 (1993); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119 (1994); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999); State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999); Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999); Talley v. Talley, 133 N.C. App. 87, 513 S.E.2d 838, 1999 N.C. App. LEXIS 340 (1999), cert. denied, 350 N.C. 599, 537 S.E.2d 495 (1999); North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000), cert. denied, 532 U.S. 964, 121 S. Ct. 1499, 149 L. Ed. 2d 384 (2001); State v. Funchess, 141 N.C. App. 302, 540 S.E.2d 435, 2000 N.C. App. LEXIS 1398 (2000); State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000); Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001); Walker v. Walker, 143 N.C. App. 414, 546 S.E.2d 625, 2001 N.C. App. LEXIS 295 (2001).

Stated in State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804 (1980); Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980); State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981); State v. Davis, 64 N.C. App. 186, 306 S.E.2d 829 (1983); Nationwide Mut. Fire Ins. Co. v. Allen, 68 N.C. App. 184, 314 S.E.2d 552 (1984); Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984); DOT v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984); White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148 (1990); Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992); Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992); State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995), cert. denied, 355 N.C. 752, 565 S.E.2d 673 (2002); Lumley v. Capoferi, 120 N.C. App. 578, 463 S.E.2d 264 (1995); Inman v. Inman, 136 N.C. App. 707, 525 S.E.2d 820, 2000

N.C. App. LEXIS 136 (2000); State v. McGraw, 137 N.C. App. 726, 529 S.E.2d 493, 2000 N.C. App. LEXIS 503 (2000); State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000); State v. Hardison, 143 N.C. App. 114, 545 S.E.2d 233, 2001 N.C. App. LEXIS 222 (2001); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001)

Cited in State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); Patterson v. Weatherspoon, 29 N.C. App. 711, 225 S.E.2d 634 (1976); Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976); State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977); Benton v. W.H. Weaver Constr. Co., 34 N.C. App. 421, 238 S.E.2d 655 (1977); State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); Tadlock v. C.L. Snipes Motors, Inc., 34 N.C. App. 557, 239 S.E.2d 311 (1977); State v. Truesdale, 34 N.C. App. 579, 239 S.E.2d 286 (1977); State v. Collins, 35 N.C. App. 250, 241 S.E.2d 98 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390 (1978); Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Jones v. Morris, 42 N.C. App. 10, 255 S.E.2d 619 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); Harris v. Harris, 50 N.C. App. 305, 274 S.E.2d 489 (1981); Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897 (1981); Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191 (1981); Rheinberg-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981); Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981); State v. LeDuc, 306 N.C. 62, 291 S.E.2d 607 (1982); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982); State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982); In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982); Powell v. Shull, 58 N.C. App. 68, 293 S.E.2d 259 (1982); State v. Griffin, 308 N.C. 303, 302 S.E.2d 447 (1983); State v. Courtright, 60 N.C. App. 247, 298 S.E.2d 740 (1983); State v. Sanderson, 60 N.C. App. 604, 300 S.E.2d 9 (1983); First Union Nat'l Bank v. Wilson, 60 N.C. App. 781, 300 S.E.2d 19 (1983); State v. Morrow, 61 N.C. App. 162, 300 S.E.2d 266 (1983); State v. Parker, 61 N.C. App. 94, 300 S.E.2d 451 (1983); Carter v. Parsons, 61 N.C. App. 412, 301 S.E.2d 405 (1983); Wall v. Stout, 61 N.C. App. 576, 301 S.E.2d 467 (1983); State v. Barneycastle, 61 N.C. App. 694, 301 S.E.2d 711 (1983); State v. Housand, 62 N.C. App. 132, 302 S.E.2d 284 (1983); Ransom v. Blair, 62 N.C. App. 71, 302 S.E.2d 306 (1983); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); Rumley v. Inman, 62 N.C. App. 324, 302 S.E.2d 657 (1983); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983); State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); State v. Canty, 308 S.E.2d 719 (N.C. 1983); State v. Atkins, 66 N.C. App. 67, 310 S.E.2d 629 (1984); In re Estate of Forrest, 66 N.C. App. 222, 311 S.E.2d 341 (1984); State v. Beasley, 66 N.C. App. 288, 311 S.E.2d 347 (1984); Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984); Gate City Printing, Inc. v. Glace-Holden, Inc., 67 N.C. App. 546, 313 S.E.2d 209 (1984); In re Barefoot, 67 N.C. App. 712, 313 S.E.2d 924 (1984); Livingston v. City of Charlotte, 68 N.C. App. 265, 314 S.E.2d 303 (1984); Citrini v. Goodwin, 68 N.C. App. 391, 315 S.E.2d 354 (1984); Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984); State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984); Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); State v. Bates, 70 N.C. App. 477, 319 S.E.2d 683 (1984); State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984); Akzona, Inc. v. American Credit Indem. Co., 71 N.C. App. 498, 322 S.E.2d 623 (1984); State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985); State v. Green, 77 N.C. App. 429, 335 S.E.2d 176 (1985); Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985); Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985); State v. Davis, 78 N.C. App. 804, 338 S.E.2d 579 (1986); State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414 (1986); State v. Sessoms, 79 N.C. App. 444, 339 S.E.2d 458 (1986); State v. McCullough, 79 N.C. App. 541, 340 S.E.2d 132 (1986); State v. Hamlet, 316 N.C. 41, 340 S.E.2d 418 (1986); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986); Williams v. Gupton, 627 F. Supp. 669 (W.D.N.C. 1986); State v. Moore, 79 N.C. App. 666, 340 S.E.2d 771 (1986); State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760 (1986); Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986); State v. Elledge, 80 N.C. App. 714, 343 S.E.2d 549 (1986); State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986); State v. Collins, 81 N.C. App. 346, 344 S.E.2d 310 (1986); Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986); State v. Connard, 81 N.C. App. 327, 344 S.E.2d 568 (1986); State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986); Overcash v. Statesville City Bd. of Educ., 83 N.C. App. 21, 348 S.E.2d 524 (1986); Williams v. Burlington Indus., Inc., 318 N.C. 441, 349 S.E.2d 842 (1986); State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986); Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986); State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986); State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987); Laumann v. Plakakis, 84 N.C. App. 131, 351 S.E.2d 765 (1987); In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987); State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987); State v. Clemmons, 319 N.C. 192, 353 S.E.2d 209 (1987); Travis v. Knob Creek, Inc., 84 N.C. App. 561, 353 S.E.2d 229 (1987); O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 353 S.E.2d 869 (1987); State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987); State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987); Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987); Phelps v. Duke Power Co., 86

N.C. App. 455, 358 S.E.2d 89 (1987); Byrd v. Hancock, 86 N.C. App. 564, 358 S.E.2d 557 (1987); State v. Wall, 87 N.C. App. 621, 361 S.E.2d 900 (1987); Federal Paper Bd. Co. v. Hartsfield, 87 N.C. App. 667, 362 S.E.2d 169 (1987); State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550 (1988); Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367 (1988); Williams v. Hillhaven Corp., 91 N.C. App. 35, 370 S.E.2d 423 (1988); Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988); State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989); Tate v. Chambers, 94 N.C. App. 154, 379 S.E.2d 681 (1989); Helms Ins. Agency, Inc. v. Redshaw, Inc., 94 N.C. App. 716, 381 S.E.2d 187 (1989); Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue, 95 N.C. App. 151, 381 S.E.2d 815 (1989); Smith v. Pass, 95 N.C. App. 243, 382 S.E.2d 781 (1989); State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989); Reid v. Warden, Cent. Prison, 702 F. Supp. 1240 (W.D.N.C. 1989); State v. Richardson, 96 N.C. App. 270, 385 S.E.2d 194 (1989); Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); In re Barnes, 97 N.C. App. 325, 388 S.E.2d 237 (1990); North Carolina Reinsurance Facility v. Long, 98 N.C. App. 41, 390 S.E.2d 176 (1990); State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990); Rucker v. Huffman, 99 N.C. App. 137, 392 S.E.2d 419 (1990); Industrial Innovators, Inc. v. Myrick-White, Inc., 99 N.C. App. 42, 392 S.E.2d 425 (1990); State v. Canady, 99 N.C. App. 189, 392 S.E.2d 457 (1990); Witherow v. Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990); State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990); State v. Estes, 99 N.C. App. 312, 393 S.E.2d 158 (1990); State v. Jones, 99 N.C. App. 412, 393 S.E.2d 585 (1990); State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990); State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990); State v. Clemmons, 100 N.C. App. 286, 396 S.E.2d 616 (1990); Evans v. AT & T Technologies, 103 N.C. App. 45, 404 S.E.2d 183 (1991); Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991); Fine v. Fine, 103 N.C. App. 642, 406 S.E.2d 631 (1991); State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991); Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991); Alberti v. Manufactured Homes, Inc., 329 N.C. 727, 407 S.E.2d 819 (1991); State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); State v. Hunter, 107 N.C. App. 402, 420 S.E.2d 700 (1992); Behringer v. City of Raleigh, 107 N.C. App. 505, 421 S.E.2d 179 (1992); Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources, 107 N.C. App. 716, 421 S.E.2d 612 (1992); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993); State v. Syriani, 333 N.C. 350, 428 S.E.2d 118 (1993); Guyther v. Nationwide Mut. Fire Ins. Co., 109 N.C. App. 506, 428 S.E.2d 238 (1993); Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865 (1993); State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267 (1993); In re Huang, 110 N.C. App. 683, 431 S.E.2d 541 (1993); Dixon v. Taylor, 111 N.C. App. 97, 431 S.E.2d 778 (1993); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993); State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993); Bell Atl. Tricon Leasing Corp. v. DRR, Inc., 114 N.C. App. 771, 443 S.E.2d 374 (1994); State v. Roten, 115 N.C. App. 118, 443 S.E.2d 794 (1994); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); Richardson v. Patterson, 116 N.C. App. 661, 448 S.E.2d 861 (1994); Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994); State v. Donnell, 117 N.C. App. 184, 450 S.E.2d 533 (1994); State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994); Welling v. Walker, 117 N.C. App. 445, 451 S.E.2d 329 (1994); Associated Mechanical Contractors v. Payne, 118 N.C. App. 54, 453 S.E.2d 545 (1995); Talton v. Mac Tools, Inc., 118 N.C. App. 87, 453 S.E.2d 563 (1995); Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); Branch Banking & Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995); State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995); In re Mount Shepherd Methodist Camp, 120 N.C. App. 388, 462 S.E.2d 229 (1995); State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995); State v. Gregory, 342 N.C. 580, 467 S.E.2d 28 (1996); Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 467 S.E.2d 58 (1996); State v. McGirt, 122 N.C. App. 237, 468 S.E.2d 833 (1996); Bowers v. Olf, 122 N.C. App. 421, 470 S.E.2d 346 (1996); State v. Vanhoy, 343 N.C. 476, 471 S.E.2d 404 (1996), overruled on other grounds, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997); State v. Weaver, 123 N.C. App. 276, 473 S.E.2d 362 (1996); Setzer v. Boise Cascade Corp., 123 N.C. App. 441, 473 S.E.2d 431 (1996); Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997); Adams v. Kelly Springfield Tire Co., 123 N.C. App. 681, 474 S.E.2d 793 (1996); State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996), cert. denied, 520 U.S. 1106, 117 S. Ct. 1111, 137 L. Ed. 2d 312 (1997); State v. Hairston, 123 N.C. App. 753, 475 S.E.2d 242 (1996); Nicholson v. American Safety Util. Corp., 124 N.C. App. 59, 476 S.E.2d 672, 1996 N.C. App. LEXIS 1016 (1996), cert. granted, 483 S.E.2d 173 (1997), cert. granted, 483 S.E.2d 174 (1997), modified and aff'd, 346 N.C. 767, 488 S.E.2d 240 (1997); Barber v. Continental Grain Co., 124 N.C. App. 310, 477 S.E.2d 77 (1996); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997); Woods v. City of Wilmington, 125 N.C. App. 226, 480 S.E.2d 429 (1997); State v. Manley, 345 N.C. 484, 480 S.E.2d 659 (1997); Holt v. Williamson, 125 N.C. App. 305, 481 S.E.2d 307 (1997), cert. denied, 346 N.C. 178, 486 S.E.2d 204 (1997); Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E.2d 358 (1997); State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997); Farmah v. Farmah, 126 N.C. App. 210, 484 S.E.2d 96 (1997); State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997); Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997); Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev'd on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998); State v.

Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998); Amjad Al-Hourani v. Ashley, 126 N.C. App. 519, 485 S.E.2d 887 (1997); State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997); State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997); State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997); State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997); State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); State v. Beck, 346 N.C. 750, 487 S.E.2d 751 (1997); State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Stinson, 127 N.C. App. 252, 489 S.E.2d 182 (1997); State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997); Smith v. Sealed Air Corp., 127 N.C. App. 359, 489 S.E.2d 445 (1997); State v. Barfield, 127 N.C. App. 399, 489 S.E.2d 905 (1997); State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997); State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997); Wicker v. Holland, 128 N.C. App. 524, 495 S.E.2d 398 (1998); Rousselo v. Starling, 128 N.C. App. 439, 495 S.E.2d 725 (1998), appeal dismissed, 348 N.C. 74, 505 S.E.2d 876 (1998), review denied, 348 N.C. 74, 505 S.E.2d 876 (1998); State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811, 1998 N.C. App. LEXIS 26 (1998), cert. denied, 348 N.C. 76, 505 S.E.2d 884 (1998), appeal dismissed, — N.C. —, 505 S.E.2d 884 (1998), aff'd, 349 N.C. 219, 504 S.E.2d 785 (1998); State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998); Condellone v. Condellone, 129 N.C. App. 675, 501 S.E.2d 690 (1998); State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998), cert. denied, 349 N.C. 237, 516 S.E.2d 605 (1998); Law Offices of Kirby v. Industrial Contractors, 130 N.C. App. 119, 501 S.E.2d 710 (1998); Leonard v. Lowe's Home Ctrs., Inc., 131 N.C. App. 304, 506 S.E.2d 291 (1998); State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999); Ultra Innovations, Inc. v. Food Lion, Inc., 130 N.C. App. 315, 502 S.E.2d 685 (1998); Barber v. Constien, 130 N.C. App. 380, 502 S.E.2d 912 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999); Inspirational Network, Inc. v. Combs, 131 N.C. App. 231, 506 S.E.2d 754 (1998); State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999); State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1998); Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999), cert. denied, 350 N.C. 308, 534 S.E.2d 589 (1999); In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999); State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999); State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999); Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710, 1999 N.C. App. LEXIS 1306 (1999), cert. denied, 351 N.C. 480, 543 S.E.2d 510 (2000); State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000); State v. Briggs, 137 N.C. App. 125, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000); In re Estate of Montgomery, 137 N.C. App. 564, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001); Melton v. Stamm, 138 N.C. App. 314, 530 S.E.2d 622, 2000 N.C. App. LEXIS 602 (2000); Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001); State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 (2001); Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 533 S.E.2d 501, 2000 N.C. App. LEXIS 890 (2000); State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858, 2000 N.C. App. LEXIS 986 (2000); Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254, 2000 N.C. App. LEXIS 987 (2000), aff'd, 353 N.C. 363, 544 S.E.2d 221 (2001); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).; State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001), cert. denied, — N.C. —, 604 S.E.2d 919 (2004); Fisher v. Carolina S.R.R., 141 N.C. App. 73, 539 S.E.2d 337, 2000 N.C. App. LEXIS 1282 (2000); Jones v. Weyerhaeuser Co., 141 N.C. App. 482, 539 S.E.2d 380, 2000 N.C. App. LEXIS 1413 (2000), appeal dismissed and cert. denied, 353 N.C. 525, 549 S.E.2d 858 (2001); Disciplinary Hearing Comm'n v. Frazier, 141 N.C. App. 514, 540 S.E.2d 758, 2000 N.C. App. LEXIS 1393 (2000), cert. granted sub nom. North Carolina State Bar v. Frazier, 353 N.C. 378, 547 S.E.2d 434 (2001); Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001); In re Flowers, 140 N.C. App. 225, 536 S.E.2d 324, 2000 N.C. App. LEXIS 1112 (2000); State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815, 2000 N.C. App. LEXIS 1401 (2000); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000), cert. denied, 353 N.C. 382, 547 S.E.2d 816 (2001); State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792, 2001 N.C. App. LEXIS 35 (2001), cert. dismissed, 353 N.C. 392, 548 S.E.2d 151 (2001), cert. denied and appeal dismissed, 353 N.C. 392, 548 S.E.2d 152 (2001); Claremont Prop. Owners Ass'n v. Gilboy, 142 N.C. App. 282, 542 S.E.2d 324, 2001 N.C. App. LEXIS 78 (2001); Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668, 2001 N.C. App. LEXIS 97, cert.

denied, 353 N.C. 450, 548 S.E.2d 524 (2001); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001); State v. Washington, 142 N.C. App. 657, 544 S.E.2d 249, 2001 N.C. App. LEXIS 174 (2001); DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 544 S.E.2d 797, 2001 N.C. App. LEXIS 189 (2001); In re Estate of Parrish, 143 N.C. App. 244, 547 S.E.2d 74, 2001 N.C. App. LEXIS 272 (2001), cert. denied, 354 N.C. 69, 553 S.E.2d 201 (2001); State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001), cert. denied, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003); State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001); In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001); State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002), cert. granted, 356 N.C. 170, 568 S.E.2d 852 (2002); Bunn Lake Prop. Owner's Ass'n v. Setzer, 149 N.C. App. 289, 560 S.E.2d 576, 2002 N.C. App. LEXIS 214 (2002); State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003); State v. Christian, 150 N.C. App. 77, 562 S.E.2d 568, 2002 N.C. App. LEXIS 403 (2002), cert. denied, 356 N.C. 168, 568 S.E.2d 618 (2002); State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002); Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002); In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004); Kanipe v. Lane Upholstery, 151 N.C. App. 478, 566 S.E.2d 167, 2002 N.C. App. LEXIS 755 (2002), cert. denied, 356 N.C. 303, 570 S.E.2d 724 (2002), cert. dismissed, 356 N.C. 303, 570 S.E.2d 725 (2002); Baker v. Showalter, 151 N.C. App. 546, 566 S.E.2d 172, 2002 N.C. App. LEXIS 776 (2002); Pitillo v. N.C. Dep't of Envtl. Health & Natural Res., 151 N.C. App. 641, 566 S.E.2d 807, 2002 N.C. App. LEXIS 882 (2002); McDonald v. Skeen, 152 N.C. App. 228, 567 S.E.2d 209, cert. denied, 356 N.C. 437, 571 S.E.2d 221, cert. dismissed, 356 N.C. 437, 571 S.E.2d 222 (2002); King v. King, 153 N.C. App. 181, 568 S.E.2d 864, 2002 N.C. App. LEXIS 1079 (2002); In re Lane Company-Hickory Chair Div., 153 N.C. App. 119, 571 S.E.2d 224, 2002 N.C. App. LEXIS 1083 (2002); State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003); State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003), cert. denied, 357 N.C. 464, 586 S.E.2d 274 (2003), aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004); State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680, 2003 N.C. App. LEXIS 1491 (2003); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002), cert. denied, 356 N.C. 691, 578 S.E.2d 597 (2003); In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002); State v. Lee, 154 N.C. App. 410, 572 S.E.2d 170, 2002 N.C. App. LEXIS 1469 (2002); State v. Spencer, 154 N.C. App. 666, 572 S.E.2d 815, 2002 N.C. App. LEXIS 1521 (2002); State v. Hinton, 155 N.C. App. 561, 573 S.E.2d 609, 2002 N.C. App. LEXIS 1578 (2002); Ellis v. Whitaker, 156 N.C. App. 192, 576 S.E.2d 138, 2003 N.C. App. LEXIS 77 (2003); Freeman v. Pac. Life Ins. Co., 156 N.C. App. 583, 577 S.E.2d 184, 2003 N.C. App. LEXIS 190 (2003); State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003); State v. Gantt, 161 N.C. App. 265, 588 S.E.2d 893, 2003 N.C. App. LEXIS 2055 (2003); State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003); State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003); Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004); Finkel v. Finkel, 162 N.C. App. 344, 590 S.E.2d 472, 2004 N.C. App. LEXIS 117 (2004), cert. denied, 358 N.C. 234, 595 S.E.2d 150 (2004); Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004); McInerney v. Pinehurst Area Realty, Inc., 162 N.C. App. 285, 590 S.E.2d 313, 2004 N.C. App. LEXIS 123 (2004); In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004); Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004); State v. Moore, 167 N.C. App. 495, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005); Hobbs Staffing Servs. v. Lumbermens Mut. Cas. Co., 168 N.C. App. 223, 606 S.E.2d 708, 2005 N.C. App. LEXIS 174 (2005); In re J.L.S., 168 N.C. App. 721, 608 S.E.2d 823, 2005 N.C. App. LEXIS 453 (2005); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005); Young v. Young, 169 N.C. App. 31, 609 S.E.2d 795, 2005 N.C. App. LEXIS 539 (2005); State v. Stevenson, 169 N.C. App. 797, 611 S.E.2d 206, 2005 N.C. App. LEXIS 791 (2005); Schenk v. HNA Holdings, Inc., 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005), cert. denied, — N.C. —, 626 S.E.2d 649 (2005); In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005); State v. Nicholson, 169 N.C. App. 390, 610 S.E.2d 433, 2005 N.C. App. LEXIS 601 (2005), appeal dismissed, cert. denied, 2006 N.C. App. LEXIS 2222 (Nov. 7, 2006), reported at 636 S.E.2d 341 (N.C. App. 2006); Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005); State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005); State v. Andrews, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005); State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005); State v. Hames, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005); Bursell v. N.C. Indus. Comm'n I.C. No. 177846, 172 N.C. App. 73, 616 S.E.2d 342, 2005 N.C. App. LEXIS 1427 (2005); State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005); Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc., 175 N.C. App. 339, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006); State v. Matthews, 175 N.C. App. 550, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006); State

v. Andrews, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005); State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006); State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006); State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006); State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006); State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006); In re Will of McFayden, 179 N.C. App. 595, 635 S.E.2d 65, 2006 N.C. App. LEXIS 2053 (2006); State v. Wallace, — N.C. App. —, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18, 2006 N.C. App. LEXIS 2504 (2006); State v. Andujar, 180 N.C. App. 305, 636 S.E.2d 584, 2006 N.C. App. LEXIS 2292 (2006); State v. Chivers, 180 N.C. App. 275, 636 S.E.2d 590, 2006 N.C. App. LEXIS 2330 (2006); State v. Parmaei, 180 N.C. App. 179, 636 S.E.2d 322, 2006 N.C. App. LEXIS 2234 (2006); Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006); Hill v. Hill, 181 N.C. App. 69, 638 S.E.2d 601, 2007 N.C. App. LEXIS 65 (2007); Bowser v. Durham Herald Co., 181 N.C. App. 339, 638 S.E.2d 614, 2007 N.C. App. LEXIS 69 (2007); State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007); Hung Nguyen v. Burgerbusters, Inc., 182 N.C. App. 447, 642 S.E.2d 502, 2007 N.C. App. LEXIS 670 (2007); Brown v. Am. Partners Fed. Credit Union, — N.C. App. —, 645 S.E.2d 117, 2007 N.C. App. LEXIS 1180 (2007); State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007); Terres Bend Homeowners Ass'n v. Overcash, 185 N.C. App. 45, 647 S.E.2d 465, 2007 N.C. App. LEXIS 1686 (2007); In re B.E., — N.C. App. —, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007); State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007); N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007); Harris v. Harris, — N.C. App. —, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008); State v. Hope, — N.C. App. —, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (Mar. 18, 2008); Frey v. Best, — N.C. App. —, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008); State v. Batchelor, — N.C. App. —, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008); State v. Bass, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 864 (May 6, 2008).

II. LIMITING SCOPE OF REVIEW.

A. Generally.

Scope Confined to Assignments of Error Set Out in Record. — Although G.S. 15A-1444(a1) permits a defendant to appeal the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing, the scope of appellate review is confined to a consideration of those assignments of error set out in the record on appeal. N.C. R. App. P. 10(a). State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830, 2003 N.C. App. LEXIS 1767 (2003).

Generally, review by court of appeals is limited by properly presented assignments of error and exceptions. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Question Must Be Presented on Appeal. — The proviso to subsection (a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of N.C.R.A.P., Rule 28 question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

A defendant may properly present on appeal the questions in subsection (a) of this rule without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under G.S. 15-173 without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Appellate review depends on specific exceptions and proper assignments of error presented in the record on appeal. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Under N.C. R. App. P. 10(a), the appellate court's scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with Rule 10. In re Baker, 158 N.C. App. 491, 581 S.E.2d 144, 2003 N.C. App. LEXIS 1194 (2003).

Plaintiff's appeal was dismissed where repeated assertions that the trial court's rulings were "contrary to the case law of this jurisdiction" failed to identify the issues briefed on appeal, and were too "broad, vague, and unspecific" to comport with the North Carolina Rules of Appellate Procedure. May v. Down East Homes of Beulaville, Inc., 175 N.C. App. 416, 623 S.E.2d 345, 2006 N.C. App. LEXIS 51 (2006), cert. denied, — N.C. —, 632 S.E.2d 176 (2006).

In a medical negligence action, an appellate court did not need to evaluate a patient's claims with respect to a witness's knowledge of the applicable standard of care and his competency to serve as an expert witness, under N.C. R. App. P. 10(a), 10(c), 28(a), because (1) even if the trial court erred in excluding the witness's testimony with respect to the applicable standard of care, the trial court's order still included a ruling that the patient failed to meet her burden of proof in establishing proximate cause; and (2) the patient failed to challenge the alternate basis for the trial court's order granting the surgeon's motion for directed verdict. Kerr v. Long, — N.C. App. —, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (Mar. 18, 2008).

Unpreserved Issue Raised in Amicus Brief. — By choosing to assign error only to the trial court's denial of his motion to suppress, the juvenile had not raised on appeal the issue of whether a fatal variance existed between the petition and the evidence; this issue was presented by the appellate defender's N.C. R. App. P. 28(i) amicus curiae brief and, under N.C. R. App. P. 2, the appellate court considered the "fatal variance" issue. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

Grounds for Obstruction and Error Must Be the Same. — Although defendant objected to instructions, he did not object on the ground upon which he asserted error, and he did not preserve the alleged error for appellate review. State v. Francis, 341 N.C. 156, 459 S.E.2d 269 (1995).

Presenting Different Theory on Appeal Than That Argued at Trial. — Defendant's conviction of murder was affirmed where, inter alia, defendant waived an assignment of error because defendant impermissibly presented a different theory on appeal than argued at trial. State v. Holliman, 155 N.C. App. 120, 573 S.E.2d 682, 2002 N.C. App. LEXIS 1591 (2002).

Plain Error Review Because of Failure to Object. — Because defendant failed to object to testimony at trial or to object to an instruction before the jury retired to deliberate, the appellate court reviewed the testimony and the instruction for plain error, under N.C. R. App. P. 10(b)(2) and N.C. R. App. 10(c)(4). State v. Skinner, 162 N.C. App. 434, 590 S.E.2d 876, 2004 N.C. App. LEXIS 177 (2004).

Where defendant did not make objections to admission of evidence or raise constitutional objections at trial, the alleged errors were reviewed under plain error. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Plain Error Review Not Applicable. — Contention that the trial court erred by failing to declare a mistrial was not reviewable for plain error because plain error review does not apply to decisions made at the trial judge's discretion. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Although defendant challenged the trial court's decision allowing a detective to testify concerning his ongoing investigation of defendant prior to his arrest, contending that the testimony should have been excluded under G.S. 8C-1-403, defendant failed to properly object to the proffered testimony, and therefore appellate review was for plain error only under N.C. R. App. P. 10(b)(1) and (c)(4); but because defendant did not specifically and distinctly allege plain error, he was not entitled to plain error review of the issue. State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007), discretionary review granted, 361 N.C. 689, 653 S.E.2d 152 (2007); rev'd, in part, remanded 362 N.C. 224, 657 S.E.2d 351 (2008, State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007).

Failure of purchasers of certain property at an execution sale to assign error to the trial court's findings of fact in support of its conclusion that the sale should be set aside due to a grossly inadequate sale price and material irregularities in the execution sale, meant that those findings were binding on appeal under N.C. R. App. P. 10(a). Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

Although the issue of a trial court's failure to appoint a guardian ad litem for a father in an action to terminate parental rights was not raised by the father in his appeal of the termination order, as was required by N.C. R. App. P. 10(a), the appellate court suspended the requirements of Rule 10(a) and sua sponte considered the issue pursuant to N.C. R. App. P. 2 in order to prevent manifest injustice to the father. In re S.B., 166 N.C. App. 488, 602 S.E.2d 691, 2004 N.C. App. LEXIS 1776 (2004).

B. Issues Not Requiring Objection or Motion.

Findings and Conclusions of Law May Be Challenged for First Time in Brief. — This rule provides that notwithstanding the absence of exceptions, an appeal duly taken from a final judgment may present for review, if properly raised in the brief, the question of whether the judgment is supported by the findings of fact and conclusions of law. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Questions of Law. — When neither party assigns error to a trial court's findings of fact, appellate review is limited to an appellant's contention that the trial court's findings of fact do not support its conclusion of law, under N.C. R. App. P.10(a). In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Exceptions or specific assignments of error are not required where the question is whether summary judgment was properly granted. The appeal from the judgment is itself an exception thereto. Vernon, Vernon, Wooten, Brown & Andrews v. Miller, 73 N.C. App. 295, 326 S.E.2d 316 (1985).

Section (a) of this rule does not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. Ellis v. Williams, 319 N.C. 413, 355 S.E.2d 479 (1987).

Although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions of law: (1) Whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. Thus, notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Ellis v. Williams, 319 N.C. 413, 355 S.E.2d 479 (1987).

An appeal from entry of summary judgment presents the question of whether the judgment is supported by the conclusions of law, and therefore constitutes an exception to the general requirement of section (a) of this rule that assignments of error must appear in the record. Burton v. NCNB Nat'l Bank, 85 N.C. App. 702, 355 S.E.2d 800 (1987).

For purposes of an appeal from a trial court's entry of summary judgment for the prevailing party, the appealing party was not required under N.C. R. App. P. 10(a) to make assignments of error because on appeal, review was necessarily limited to whether the trial court's conclusions as to whether there was a genuine issue of material fact and whether the moving party was entitled to judgment — both questions of law — were correct. Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 362 N.C. 269, 658 S.E.2d 918, 2008 N.C. LEXIS 337 (2008).

Or Where Questions of Jurisdiction or Sufficiency of Criminal Charge Are Raised. — Under this rule, upon appeal, any party may present for review, by properly raising the issue in the brief, the questions of whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law. This is true, notwithstanding the absence of exceptions or assignments of error in the record on appeal. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Under section (a) any party may present for review, by properly raising the issue in his brief, the questions of whether the court had jurisdiction of the subject matter and whether a criminal charge is sufficient in law. This rule applies even when no motion is made to quash. State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

Failure to object at trial ordinarily waives the right to assert error on appeal. However, the sufficiency of a criminal charge may be challenged without any exceptions or assignment of error having been made. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

Whether assault on a female is charged as a lesser included offense by an indictment charging attempted rape questions the sufficiency of the indictment. Accordingly, the issue may be raised on appeal, even in the absence of timely objection at trial. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

Subject Matter Jurisdiction. — Notwithstanding the absence of exceptions properly set out in the record on appeal, a party may present for review the question of subject matter jurisdiction by raising the issue in his brief. Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987).

When a prospective employee alleged her injury during a pre-employment interview was covered under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., and, therefore, the North Carolina Industrial Commission had exclusive jurisdiction over her claim, this was a question of subject matter jurisdiction; even though not listed as an assignment of error in the record on her appeal from the trial court, pursuant to N.C. R. App. P. 10(c)(1), the claim had to be considered by the appellate court because it was a question of jurisdiction, which could be raised at any time. Huntley v. Howard Lisk Co., 154 N.C. App. 698, 573 S.E.2d 233, 2002 N.C. App. LEXIS 1528 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 389 (2003).

Whether one has standing to obtain judicial review of administrative decisions is a question of subject matter jurisdiction which, notwithstanding the absence of exceptions or assignments of error in the record on appeal, a party may present for review by properly raising the issue in his brief. In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985); Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Award of Legal Guardianship and Visitation. — Mother's appeal of trial court's award of legal guardianship of child and award of visitation to the mother was reviewable because the mother's failure to object at the dispositional hearing was not a failure to preserve the issues for appeal; nor was the mother required to object at the hearing or raise a motion in order to preserve this type of question for appellate review. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Unrecorded Objection on Conversation Between Judge and Jury Foreperson. — Defendant's claim that the trial court had unrecorded bench conversations with a jury foreperson in violation of N.C. Const., Art. I, § 24 was preserved for review, even without an objection at trial under N.C. R. App. P. 10(b)(1). State v. Wilson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1615 (Sept. 2, 2008).

III. PRESERVING QUESTIONS FOR APPEAL.

A. Generally.

When a party fails to raise an appealable issue, the appellate court will generally not raise it for that party. Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983).

Only exceptions noted in the record and made the basis for assignments of error will be considered on appeal. State v. Kidd, 60 N.C. App. 140, 298 S.E.2d 406 (1982), cert. denied, 307 N.C. 700, 301 S.E.2d 393 (1983).

A party must, prior to arguing an alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Where defendant failed to specifically and distinctly allege that the trial court's instruction amounted to plain error, defendant waived any appellate review. State v. Hamilton, 338 N.C. 193, 449 S.E.2d 402 (1994).

Employee failed in an appeal of the lower court's approval of an agency decision stating that the employee's refusal to report to work after the expiration of family and medical leave was a voluntary resignation without notice; the employee did not argue two subject matter jurisdiction issues which defeated the claim. Shackleford-Moten v. Lenoir County Dep't of Soc. Servs., 155 N.C. App. 568, 573 S.E.2d 767, 2002 N.C. App. LEXIS 1630 (2002), cert. denied, 357 N.C. 252, 582 S.E.2d 609 (2003).

Conflict Between G.S. 8C-1-103(a)(2) and N.C. R. App. P. 10(b)(1). — Constitution of North Carolina expressly vested in the Supreme Court of North Carolina the exclusive authority to make rules of procedure and practice for the Appellate Division; although G.S. 8C-1-103(a)(2) was contained in the Rules of Evidence, it was manifestly an attempt to govern the procedure and practice of the Appellate Division as it purported to determine which issues were preserved for appellate review, and to the extent it conflicts with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

It is well-established that under N.C. R. App. 10(b)(1), in order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desires the court to make; the law does not permit parties to swap horses between courts in order to get a better mount, meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court. Wood v. Weldon, 160 N.C. App. 697, 586 S.E.2d 801, 2003 N.C. App. LEXIS 1912 (2003), cert. denied, 358 N.C. 550, 600 S.E.2d 469 (2004).

N.C. R. App. P. 10(b)(1) requires an objection at trial for preservation of an issue on appeal; the North Carolina Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1). State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

When defendant was convicted of perjury and false statements for executing an affidavit of indigency stating that he had no interest in real property when his girlfriend had placed his name on a deed of trust on property she owned, an appellate court reviewed the merits of his conviction, even though he had not moved to dismiss at the close of all the evidence and had thus not preserved the issue for appeal, under N.C. R. App. P. 10(b)(3), because under N.C. R. App. P. 2 it determined it would "prevent manifest injustice" to defendant to review his convictions. State v. Denny, — N.C. App. —, 635 S.E.2d 438, 2006 N.C. App. LEXIS 2158 (2006), rev'd, in part, aff'd in part, 361 N.C. 662, 652 S.E.2d 212 (2007), State v. Denny, — N.C. App. —, 635 S.E.2d 438, 2006 N.C. App. LEXIS 2158 (2006).

Failure to Raise Issue in Trial Court. — Defendant against whom a default judgment was entered was not allowed to argue on appeal that the summons used for service by publication was ineffective due to more than 30 days elapsing since its issuance, as defendant did not raise the issue in the trial court. Creasman v. Creasman, 152 N.C. App. 119, 566 S.E.2d 725, 2002 N.C. App. LEXIS 856 (2002).

Motion to dismiss a city's appeal of the denial of its motion for judgment on the pleadings because the motion restated the allegations of a previously denied motion to dismiss was denied because the issue was not presented to the trial court. Lovelace v. City of Shelby, 153 N.C. App. 378, 570 S.E.2d 136, 2002 N.C. App. LEXIS 1175 (2002), cert. denied, 356 N.C. 437, 572 S.E.2d 785 (2002).

Objections on an appeal by a boyfriend of a married woman, who was sued by the woman's husband for alienation of affection and criminal conversation, that the trial court erred in allowing consideration of the husband's lost income and benefits were not properly preserved for review under N.C. R. App. P. 10(b)(1), where his objection at trial that the evidence was speculative, improperly documented, and was impermissible hearsay, was not on the same issue raised on appeal as to the impropriety of such evidence on the issue of damages; similarly unpreserved was the boyfriend's claim on appeal that the evidence on damages was improperly admitted as too speculative and uncertain, where his objection at trial was on grounds of hearsay and unavailability. Oddo v. Presser, 158 N.C. App. 360, 581 S.E.2d 123, 2003 N.C. App. LEXIS 1196 (2003).

When defendant argued, on appeal, that the trial court erred by allowing the State to present evidence that defendant, upon being informed of his rights under Miranda, chose not to make a statement and requested an attorney, based on his Fifth Amendment right to silence and his Sixth Amendment right to counsel, could not be considered on appeal, under N.C. R. App. P. 10(b)(1), because the failure to raise the constitutional issue before the trial court barred appellate review. State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Where defendant argued on appeal that the trial court committed plain error by failing to declare a mistrial on grounds that some of the jurors were in a position to see defendant in the hallway in handcuffs, but defense counsel did not seek a mistrial and did not object at trial to the trial court's ruling, the issue was not preserved for appellate review pursuant to N.C. R. App. P. 10(c). State v. Peoples, 167 N.C. App. 63, 604 S.E.2d 321 (2004).

Where a county supervisor of elections did not raise theories before the trial court that the county board of elections and the North Carolina Board of Elections ratified a decision to rehire the supervisor after retirement and that both boards were thereby estopped from denying the supervisor's continued appointment as the county director of elections, the appellate court could not consider those argument for the first time on the supervisor's appeal of a motion granting summary judgment dismissal of a complaint challenging a decision to terminate the supervisor's employment. Revels v. Robeson County Bd. of Elections, 167 N.C. App. 358, 605 S.E.2d 219, 2004 N.C. App. LEXIS 2167 (2004).

Defendant waived appellate review of the trial court's ruling that he attend his co-defendant's sentencing hearing because he made no objection to the court's ruling. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, — U.S. —, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Defendant failed to preserve his challenge to a juror for review where he failed to object to her continued service after she disclosed, during trial, that she knew one of the State's witnesses. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Appellate court refused to review the admission during a termination of parental rights proceeding of the orders entered in a neglect and dependency proceeding under N.C. R. App. P. 2 as the mother never appealed the orders, despite being represented by counsel, and did not contest the admission of the orders in the termination of parental rights proceeding as required by N.C. R. App. P. 10. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Defendant could not claim on appeal that references by two witnesses concerning his time in jail violated his right to a fair trial, as defendant did not raise an objection to such testimony in the trial court; thus, there was nothing for the appellate court to review. State v. Medina, 174 N.C. App. 723, 622 S.E.2d 176, 2005 N.C. App. LEXIS 2608 (2005), cert. denied, — N.C. —, 630 S.E.2d 448 2006.

Owner conceded that the trial court entered no order regarding discovery of its competitors' computers or release of information concerning the income and assets of the competitors; absent a ruling from the trial court on these two issues, the owner could not assign error to them under N.C. R. App. P. 10(b)(1). Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Because certain specific grounds were not argued in defendant's motion to the trial court, they were not preserved for appellate review under N.C. R. App. P. 10(b)(1). State v. Kaher Maruf Muhammad, — N.C. App. —, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Defendant's contention that defendant's constitutional rights were violated by the trial court's refusal to hear arguments regarding an outburst by a spectator during the State's closing argument was not preserved for appellate review because defendant failed to make any constitutional arguments to the trial court. State v. Goldsmith, — N.C. App. —, 652 S.E.2d 336, 2007 N.C. App. LEXIS 2310 (2007).

Because the issue of entrapment was not raised before the trial court, it was not reviewed on appeal. State v. Moore, — N.C. App. —, 656 S.E.2d 287, 2008 N.C. App. LEXIS 208 (2008).

Defendant did not preserve an issue for appellate review because defendant did not raise the issue in the trial court. Furthermore, because defendant did not allege that the trial court committed plain error, defendant waived the issue. State v. Dewalt, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 903 (May 6, 2008).

Contention not raised in the trial court may not be raised for the first time on appeal under N.C. R. App. P. 10(b)(1). Kitchin v. Halifax County, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1624 (Sept. 2, 2008).

Because defendant did not object during the closing argument, the appellate court reviewed the prosecutor's remarks for plain error under N.C. R. App. P. 10(c)(4). State v. Streeter, — N.C. App. —, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (Aug. 5, 2008).

Failure to Obtain a Ruling from the Trial Court — Appellate court refused to consider a condominium association's argument that the trial court erred when it considered affidavits offered by defendant subcontractor before it granted the subcontractor's motion for summary judgment because the trial court did not rule on the association's motion to strike the affidavits and the association did not ask the court for a ruling on its motion. Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004).

Employee failed to preserve for appellate review the issue of whether a trial court erred by not ruling on the employee's motion to strike paragraphs from affidavits submitted in support of her employer's motion for summary judgment because the trial court's order granting the employer's motion for summary judgment did not address the employee's motion to strike and there was no indication in the record before the appellate court that the trial court otherwise ruled on the employee's motion to strike. Therefore, because the employee failed to obtain a ruling on her motion to strike, her assignment of error was overruled. Gilreath v. N.C. HHS, 177 N.C. App. 499, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

When, in a personal injury case, alleged injured parties objected to certain affidavits filed with their opponents' summary judgment motion, but did not obtain a ruling on their objection, under N.C. R. App. P. 10(b)(1), the issue was not preserved for appeal, so the issue was not properly before the appellate court. Walden v. Morgan, — N.C. App. —, 635 S.E.2d 616, 2006 N.C. App. LEXIS 2169 (2006).

County's assignments of error were not preserved for appellate review because the county in its motion to dismiss argued the various issues raised in a town's assignments of error, but did not present any argument as to the issues the county attempted to raise on appeal; furthermore, while the county listed the issues as part of its pretrial order, the appellate court was unable to determine from the order whether the trial court was presented with any argument on the issues or whether the trial court made any ruling on the issues, as no mention of the issues was made in the trial court's judgment. Town of Green Level v. Alamance County, 184 N.C. App. 665, 646 S.E.2d 851, 2007 N.C. App. LEXIS 1622 (2007).

Record did not indicate that a lender obtained a ruling from the trial court on its motion for continuance; therefore this question was not properly preserved for appellate review. Carolina Bank v. Chatham Station, Inc., — N.C. App. —, 651 S.E.2d 386, 2007 N.C. App. LEXIS 2195 (2007).

Where a criminal defendant did not object to the introduction of evidence of his prior record level worksheet and, in fact, admitted his prior record level at sentencing, the defendant did not preserve this issue for appellate review by objection, and it was deemed abandoned. State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004).

Grounds Apparent from Context. — Substance of the testimony was apparent from the context within which the questions were asked under G.S. 8C-1-103(a)(2), the grounds for admitting the testimony as evidence of the victim's violent character pertinent to defendant's assertion of self-defense under G.S. 8C-1-404(a)(2) were apparent from the context under N.C. R. App. P. 10(b)(1), and the issue of the testimony's admissibility was properly preserved for appellate review. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Failure to Move for Dismissal. — Juvenile was precluded from raising the issue of sufficiency of the evidence of second-degree sexual offense on appeal where he failed to move for a dismissal at the close of the evidence. In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Defendant waived his right to appellate review of the denial of defendant's motion to dismiss the action at the close of the State of North Carolina's evidence, under N.C. R. App. P. 10(b)(3), because, following defendant's presentation of evidence, defendant failed to move to dismiss the charges or to renew defendant's challenge to the sufficiency of the evidence. State v. Cox, — N.C. App. —, 661 S.E.2d 294, 2008 N.C. App. LEXIS 1097 (2008).

Failure to Move for Change of Venue. — Where defendant failed to move for a change of venue or a special venire due to alleged prejudicial pretrial publicity in defendant's capital murder case, the matter was not preserved for appellate review under N.C. R. App. P. 10(b)(1). State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

Burden of Establishing Right to Review Where Not Raised at Trial. — Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

When a defendant contends that an exception, in the words of subdivision (b)(1) of this rule, "by rule or law was deemed preserved or taken without" objection made at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error. In so doing, he must alert the appellate court to the fact that no action was taken by counsel at trial and then establish his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

Because defense counsel did not object to a sergeant's testimony at trial, the appellate court's review was limited to a consideration of plain error pursuant to N.C.R. App. P. 10(b)(1); defendant would be entitled to a new trial only if showed that the error was so fundamental that, absent the error, the jury probably would have reached a different result. N.C.R. App. P. 10(c)(4). State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219, 2004 N.C. App. LEXIS 707 (2004).

Failure to Except Precludes Review. — The general rule is that where no objection or exception is made at trial to the allegedly improperly admitted evidence, the appellant may not challenge the item for the first time on appeal. State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980).

The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal and the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect. State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

In an action for breach of contract, plaintiff waived its objection to the trial court's framing of an issue submitted to the jury since plaintiff did not object to that issue at trial nor did it request a different issue. Burke County Pub. Sch. Bd. of Educ. v. Juno Constr. Corp., 50 N.C. App. 238, 273 S.E.2d 504, cert. withdrawn as improvidently granted, 304 N.C. 187, 282 S.E.2d 778 (1981).

In plaintiff's action for divorce from bed and board on the ground that defendant had rendered such indignities as to make her life burdensome, defendant could not complain on appeal that the issue of plaintiff's indignities offered to defendant should have been submitted to the jury, since defendant never demanded submission of the issue at trial. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981).

The plaintiffs, who did not object at trial to the submission of the contributory negligence issue to the jury, could not complain on appeal. Kirk v. R. Stanford Webb Agency, Inc., 75 N.C. App. 148, 330 S.E.2d 262, cert. denied, 314 N.C. 541, 335 S.E.2d 18 (1985).

Where the trial judge improperly excluded evidence because he viewed it as parol evidence varying the terms of an express contract, but plaintiff assigned no error to the ruling, it could not be reached on appeal. Catoe v. Helms Constr. & Concrete Co., 91 N.C. App. 492, 372 S.E.2d 331 (1988).

Where State neither objected nor excepted to defendant's oral motion to suppress, and instead the district attorney stated that he was prepared to go forward with a hearing so that he could show why the statements made by defendant were admissible, objection and exception would not be deemed to have been made by operation of law, and the State was precluded from arguing on appeal that defendant's motion was untimely or improper. State v. Seagle, 96 N.C. App. 318, 385 S.E.2d 532 (1989).

Where defendant assigned error to the trial judge's ruling allowing six questions/exchanges on cross-examination, but only four of them were objected to on appeal, the remaining two questions were waived, as they were not properly preserved on appeal. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

Plaintiff's argument was dismissed where plaintiff did not raise the issues in the court below. Pharr v. Worley, 125 N.C. App. 136, 479 S.E.2d 32 (1996).

The defendant waived his right to raise on appeal the trial court's failure to ensure the presence of a defense witness, where after hearing the trial court's statements concerning the absence of the witness, the defense did not request a recess, move for a continuance, or request the issuance of a material witness order. State v. Smith, 130 N.C. App. 71, 502 S.E.2d 390 (1998).

Defendant insurer's claim that the trial court erroneously credited the $ 50,000 paid by an insurance company solely to another UIM insurer instead of allowing the two UIM insurance companies to share the credit pro rata, based on its determination that the other UIM policy was "primary" and the defendant's UIM policy was "excess," was not preserved, and therefore, not reviewable, in that the defendant did not specifically assign error to the foregoing portion of the trial court's judgment. Dutch v. Harleysville Mut. Ins. Co., 139 N.C. App. 602, 534 S.E.2d 262, 2000 N.C. App. LEXIS 976 (2000).

Defendant failed to preserve for review under N.C. R. App. P. 10(b)(1) the issue of whether the trial court improperly admitted hearsay testimony without conducting a voir dire examination of the declarant, because defendant did not present the trial court with a timely request or motion. State v. Carter, 153 N.C. App. 756, 570 S.E.2d 772, 2002 N.C. App. LEXIS 1272 (2002).

Defendant's allegation that the trial court refused to allow him to approach the bench to inform the court that a plea agreement had been arrived at would not be considered on appeal because defendant made no objection to proceeding with trial; therefore, the defendant failed to properly preserve his argument for appeal, under N.C. R. App. P. 10(b)(1). State v. Williams, 154 N.C. App. 466, 572 S.E.2d 213, 2002 N.C. App. LEXIS 1439 (2002), aff'd, 357 N.C. 503, 586 S.E.2d 89 (2003).

In contract action, employee waived appellate review of his argument that a referee erred by not making specific findings of fact and conclusions of law, under N.C. R. App. P. 10(b)(1), by not excepting to the referee's report on this ground or objecting at the hearing. Gaynor v. Melvin, 155 N.C. App. 618, 573 S.E.2d 763, 2002 N.C. App. LEXIS 1586 (2002).

Where the motorist did not object to the trial court's ruling on the injured person's motion for attorney's fees prior to ruling on the injured person's initial motion for a new trial, the motorist failed to preserve this issue for appellate review. Phillips v. Brackett, 156 N.C. App. 76, 575 S.E.2d 805, 2003 N.C. App. LEXIS 27 (2003).

Defendant's contention, that two statutes used to impose the probationary condition that defendant not violate the rules and regulations of the Department of Correction even though defendant was housed in a county detention facility, violated defendant's constitutional rights could not be reviewed on appeal as defendant had not raised the claim in the trial court that defendant's constitutional rights were violated; thus, the appellate court could not consider that contention for the first time on appeal. State v. Payne, 156 N.C. App. 687, 577 S.E.2d 166, 2003 N.C. App. LEXIS 192 (2003).

Since the record did not indicate that the lessees objected on the basis that the lessor was required to amend its complaint, and thus should have been limited to the $14,170 of damages requested in the complaint, before entry of the partial summary judgment order, and the only mention of the argument by the lessees occurred after the jury entered its verdict, the lessees failed to preserve the issue for appellate review. Sylva Shops, Ltd. P'ship v. Hibbard, 175 N.C. App. 423, 623 S.E.2d 785, 2006 N.C. App. LEXIS 181 (2006).

Failure to Assign Error. — Where employer failed to assign error to the commission's opinion and award on the basis that the commission erroneously failed to give a credit for temporary total disability benefits paid past the date the employee reached maximum medical improvement, that argument was not properly preserved for appellate review. Lewis v. Craven Reg'l Med. Ctr., 174 N.C. App. 561, 621 S.E.2d 259, 2005 N.C. App. LEXIS 2473 (2005), cert. denied, — N.C. —, 629 S.E.2d 853 (2006).

Because a party did not assign as error ineffective assistance of counsel, the party's argument that her counsel was ineffective for failing to object to testimony as being hearsay at trial was not properly before the court under N.C. R. App. P. 10(c)(1). In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

When plaintiff in a quiet title suit failed to assign as error that a failure to register a certificate of merger constituted a cloud on title, plaintiff's argument was not properly before the appellate court. Spruce Pine Indus. Park, Inc. v. Explosives Supply Co., 179 N.C. App. 524, 634 S.E.2d 264, 2006 N.C. App. LEXIS 1974 (2006).

Employer and its worker's compensation carrier did not assign error to a finding by the Industrial Commission that its calculation of an employee's weekly wage was fair and just to both parties; thus, the issue was not preserved for appellate review pursuant to N.C. R. App. P. 10(a). Greene v. Conlon Constr. Co., 184 N.C. App. 364, 646 S.E.2d 652, 2007 N.C. App. LEXIS 1430 (2007).

Defendant's failure to support his contention that the trial court committed plain error by allowing a witness to describe what she saw on a computer precluded appellate review of that assignment of error. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

When, in a dependency proceeding, a department of social services did not object to the judge who had previously heard the case conducting a hearing in the case, even though, that day, she was assigned to hear cases in the civil district court rather than the juvenile court, it could not raise, on appeal, the question of whether the judge improperly retained jurisdiction over the case, because it did not raise the issue before the trial court, as required by N.C. R. App. P. 10(b)(1). In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

When, in a dependency proceeding, a trial court orally granted foster parents' oral request to intervene, if a father's assignment of error to a finding of fact which addressed the foster parents' intervention was sufficient, for purposes of a notice of appeal, review was still precluded under N.C. R. App. P. 10(b)(1), because no one objected to the request to intervene, so the question was not presented to the trial court and preserved for review. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Failure to Cross-Assign Error. — Because the appellee failed to cross-assign error to the trial court's failure to render judgment on alternative grounds, the appellee did not properly preserve for appellate review those alternative grounds; the additional arguments raised in appellee's brief, if sustained, would provide an alternative basis for upholding the trial court's determination that a premarital agreement was invalid and unenforceable. Harllee v. Harllee, 151 N.C. App. 40, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

Capital Cases. — In every case where a death sentence has been pronounced, it is the practice of the Supreme Court to carefully review the entire record to determine if prejudicial error appears. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

If, after careful review of the entire record in capital cases error does appear, even though not assigned by defendant, the Supreme Court will take cognizance of the error ex mero motu. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

If, upon an examination of the record for the ascertainment of reversible error in capital cases, error is found, it then becomes the duty of the Supreme Court upon its own motion to recognize and act upon the error so found. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Defendant who assigned error to the submission of an aggravating circumstance to the jury preserved his exception by objecting to it on several occasions, thus defendant could appeal pursuant to subdivision (b)(1). State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994).

In a prosecution for murder the trial court erred in allowing the defendant a new trial on the basis that the retroactivity of the Mullaney rule (see Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977)) was applicable, where the defendant-appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Purpose of provision in subdivision (b)(1) of this rule that an exception shall be set out immediately following the record of judicial action to which it is addressed is to make appellate review more effective by narrowing the scope of inquiry to, and providing a visible reference point in the record for, the particular judicial action which the appellant assigns as error. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Failure to object to the introduction of evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review, that is, that an exception, by rule or law was deemed preserved or taken without any such action, or that the alleged error constitutes plain error. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986).

Where defendant failed to object to the district attorney's summary of the evidence offered upon his guilty plea, he waived his right to appeal any possible error regarding this evidence. State v. Mullican, 95 N.C. App. 27, 381 S.E.2d 847 (1989), aff'd, 329 N.C. 683, 406 S.E.2d 854 (1991).

Party believing the methodology used by an expert witness in valuing property at issue is not valid or, if valid, is not properly applied to the facts at issue, has an obligation to object to its admission; if a timely objection is not lodged at trial, it cannot be argued on appeal that the trial court erred in relying on this evidence in determining the value of the asset at issue. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Because defense counsel only made general objections to the prosecutor's questions when defendant was cross-examined during his trial for first degree murder and failed to state specific grounds for his objections, defendant's claims that the prosecutor improperly questioned him about prior bad acts and his juvenile convictions were not preserved for review; furthermore, the appellate court held that the trial court did not commit plain error by allowing the prosecutor to ask defendant about his juvenile convictions. State v. Perkins, 154 N.C. App. 148, 571 S.E.2d 645, 2002 N.C. App. LEXIS 1403 (2002).

Failure to Object to Testimony. — By failing to object to State's questioning of pathologist regarding fecal matter found in victim's vagina, defendant waived this assignment of error. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Failure to object at trial to plaintiff's counsel's statement as to dollar amount of actual and projected medical costs resulted in a failure to preserve the issue for appeal, under N.C. R. App. P. 10(b)(1). Floyd v. McGill, 156 N.C. App. 29, 575 S.E.2d 789, 2003 N.C. App. LEXIS 35 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 364 (2003).

Where a land owner failed to object to testimony at trial, he waived his right to appellate review of the trial court's denial of a motion in limine under N.C. R. App. P. 10(b)(1). City of Wilson v. Hawley, 156 N.C. App. 609, 577 S.E.2d 161, 2003 N.C. App. LEXIS 193 (2003).

Worker's compensation claimant's argument that a doctor had an ex parte communication with an employer that rendered his testimony incompetent was not preserved for appellate review as the claimant did not object on Salaam v. N.C. Dep't of Transp., 468 S.E.2d 536 (1996), disc. review improvidently allowed, 480 S.E.2d 51 (1997), grounds before the North Carolina Industrial Commission. Perkins v. U.S. Airways, 177 N.C. App. 205, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

Failure to Object to Motion in Arrest of Judgment. — Defense counsel's failure to object to the State' motion to arrestjudgment on a conviction precluded appellate review of the issue. State v. Garris, — N.C. App. —, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Defendant did not waive right to appeal hearsay ruling by failing to renew his objection. — Defendant did not waive his right to appeal the trial court's hearsay ruling under N.C. R. App. P. 10(b)(1) under circumstances in which defendant raised his hearsay objection while an officer was testifying, moments before defendant expected the officer to deliver an allegedly inadmissible statement to the jury, the trial court excused the jury and engaged in a lengthy discussion with the parties, the trial court overruled defendant's objection, the jury returned, the trial resumed, and the officer read defendant's statement to the jury within minutes of defendant's objection and the trial court's ruling; under these circumstances, N.C. R. App. P. 10(b)(1) did not require defendant to renew his objection when the officer resumed his testimony. Defendant's prior objection was sufficiently contemporaneous with the challenged testimony to be considered "timely" for purposes of the appellate rules. State v. Hazelwood, — N.C. App. —, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

Failure to Object to Admission of Defendant's Police Statement. — Where defendant conceded that he was provided with a copy of his statement that he gave the police during the discovery process, which he reviewed at that time, and where defendant allowed this statement to be published to the jury without objection, and did not argue the admission to be plain error, he could not say it was error to publish the statement at trial without first redacting any mention of his prior charges contained within the statement. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

Failure to Object to Specific Fact-Finding of Industrial Commission. — Where the Industrial Commission weighed the evidence and determined the credibility of the witnesses before it and made findings of fact as to its award of temporary disability to an employee who had fallen at his workplace, such satisfied the fact-finding of G.S. 97-85; the finding that the employee suffered a back injury within G.S. 97-2(6) was presumed to be correct on appeal, pursuant to N.C. R. App. P. 10(b) where the employer did not preserve that issue for review by separately contesting each particular finding of fact. Johnson v. Herbie's Place, 157 N.C. App. 168, 579 S.E.2d 110, 2003 N.C. App. LEXIS 640 (2003), cert. denied, 357 N.C. 460, 585 S.E.2d 760 (2003).

Failure to Object to Imposition of Costs and Pre-Judgment Interest. — In a wrongful death action based on the medical specialist's malpractice, the trial court did not err in requiring the specialist to pay all pre-judgment interest and costs because the medical specialist failed to make any objection on the record as to the imposition of costs and pre-judgment interest or the apportionment thereof as required by G. S. 1A-1, Rule 10(b)(1). Boykin v. Kim, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

Untimely Objection. — Where, at the time of defendant's objection to the admission of the envelope's contents, plaintiff had previously been permitted to testify about them without objection, defendant's objection was not raised in a timely manner. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

Evidence Incompetent by Statute. — Failure of the trial judge to exclude evidence rendered incompetent by statute is reversible error, whether objection is interposed and exception noted or not. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

Another exception to the waiver rule implicit in subsection (b) is the admission of evidence contrary to a statute which precludes its admission in furtherance of some public policy of the State. In this instance failure to object to the evidence does not waive one's right to have the error considered on appeal. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Motion in Limine by Itself Is Insufficient to Preserve Issue. — Where defendants filed a pretrial motion in limine to exclude all references to insurance matters but failed to object to individual questions regarding insurance, they had not preserved their objection to the testimony. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479, 1999 N.C. App. LEXIS 1176 (1999).

Matters Underlying a Motion in Limine. — It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; to preserve for appeal matters underlying a motion in limine, the movant must make at least general objection when the evidence is offered at trial. Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992), rev'd on other grounds, 333 N.C. 455, 427 S.E.2d 317 (1993).

Hearsay. — Although the Court of Appeals disapproves of the admission of hearsay statements three or four times removed from the original declarant under the guise of corroborating the corroborative witness, a defendant must object on that ground, giving the trial court the opportunity to correct any perceived error, in order to preserve the question for appellate review. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

Continuing Objection Preserved All Issues Regarding Hearsay. — Defendant's pattern of objections to hearsay testimony constituted a continuing objection to the line of questioning and therefore all of the hearsay testimony could be considered on appeal, even though only part of the testimony was objected to at trial. State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

Discretion of Trial Judge. — A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

Discretion of Appellate Court. — Although defendant did not properly preserve for appeal either issue on which he was relying, the Court of Appeals may hear appeals in its discretion under N.C.R.A.P., Rule 2. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Where the parents and the widow of a deceased employee, and the employer, all failed to designate which assignments of error, as well as which particular findings and conclusions, they brought forward on their appeal from a determination of the North Carolina Industrial Commission which denied them death benefits, they violated N.C. R. App. P. 10 and none of the assignments of error were properly before the court for review; however, a court may exercise its discretion under N.C. R. App. P. 2 and consider the merits of the issues raised, as the court did. Goodrich v. R.L. Dresser, Inc., 161 N.C. App. 394, 588 S.E.2d 511, 2003 N.C. App. LEXIS 2204 (2003).

Although the appellants' brief did not conform completely to the mandates of the North Carolina Rules of Appellate Procedure, thereby subjecting their appeal to dismissal, the appellate court nevertheless elected to reach the merits of their appeal; the court found that it was proper not to dismiss the appeal because, inter alia, the court did not believe that the appellees were substantially prejudiced as the appellants' assignments of error were specific enough to put the appellees on notice of the contested issues and upon what basis the court might rule, and maintaining the integrity of the laws through proper interpretation and application outweighed the importance of dismissal in a case in which the rules violations had little to no impact. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

An objection to testimony not taken in apt time is waived. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

While, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission not assignable as error, this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Defendant neither moved for recess nor objected to trial court's decision to proceed when his witnesses had not appeared after fifty minutes. Thus, defendant cannot argue on appeal for first time that trial court erred by proceeding to jury without testimony by such witnesses. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), appeal dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Except where the error complained of is so prejudicial that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, counsel's failure to make timely objection will not waive defendant's right to object under subsection (b). State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Or Where Error Violates Defendant's Constitutional Rights. — Where the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

Failure To Object to Aggravated Sentence. — Defendant's failure to object to the trial court's imposition of an aggravated sentence did not bar defendant from arguing the sentence on appeal. State v. Harris, 175 N.C. App. 360, 623 S.E.2d 588, 2006 N.C. App. LEXIS 57, vacated, in part, on other grounds, 361 N.C. 154 (2006), petition denied as to additional issues, 361 N.C. 174, 641 S.E.2d 308 (2006).

Defendant's claim of a Blakely v. Washington, 542 U.S. 296 (2004), error in sentencing was considered, even though defendant did not object at trial, as an error at sentencing was not considered an error at trial for the purpose of N.C. R. App. P. 10(b)(1) because the rule was directed to matters that occurred at trial and upon which the trial court had to be given an opportunity to rule in order to preserve the question for appeal. State v. McQueen, 181 N.C. App. 417, 639 S.E.2d 131, 2007 N.C. App. LEXIS 154 (2007), cert. denied, appeal dismissed, 361 N.C. 365, 646 S.E.2d 535 (2007).

Where the injured persons failed to object to the size or composition of the three-commissioner panel of the North Carolina Industrial Commission at any time prior to the close of the hearing on their claim under the North Carolina Childhood Vaccine-Related Injury Compensation Program, G.S. 130A-422 to G.S. 130A-434, the injured parties failed to properly preserve that issue. Goetz v. Wyeth-Lederle Vaccines, 168 N.C. App. 712, 608 S.E.2d 810, 2005 N.C. App. LEXIS 448 (2005).

Where defendant failed to object to trial court's termination of first trial by a declaration of mistrial, defendant was not entitled by reason of former jeopardy to dismissal of charge against him; defendant was given notice and opportunity to object before mistrial was declared. State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (1996).

Where Record Did Not Reveal Any Request That Trial Court Make Findings of Fact and Conclusions of Law. — Where the record did not reveal any request by former wife that the trial court make findings of fact and conclusions of law, the former wife's assignment of error asserting that the trial court failed to make those findings and conclusions in dismissing her action was overruled. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Where record on appeal did not indicate that the trial court considered plaintiff's motions, as required by N.C.R.A.P. Rule 9, the court could not review plaintiff's assignment of error pursuant to subdivision (b)(1) of this rule. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869, 1999 N.C. App. LEXIS 657 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

Court Transcript. — While defendant's brief contained references to the court transcript, none of the referenced pages specifically indicated that defendant had moved to set aside the verdict, and the court would not review on appeal. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Review Limited to Plain Error. — Where defendant failed to object to jury instruction at trial, Supreme Court's review of alleged error was limited on appeal to review for plain error. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Where a defendant did not object to instruction at trial, any defect in the instruction must rise to the level of plain error for defendant to be entitled to relief on appeal. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

Appellate review was limited to plain error review where defendant made no objection or exception to evidence presented and admitted at trial. State v. McNair, 146 N.C. App. 674, 554 S.E.2d 665, 2001 N.C. App. LEXIS 1061 (2001).

When defendant's motion in limine did not preserve his objection, for purposes of appeal, to certain evidence to which he did not object at trial on the same basis as the objection he asserted on appeal, the appellate court's review of his objection was limited to plain error, under N.C. R. App. P. 10(c)(4). State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

Exception to Default Judgment. — Defendant's exception to judgment, entered in open court, permitted him to challenge on appeal whether a default judgment could be based upon plaintiff's complaint. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

When a defendant presents evidence at trial, he waives his right on appeal to assert the trial court's error in denying the motion to dismiss at the close of the state's evidence. State v. Davis, 101 N.C. App. 409, 399 S.E.2d 371 (1991).

An unrepresented party is not relieved of the duty to object to evidence in order to preserve the issue for appeal. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

Where a statement contains both corroborative and noncorroborative evidence, the defendant must object specifically to the inadmissible portions. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

Withdrawal of Challenged Questions. — Where a defendant withdraws challenged questions, the court's ruling on those questions is not preserved for review. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Loss of Right to Challenge Search Warrant. — Defendant's assignment of error asserting that search warrant was deficient under G.S. 15A-244(3) in failing to meet the requirements of G.S. 15A-245(b) and was prohibited under Article I, Section 20 of the North Carolina Constitution was dismissed as not properly before the Court pursuant to subsection (c) of this rule. State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999).

Sentencing Issue Did Not Have to Be Preserved. — N.C. R. App. P. 10(b) did not preclude defendant from raising the issue of an order that he have no contact with the victims on appeal, because an error at sentencing is not considered an error at trial for the purpose of the rule because the rule was directed to matters which occurred at trial and upon which the trial court had to be given an opportunity to rule in order to preserve the question for appeal. State v. Curmon, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Substantial Compliance Sufficient for Preservation of Error. — Where at the charge conference, plaintiff specifically objected to the submission to the jury of the issue of the doctrine of sudden emergency, and later objected to the content of sudden emergency charge, and plaintiff specifically referenced this portion of the transcript within his brief and included a copy of the trial court's instruction on the sudden emergency doctrine, plaintiff substantially complied with the rules of Appellate Procedure and therefore adequately preserved to question for appellate review. Holbrook v. Henley, 118 N.C. App. 151, 454 S.E.2d 676 (1995).

Although the defendant did not raise his double jeopardy argument using those exact words at his trail, the substance of the argument was sufficiently presented and, more importantly, addressed by the trial court in finalizing its instructions to the jury; accordingly, the appellate court considered the merits of the defendant's double jeopardy argument on appeal. State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003).

Counsel Precluded from Asserting Defense That Counsel Knew to Be False. — Where a prison inmate was convicted of offenses related to a fire which caused the death of a victim who was bound to a chair, and the inmate asserted that defense counsel was ineffective for failing to pursue a defense that the fire started accidentally, the inmate failed to rebut counsel's testimony that the inmate admitted to starting the fire, and thus counsel was precluded from asserting an accident defense which counsel knew to be false. Blakeney v. Lee, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 32922 (W.D.N.C. May 3, 2007).

Defendant Waived Appellate Review. — Where an insured business failed to assign error to a conclusion of law of the trial court judge with respect to the calculation of additional premiums that were due to the insurer, the issue was not preserved for appellate review under N.C. R. App. P. 10(a). N.C. Farm Bureau Mut. Ins. Co. v. T-N-T Carports, Inc., 185 N.C. App. 686, 649 S.E.2d 420, 2007 N.C. App. LEXIS 1942 (2007).

Issue Not Preserved. — Defendant argued that cautionary instruction was error, as it drew particular attention to prosecutor's improper question; however, before the judge gave the second instruction, defense counsel did not object and defendant failed to preserve the issue for appellate review. State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565 (1994), aff'd, 339 N.C. 733, 453 S.E.2d 865 (1995).

The defendant failed to preserve his claim that a prospective juror should have been excused for cause in his capital murder trial, where he argued on appeal that a police officer should have been excused because he had heard about the case during his employment as a police officer and because the officer said that he would find a police officer to be a more credible witness simply due to his status as an officer, but he did not make these arguments at trial, arguing there that the officer should be dismissed because he was seen talking to a deputy sheriff during a break. State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999).

Defendant failed to preserve his objection to testimony by a child sexual abuse expert that he contended was contradictory rather than corroborative, where he did not object on the ground that it was outside the scope of corroborative testimony, but merely requested the trial court to instruct the jury that the evidence was offered for only corroborative purposes. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

In his appellate brief, plaintiff argued issues of negligence versus intent, policy coverage and defendant's duty to defend the insured in the prior proceeding; however, plaintiff did not preserve the right to argue these issues on appeal where he neither moved the trial court for a directed verdict or judgment notwithstanding the verdict, nor did he give notice of appeal from the jury verdict. Pate v. State Farm Fire & Cas. Co., 136 N.C. App. 836, 526 S.E.2d 497, 2000 N.C. App. LEXIS 153 (2000).

Where defendant did not move for a mistrial, the failure of the trial court to grant a mistrial was not an error that was properly preserved for appellate review. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

By simply relying on the words "plain error" in a footnote as the extent of defendant's argument, defendant failed to argue plain error and thereby waived appellate review. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

Outdoor advertising companies who were appealing the revocations of their permits for certain outdoor advertising signs did not show that they would be required to violate certain state statutes, such as G.S. 136-89.56, prohibiting commercial enterprises on certain highways, or G.S. 136.89.58, prohibiting standing vehicles on the right-of-way of certain highways, to measure the height of those signs, nor was this argument raised before the trial court, as required by N.C. R. App. P. 10(b)(1). Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

Defendant did not preserve his claim that the State was improperly allowed to play an inaudible tape for the jury where he objected to the admission of the tape prior to a proper foundation being laid, but he did not object after the trial court ruled that the tape had been properly authenticated. State v. Brice, 167 N.C. App. 72, 604 S.E.2d 356, 2004 N.C. App. LEXIS 2054 (2004).

Passenger's appeal of the reduction of her judgment against defendant in an action for personal injuries sustained in an automobile collision by the amount of her settlement with a third-party defendant, pursuant to G.S. 1B-4, on the ground that she sustained two distinct injuries rather than a single indivisible injury, was dismissed because the passenger did not separate the injuries in the trial court, thus failing to preserve the issue for appeal pursuant to N.C. R. App. P. 10(b)(1). Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Because an appellant's assignments of error: (1) were extremely broadsided, (2) were not followed by citations to the record or transcript, and (3) failed to specify which findings were being challenged, the appellate court was unable to determine which findings of fact the appellant specifically contended were misapplications of the whole record test. N.C. Dep't of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 616 S.E.2d 594, 2005 N.C. App. LEXIS 1805 (2005).

On an appeal of a dependency finding, the father's arguments regarding changes to and reliability of a doctor's opinion were not properly before the appellate court because the father: (1) failed to object to the doctor's testimony during the hearing; and (2) failed to specifically assign error to that testimony or the trial court's reliance on that testimony. In re A.E., 171 N.C. App. 675, 615 S.E.2d 53, 2005 N.C. App. LEXIS 1368 (2005).

Appellate court would not address the claimant's assertion that the trial court erred in awarding costs to the opposing parties, as that assertion was not set forth in the claimant's assignment of errors. Duncan v. Cuna Mut. Ins. Soc'y, 171 N.C. App. 403, 614 S.E.2d 592, 2005 N.C. App. LEXIS 1207 (2005).

Mother failed to properly preserve for appellate review the issue of whether the trial court erroneously allowed the guardians to participate in the juvenile dependency proceedings without filing a motion to intervene, because the mother failed to object to the guardians' participation in the proceedings at the trial level. In re L.M.C., 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005).

When at trial, defendant moved to suppress his confession on due process grounds, and only on appeal asserted that his confession should have been suppressed on Miranda grounds, he had not preserved the Miranda question for appellate review. State v. Smith, 178 N.C. App. 134, 631 S.E.2d 34, 2006 N.C. App. LEXIS 1290 (2006).

Defendant's contention that the trial court erred in denying a motion for a mistrial based on an improper identification was not properly preserved for review because defense counsel failed to raise an objection when the victim testified about the photo line-up. State v. Summers, 177 N.C. App. 691, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188, appeal dismissed, cert. denied, 637 S.3.2d 192 (N.C. 2006).

Defendant's general objection to the recalling of an expert on the second day of trial did not preserve defendant's specific objection to the expert's testimony at that time. State v. Hammett, 361 N.C. 92, 637 S.E.2d 518, 2006 N.C. LEXIS 1296 (2006).

Defendant's assignment of error was dismissed under N.C. R. App. P. 10(c)(4) due to defendant's failure to properly preserve and present it or to request and argue for plain error review because defendant, while he objected to the introduction of certain evidence by pretrial motion, failed to preserve the issue by renewing his objection when the evidence was presented at trial. Furthermore, defendant, in his brief and at oral argument, failed to specifically and distinctly contend that the admission of the evidence amounted to plain error. State v. Petrick, — N.C. App. —, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007).

Mother, whose son was adjudicated neglected, did not preserve for appellate review any argument regarding the trial court's consideration of the facts relating to her other children because the mother did not object when the Department of Social Services offered into evidence reports that provided evidentiary support for the trial court's findings of fact regarding the other children; because there was no objection, the reports constituted substantive evidence sufficient to support the trial court's findings of fact. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Issue Preserved. — Because defendant objected to a police officer's testimony as to the victim's prior statements during trial, the issue was properly preserved for appeal under a de novo standard of review pursuant to N.C. R. App. P. 10(b)(1). State v. Streeter, — N.C. App. —, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (Aug. 5, 2008).

No Objection to Proceedings Pro Se Before Industrial Commission. — The issue of whether the Industrial Commission erred in allowing the claimant to proceed pro se with her appeal after her counsel withdrew was not preserved for appeal, where claimant assented to her counsel's withdrawal, fully participated in the hearing before the Commission, and never objected to counsel's withdrawal or proceeding pro se. Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999).

Where defendant lodged no objection on the record, court refused to allow defendant to bootstrap his unpreserved argument regarding submission of punitive damages to the jury onto his challenge to the court's allowance of plaintiff's motion to amend. Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999), rev'd on other grounds, 351 N.C. 166, 522 S.E.2d 73 (1999).

On appeal from adverse name change decision, the appellate court declined to address petitioner's constitutionally-based assignments of error because the record failed to show that she raised them before the clerk or the superior court. In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999).

Where defendant failed to address the increased sentence received after his lower consolidated sentence was declared illegal, never addressed the constitutionality (double jeopardy or due process concerns) of the resentencing, and argued only that the offenses should have been consolidated, he failed to preserve those issues for review. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Defendant abandoned the issue of whether the aggravating factor of damage causing great monetary loss could be applied to the offense of conspiracy, by not stating it in his assignments of error. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

Failure to object in juvenile dispositional hearing, even acknowledging the informality allowed in a dispositional hearing, the record gave no indication that juvenile defendant contested the continuance of the dispositional hearing on the grounds that a sex offender specific evaluation was unavailable; defendant was procedurally barred from asserting this argument on appeal. In re J.J.D.L., — N.C. App. —, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Sanctions Other than Dismissal. — Dismissal of an appeal for failure to comply with N.C. R. App. P. 10(c)(1) was reversed and remanded because the intermediate appellate court should have considered whether sanctions other than dismissal would have been appropriate pursuant to N.C. R. App. P. 25(b) or 34. If the court concluded that dismissal was the appropriate sanction, it may then have considered whether the circumstances of the case justified invoking N.C. R. App. P. 2 to reach the merits of the appeal. Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

Illustrative Cases. — The court could not address the defendants' claim that the trial court erred in instructing the jury that violation of an OSHA regulation is negligence per se, and in admitting OSHA citations into evidence along with expert testimony regarding the OSHA violations, because they were not properly raised in the trial court. Wolfe v. Wilmington Shipyard, Inc., 135 N.C. App. 661, 522 S.E.2d 306, 1999 N.C. App. LEXIS 1243 (1999).

Trial court properly declined to strike ex mero motu four jurors that were empaneled prior to a claim that defendant was incompetent to aid in jury selection; defendant did not move to strike the jurors at trial, and the issue was not properly preserved for appellate review pursuant to N.C.R. App. P. 10(b)(1), and while defendant requested plain error review of the issue, the plain error doctrine was limited to errors in jury instructions and the admission of evidence, N.C.R. App. P. 10(c)(4), and further, it was not clear from the record that defendant was not competent on when the jurors were selected. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003).

Trial court, at most, committed harmless error in admitting the prior statement of a witness to police regarding defendant shooting at him and the appellate court could not review the issue of whether the jury was properly charged regarding the limited purpose for which it was to consider that evidence, as defendant only raised a general objection to the admission of the prior statement, did not request a limiting instruction, and did not state the specific ground on which he objected to admission of that evidence; as a result, the issue was waived for appellate review. State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601, 2003 N.C. App. LEXIS 1438 (2003).

Car purchasers failed to preserve for review of a question regarding the notification of potential members of a lawsuit class after the purchasers withdrew their motion for class certification and as such, the appellate court declined to review the alleged error. Alexander v. DaimlerChrysler Corp., 158 N.C. App. 637, 582 S.E.2d 57, 2003 N.C. App. LEXIS 1220 (2003).

Although the mother and father objected to the social worker's opinion that sexual abuse of at least one of their children had occurred, they did not object to the doctor's testimony that she had diagnosed the older daughter as having been sexually abused, and, thus, the mother and father could not challenge on appeal the admission of the doctor's testimony. In re Morales, 159 N.C. App. 429, 583 S.E.2d 692, 2003 N.C. App. LEXIS 1518 (2003).

Under N.C. R. App. P. 10(b)(1), defendant's counsel properly preserved for review his objection to the trial court's order allowing the State to present evidence of defendant's alleged prior acts of violence towards his former girlfriend. The trial court had granted a pre-trial motion in limine filed by defense counsel, which precluded the State from presenting evidence concerning defendant's alleged acts of violence towards his former girlfriend during its case in chief; moreover, defense counsel interposed a timely objection as soon as the prosecutor, on cross examination, began to question defendant about his alleged conduct regarding the former girlfriend and thereafter argued vigorously that this evidence should be excluded or a mistrial should be granted. State v. Dennison, 163 N.C. App. 375, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004).

Although defendant did not raise a specific objection to one of the exhibits the State put forth regarding his prior convictions, defendant's objection to the admission of this evidence in another exhibit, which the court required the State to redact, presented together with the first exhibit, was sufficient to preserve the issue for appellate review. State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (2005).

Defendant was not required by N.C. R. App. P. 10(b)(1) to object during sentencing in order to properly preserve a claim of an error as to whether the trial court erroneously considered evidence from his co-defendant's trial for appellate review; Rule 10(b)(1) concerned matters that occurred at trial and upon which the trial court had to be given an opportunity to rule in order to preserve the question for appeal. State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343, 2006 N.C. App. LEXIS 582 (2006).

Assignment of error that stated that the challenged finding was "contrary to law" without stating any specific reason that the finding is "contrary to law" failed to identify the issues briefed on appeal. Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006).

Town's assignments of errors nine through 12, in a case regarding the disclosure of alleged public records, were insufficient because they failed to state the legal basis upon which the error was assigned, and thus the newspaper's motion to dismiss in that regard had to be granted. Womack Newspapers, Inc. v. Town of Kitty Hawk, 181 N.C. App. 1, 639 S.E.2d 96, 2007 N.C. App. LEXIS 81 (2007).

Because no objection was made to the introduction of counting tests at either the motion to suppress hearing or at trial, the error alleged by defendant was not properly before the appellate court for consideration. State v. Teate, 180 N.C. App. 601, 638 S.E.2d 29, 2006 N.C. App. LEXIS 2515 (2006).

Since defendant did not preserve for review defendant's objection that the trial court should have granted a mistrial because a witness was unable to identify defendant as cocaine seller, the appellate court reviewed the alleged error to see if the trial court abused its discretion. The appellate court determined that a mistrial was not warranted because the State presented other evidence that identified defendant as the cocaine seller. State v. Mack, — N.C. App. —, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

The purpose of subdivision 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions to cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. State v. Allen, 339 N.C. 545, 453 S.E.2d 150 (1995), overruled on other grounds, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

B. Jury Instructions; Findings and Conclusions of Judge.

The purpose of subdivision (b)(2) of this rule is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Sigmon, 74 N.C. App. 479, 328 S.E.2d 843 (1985).

The purpose of subdivision (b)(2) of this rule appears to be to provide the trial court an opportunity to correct any obvious defects and thereby eliminate the need for an appeal and a new proceeding. Implicit in this rule is also an obligation on a party to object to erroneous findings made by the trial court. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

Subdivision (b)(2) of this rule and Rule 21 of the Rules of Practice for the Superior and District Courts were designed to prevent unnecessary new trials caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. This policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

Subdivision (b)(2) Mandatory. — Subdivision (b)(2) of this rule, requiring objection to the charge before the jury retires, is mandatory and not merely directory. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Sigmon, 74 N.C. App. 479, 328 S.E.2d 843 (1985); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985); State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

G.S. 15A-1446(d)(13) Abrogated by Subdivision (b)(2). — By enacting subdivision (b)(2) of this rule, the Supreme Court has by preemption abrogated G.S. 15A-1446(d)(13). State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982), modified on other grounds, 308 N.C. 530, 302 S.E.2d 786 (1983).

Insofar as the provisions of G.S. 15A-1446(d)(5) allow a party to raise arguments regarding the sufficiency of the evidence to support a finding of fact at sentencing, it is inconsistent with the spirit and purpose of subdivision (b)(2), and statutes which are in conflict with the Rules of Appellate Procedure are ineffective. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

Construction of Subdivision (b)(2) with G.S. 15A-1231. — Subdivision (b)(2) of this rule and G.S. 15A-1231 are in conflict. Subdivision (b)(2) of this rule, however, is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under N.C. Const., Art. IV, § 13(2). Therefore, to the extent that G.S. 15A-1231 is inconsistent with subdivision (b)(2) of this rule, the statute must fail. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

F.R.Civ.P., Rule 51, contains language almost identical to subdivision (b)(2) of this rule. Under F.R.Civ.P., Rule 51, no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

A motion for a new trial made under G.S. 1A-1, Rule 59 is a substitute for the obligation of counsel to timely object to the jury instructions. Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (1985).

Objections Required by Subdivision (b)(2). — Pursuant to subdivision (b)(2) of this rule, in order to preserve a right to appeal a party must object to the jury charge, or any omission therefrom, before the jury retires. The rule also explicitly requires a party to object to the failure of the trial court to make necessary findings and conclusions in order to advance these issues on appeal. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

Where jury was erroneously instructed that it could award prejudgment interest on damages under G.S. 24-5 the court declined to disturb the judgment because defendant did not object to the instruction as required by subdivision (b)(2) of this Rule and the jury awarded no interest. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

Where a woman's former boyfriend, who was being sued by the woman's husband for alienation of affections and criminal conversation, objected to jury instructions as to evidence of a recorded telephone conversation with respect to the husband's alienation of affections claim, such did not constitute a proper objection to the standard of review contained in that instruction; accordingly, the error was waived on review pursuant to the boyfriend's failure to properly object in compliance with N.C. R. App. P. 10(b)(2). Oddo v. Presser, 158 N.C. App. 360, 581 S.E.2d 123, 2003 N.C. App. LEXIS 1196 (2003).

Because lessors failed to object to jury instructions before the jury retired to deliberate, they failed to preserve the issue for appellate review as required under N.C. R. App. P. 10(b)(1) and thereby waived their right to appellate review of the jury charge issue. Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004).

Where driver failed to object to the trial court's instruction, which was substantially the same as the North Carolina Pattern Jury Instruction for peculiar susceptibility, the issue was therefore not properly preserved for appellate review. Oakes v. Wooten, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Three of an owner's assignments of error to jury instructions and omissions were not reviewed under N.C. R. App. P. 10(b)(2) as the owner did not object on the record to the omission from and inclusions in the jury instructions before the jury retired to consider its verdict. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Subdivision (b)(2) of this rule has no application once the jury has begun its deliberations. City of Winston-Salem v. Hege, 61 N.C. App. 339, 300 S.E.2d 589 (1983).

This rule requires that a party object to the jury charge before the jury retires to consider its verdict. Failure to do so waives any such objection. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

Objection Must Be Specific to Item Reviewed. — Where defendant objected only to the trial court's reading of the first sentence of the jury instruction and his objection was not directed to the circumstances under which the jury could find a statutory aggravating circumstance, defendant waived appellate review of this assignment of error. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

High Degree of Specificity Required Under Subdivision (b)(2). — Defendant, who failed to object to an intervening negligence instruction as omitting reference to foreseeability, did not preserve that issue for review, although he had made a general objection to the instruction. Burchette v. Lynch, 139 N.C. App. 756, 535 S.E.2d 77, 2000 N.C. App. LEXIS 1025 (2000).

Where defense counsel submitted written request for particular instructions prior to the jury arguments, which the court denied, defendant was not required by either subdivision (b)(2) of this rule or Rule 21 of the General Rules of Practice for the Superior and District Courts to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review. State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984).

Failure to Sign Written Instructions Did Not Prevent Issue Preservation. — A written request for jury instructions was sufficient to preserve plaintiff's objection to the instructions on appeal although it was not signed by plaintiff's counsel as required by G.S. 1A-1, Rule 51(b). Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487, 2000 N.C. App. LEXIS 904 (2000).

Statement Held to be Waiver of Issues of Instructions as Given. — Guaranty association's statement to the trial court, that its only objection was to the trial court's ruling that it would not give the request for instructions that was filed by the guaranty association prior to the call of the case, was a waiver of the issue of the instructions as given. Papdopoulos v. State Capital Ins. Co., 183 N.C. App. 258, 644 S.E.2d 256, 2007 N.C. App. LEXIS 1036 (2007).

Failure to Object to Proposed Jury Instructions on Punitive Damages Precludes Appellate Review. — Where a boyfriend was sued by a husband for alienation of his wife's affections and criminal conversation, the boyfriend's argument that the trial court did not provide the jury with any standards for the assessment of punitive damages and that the omission violated his rights to due process and equal protection under the United

States Constitution and similar rights under the North Carolina Constitution, complied with neither N.C. R. App. P. 28(b)(6) nor N.C. R. App. P. 10(b)(1), and the assignment of error was overruled. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 630 (2003).

Failure to Except to Jury Instructions. — Defendant waived his right to assign error to certain instructions on appeal where, at trial, before the judge had completed his final instructions to the jury, the judge called the attorneys to the bench and inquired whether either attorney had any further requests, additions, or corrections regarding the instructions to the jury and both attorneys responded negatively, since defense counsel had the opportunity to make an objection out of the hearing of the jury but made no objection at trial. State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983).

Defendants, who failed to object to certain instructions at trial, were barred from raising them on appeal. Lowder v. All Star Mills, Inc., 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985); Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

It was conclusively presumed that the jury instructions, not objected to by the defendant, conformed to the issues submitted and were without legal error. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Where a defendant failed to object to an instruction, this rule barred her from assigning error to this portion of the judge's instruction. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Failure to object to the instructions given constitutes a waiver of the right to challenge the instructions on appeal. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

Where defendant failed to object before the jury retired to that portion of the judge's instructions to the jury to which he took exception, although the court gave him opportunities to object, the assignment of error lacked a properly preserved exception and had no merit. State v. Powell, 91 N.C. App. 441, 371 S.E.2d 724 (1988), cert. denied, 324 N.C. 116, 377 S.E.2d 243 (1989).

Where plaintiff failed to except and cross-assign error to the failure of the trial judge to submit any issue relating to the liability of corporate defendant, that portion of the lower court's judgment taxing attorney's fees and expenses against the corporate defendant for unwarranted refusal to settle the case was not properly before the Court of Appeals. Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988), aff'd in part, 324 N.C. 331, 377 S.E.2d 745 (1989).

A party to a trial may not assign as error any portion of the jury charge unless it was objected to at trial prior to the jury retiring to deliberate. In such cases defendant is entitled to relief only if he can show that the instructions complained of constitute "plain error." State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where defendant pled gross contributory negligence as a defense in his answer but made no request that the court give such an instruction at either of the two charge conferences or when given the opportunity to object to the jury instructions before the jury retired to consider its verdict, defendant waived the objection that the trial court erred in failing to instruct the jury on gross contributory negligence. Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Defendant failed to object to trial court's denial of his request for a punitive damages charge and accordingly could not contest the issue on appeal. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774, cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Where the defendant claimed the trial court erred in its instructions on lack of mental capacity as a factor tending to negate the specific intent required for first-degree murder but the defendant did not object to the instructions, the assignment of error was barred. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Although plaintiff urged the court to dismiss assignments of error for failure to contemporaneously object to the trial court's instruction, the policy of Rule 10(b)(2) is met when a request to alter an instruction has been submitted to the trial court at the charge conference. Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995).

Because defendant's tender of modified jury instructions prior to voir dire was not sufficient to constitute a request for Conner instructions during the questioning of two jurors, he waived his right to assert that trial court improperly denied his request for instructions to disregard parole-related considerations in determining his sentence. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Plaintiff waived all objections to a trial court's jury instructions because a timely objection was not made at trial, as required by N.C. R. App. P. 10(b)(2). Alford v. Lowery, 154 N.C. App. 486, 573 S.E.2d 543, 2002 N.C. App. LEXIS 1459 (2002).

Since the one business partner did not object in the trial court to certain issues submitted to the jury and the trial court's jury instructions, the one business partner did not preserve those issues for appeal and the appellate court could not review them. Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004).

Defendant waived his right to claim that the trial court erred when it instructed the jury on first-degree kidnapping because he did not object to the trial court's instruction and did not allege that the trial court committed plain error when it instructed the jury, either in his assignments of error or in his appellate brief. State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22, 2004 N.C. App. LEXIS 827 (2004), cert. denied, 359 N.C. 193, 607 S.E.2d 653 (2004), aff'd, — N.C. —, 611 S.E.2d 833 (2005), remanded, Forrest v. North Carolina, 126 S.C. 29777 (U.S. 2006).

In a cardiologist's breach of an employment contract action, where the cardiologist did not object to, or otherwise properly preserve, the issue of whether the trial court erred in denying a requested instruction on contract ambiguity, and where the transcript showed the cardiologist voluntarily withdrew a request for that instruction, the issue was not properly before the appellate court pursuant to N.C. R. App. P. 10(b)(2) and the appellate court dismissed that issue. Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 607 S.E.2d 286 (2005).

Where defendant did not object to the jury instructions at trial and argued on appeal that the 2.9 grams of methamphetamine found in her home was for personal use, and her trial strategy was to have the jury consider only two possible verdicts on each offense without the option of a verdict on a lesser included offense, she was not entitled to plain error review. State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

Although defendant failed to object to the trial court's instructions at trial, defendant's failure to object to a possible violation of the right to a unanimous jury verdict did not waive defendant's right to appeal alleged giving of a disjunctive instruction, and it could be raised for the first time on appeal. State v. Davis, — N.C. App. —, 656 S.E.2d 632, 2008 N.C. App. LEXIS 278 (2008).

Appellate court reviewed the jury instructions only for plain error under N.C. R. App. P. 10(c)(4) because defendant failed to object to the jury instructions. State v. Smith, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 906 (May 6, 2008).

Same — Law Changed Hours Before Charge. — Although plaintiffs did not object to jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged, where both court and counsel were understandably unaware that the law had changed only hours before the jury was charged. Any objections lodged by the plaintiffs would have been unavailing where the trial judge instructed the jury in accordance with what to him was still established law. Hunnicutt v. Griffin, 76 N.C. App. 259, 332 S.E.2d 525, cert. denied, 314 N.C. 665, 336 S.E.2d 400 (1985).

A request for an instruction at the charge conference is sufficient compliance with this rule to warrant the Supreme Court's full review on appeal, where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions. State v. Ross, 322 N.C. 261, 367 S.E.2d 889 (1988).

Although the defendant's counsel did not object to the jury charge when it was given, his earlier request for the alibi instruction at the charge conference was sufficient under subdivision (b)(2) of this rule to warrant the court's full review on appeal. State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L.Ed.2d 659 (1993).

Instructions on Self-Defense. — Subdivision (b)(2) of this rule does not alter the rule of State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980), holding that where competent evidence is presented, the trial judge must give self-defense and "no duty to retreat" instructions even absent a specific request. However, it operates to preclude a defendant from assigning as error on appeal a trial judge's failure to so instruct unless defendant preserves the error by making a timely objection at trial. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

The necessity for identifying the instruction objected to has long been the established practice in North Carolina. The new rules merely clarify the requirement. State v. Snyder, 31 N.C. App. 745, 230 S.E.2d 599 (1976), cert. denied, 292 N.C. 268, 233 S.E.2d 395 (1977).

Where the exceptions supporting the assignment of error as to the jury charge refer the court to every transcript page of the jury charge, and defendant fails to clearly identify the objectional portions by setting them within brackets or by any other clear means of reference, the alleged error in the jury charge is not present for consideration on appeal. Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 622, 323 S.E.2d 923 (1984).

And Substance of Inadequacy Must Be Supplied. — Subdivision (b)(2) of this rule means that when an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, substantially supply the omission which he contends rendered the charge insufficient. State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978).

The review of the evidence and the statement of the parties' contentions are a "portion of the jury charge" and come within the purview of subdivision (b)(2) of this rule. Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Preservation of Jury Instruction Objections for Review Prior to 1981 Amendment. — See Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004, 101 S. Ct. 545, 66 L. Ed. 2d 301 (1980), rehearing denied, 449 U.S. 1119, 101 S. Ct. 932, 66 L. Ed. 2d 848 (1981).

Error Preserved. — Under N.C. R. App. P. 10(b)(2), defendant preserved the argument that the trial court improperly refused to instruct the jury on the defense of voluntary intoxication; defense counsel stated before the trial court its desire to bring forward the defense's exception that the trial court did not instruct on intoxication. State v. Keitt, 153 N.C. App. 671, 571 S.E.2d 35, 2002 N.C. App. LEXIS 1248 (2002), aff'd, 357 N.C. 155, 579 S.E.2d 250 (2003).

Error Not Preserved. — Where the State made a general request for an instruction on aiding and abetting, and defense counsel did not object and did not make a specific request as to the form of the instruction the trial court was never made aware of specific instruction sought by the parties. Thus, because defense counsel did not object to the instructions the court decided to give, the court never had the opportunity to cure any perceived errors in the instructions and the question was not preserved for appeal. State v. Allen, 339 N.C. 545, 453 S.E.2d 150 (1995), overruled on other grounds, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Failure to Object to Special Interrogatories in Judgment Notwithstanding the Verdict. — Defendant who failed to assert an issue involving special interrogatories in his motion for judgment notwithstanding the verdict, consequently, failed to preserve the issue for appellate review under N.C. R. App. P. 10(b)(2). Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

No Plain Error Shown. — In drug case, defendant failed to show that there was plain error in the use of pattern jury instructions with regards to constructive possession because there was little likelihood that the jury would have reached a different conclusion had special instructions been given. State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Failure to Object to Trial Court's Lack of Written Findings of Fact and Conclusions of Law. — Under N.C. R. App. P. 10(b)(2), defendant waived any claim that the trial court failed to make findings of fact and conclusions of law regarding whether he had been denied his right to communicate with counsel, family, and friends, by not making a timely objection or requesting that the trial court reduce its findings and conclusions to writing. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

Failure to Except to Findings of Fact. — When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Failure to object to disputed charge during the opportunity provided results in failure to properly preserve the assignment of error for appeal, as required by this rule. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

When no exceptions are made to separate findings of fact, they are presumed to be supported by competent evidence. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Assignments of error not supported by exceptions duly noted in the record or transcript as required by this rule presented no question for review. Wachovia Bank & Trust Co. v. Southeast Airmotive, Inc., 91 N.C. App. 417, 371 S.E.2d 768 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230 (1989).

Failure to Except to Consideration of Nonstatutory Factors. — Defendant failed to object at the sentencing hearing to the trial court's consideration of the nonstatutory aggravating factor that defendant had the intent to kill when he assaulted the victims; his right to appellate review on the issue was, therefore, waived. State v. Degree, 110 N.C. App. 638, 430 S.E.2d 491 (1993).

Issue Preserved in Spite of Failure to Record Objection. — Where there was no dispute that defendant's counsel objected to plaintiff's motion to amend complaint to include an issue of punitive damages, this rule did not bar defendant from challenging the trial court's instruction to the jury and the submission of the issue of punitive damages, even though the objection was not recorded. Shore v. Farmer, 351 N.C. 166, 522 S.E.2d 73 (1999).

Defendant satisfied N.C. R. App. P. 10(b)(2) by making his objections to proposed jury instructions and requests at the charge conference before the jury retired; therefore defendant's failure to object at the time the court instructed the jury did not amount to waiver of said error. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

Review Available Despite Failure to Object. — Even though defendant failed to object or raise as plain error the jury instructions given in a case relating to damage to computers, appellate court could review the case under N.C. App. Proc., Rule 2 because there was limited case law and no jury instructions on the crime. State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Although defendant did not object to the jury instructions at the time they were given, defendant's request for an instruction requiring the jury to return a verdict of not guilty if it concluded that the State failed to prove any of the elements of the charged assault beyond a reasonable doubt and the trial judge's agreement to give such an instruction provided sufficient compliance with N.C. R. App. P. 10(b)(2), to allow for appellate review. State v. McArthur, — N.C. App. —, 651 S.E.2d 256, 2007 N.C. App. LEXIS 2202 (2007).

C. Sufficiency of Evidence.

Construction with Other Law. — Conflict between G.S. 15A-1446(d)(5), allowing insufficiency of the evidence to be raised on appellate review even though no objection was raised at trial, and N.C. R. App. P. 10(b)(3), providing that a defendant could not assign as error the insufficiency of the evidence unless he moved to dismiss the case at trial, was resolved in favor of the Rule. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

By introducing evidence, defendant waived his motion to dismiss at the close of the state's evidence. State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632, appeal dismissed and cert. denied, 311 N.C. 765, 321 S.E.2d 148 (1984).

By putting on evidence after the State rests its case, a defendant waives his right to appeal the denial of the initial motion to dismiss made at the close of the State's case. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Necessity of Motion to Dismiss. — Although G.S. 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review, even when no objection or motion has been made at trial, subdivision (b)(3) of this rule, which controls, provides that a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

The defendant waived appellate review of the issue that insufficient evidence of vaginal penetration was presented, where the defendant moved to dismiss the first degree rape charge at the close of the state's case for insufficient evidence, but the trial court denied that motion, and the defendant did not renew his motion to dismiss at the close of all evidence. State v. Hinnant, 131 N.C. App. 591, 508 S.E.2d 537 (1998).

Since the juvenile did not file a motion to dismiss the juvenile petition filed against her alleging that she knowingly possessed marijuana, she was not entitled to challenge on appeal the sufficiency of the evidence to prove the crime charged because N.C. R. App. P. 10(b)(3) prevented her from doing so. In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003).

Where the juvenile defendant filed a motion to dismiss for insufficiency of evidence at the close of the State's evidence and the motion was denied, the defendant's failure to renew the motion at the close of all of the evidence rendered the issue waived on appeal of the denial of the motion pursuant to N.C. R. App. P. 10(b)(3).

Defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial; where defense counsel told the trial court at the close of the State's evidence that he did not care to be heard on defendant's conspiracy charge, and at the close of all evidence, defense counsel merely renewed prior motions, the issue of sufficiency of the evidence was not preserved for appeal. State v. Boyd, 162 N.C. App. 159, 595 S.E.2d 697 (2004).

As defendant did not move to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence nor at the close of all the evidence, pursuant to N.C. R. App. P. 10(b)(3), his assignm ent of error as to the sufficiency of the evidence was dismissed. State v. Battle, 172 N.C. App. 335, 615 S.E.2d 733, 2005 N.C. App. LEXIS 1436 (2005).

Respondent juvenile waived respondent's right to challenge the sufficiency of the evidence to support an involuntary manslaughter conviction because respondent failed to make a motion to dismiss the petition at the close of all evidence. In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

When defendant was convicted of two counts of robbery with a dangerous weapon under G.S. 14-87(a), based on defendant taking personal property from two victims who were married to each other, defendant's claim on appeal that the trial court erred in failing to dismiss one of the counts because the property taken was marital property was waived, under N.C.R.A.P. 10(b)(3), because defendant failed to move to dismiss either of the robbery charges at trial and failed to move to arrest judgment on either of the charges. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007).

Defendant complied with N.C. R. App. P. 10(b)(3) and preserved defendant's right to appeal 14 convictions based upon an insufficiency of the evidence where: (1) defendant made a motion to dismiss at the close of the state's evidence, stating specific arguments as to five of the charges; (2) following the close of defendant's case in chief, defense counsel renewed the motion to dismiss; and (3) after the jury returned guilty verdicts on all charges, defendant made a final motion to dismiss all charges, including the specific five charges previously argued in defendant's motion to dismiss. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Because defendant failed to renew his motion for dismissal at the close of all the evidence, defendant failed to preserve the issue of whether the court properly denied his motion to dismiss the charges against him for appellate review. State v. Brunson, — N.C. App. —, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Or Judgment as in Case of Nonsuit. — Although G.S. 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, such statute is negated by subdivision (b)(3) of this rule, which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit at trial. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Assigning error to a conclusion of law on the generalized basis of "insufficiency of the evidence" does not preserve the issue of the sufficiency of evidence supporting the findings of fact on which the conclusion was based; a father failed to preserve the issue of whether the evidence supported the trial court's findings in his termination case, where the father did not assign error to any of the trial court's findings of fact, and thus the trial court's findings were presumed to be supported by competent evidence and were binding on appeal. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

Failure to Renew Motion to Dismiss. — In a juvenile delinquency proceeding, where the juvenile did not renew a motion to dismiss, the juvenile waived an assignment of error as to the original adjudication error on a sufficiency of the evidence basis. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Objection Not Preserved Because Motion to Dismiss Not Based on Specific Objection. — Defendant's motion to dismiss based specifically on defendant's contention that the state failed to prove that the crime allegedly occurred in North Carolina was insufficient to preserve a challenge to the sufficiency of the evidence for appellate review. State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876, 2007 N.C. App. LEXIS 1805 (2007).

Having failed to preserve a record of any motion for directed verdict at the close of all evidence, defendant waived his right to assign error to either the trial judge's purported ruling on that motion or the ruling on the motion for judgment notwithstanding the verdict. Jansen v. Collins, 92 N.C. App. 516, 374 S.E.2d 641 (1988).

Defendants' motion for a new trial did not meet the requirements of G.S. 1A-1, Rule 7(b)(1) where defendants merely stated that they were entitled to a new trial under G.S. 1A-1, Rule 59(a)(5), (a)(7) and (a)(8), but did not state any specific basis for granting a new trial. Meehan v. Cable, 135 N.C. App. 715, 523 S.E.2d 419, 1999 N.C. App. LEXIS 1373 (1999).

Issue Sufficiently Preserved for Appellate Review. — Where defendant challenged convictions for first degree rape and first degree sexual offense by anal intercourse, arguing that there was insufficient evidence showing that defendant employed or displayed a dangerous weapon during commission of these offenses, defendant sufficiently preserved the issue for appellate review because defendant was not required to provide specific reasoning to support the motion; the assignment of error was adequate as to the denial of defendant's motions to dismiss the charges for insufficient evidence. State v. Person, — N.C. App. —, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

IV. ASSIGNMENTS OF ERROR.

A. Form; Record References.

Compliance Universally Mandatory. — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

Assignments of error are now mandatory to perfect an appeal. Shook v. County of Buncombe, 125 N.C. App. 284, 480 S.E.2d 706 (1997).

Failure to assign error to court's conclusion regarding forum non conveniens constituted an acceptance and a waiver of the right to challenge said conclusion as unsupported by the facts. Fran's Pecans, Inc. v. Greene, 134 N.C. App. 110, 516 S.E.2d 647 (1999).

Even though defendant objected to the admission of certain evidence at trial, when he did not assign error to the admission of this evidence, the appellate court could not review this issue. State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213, 2004 N.C. App. LEXIS 1167 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 866 (2004), cert. dismissed, 359 N.C. 192, 607 S.E.2d 651 (2004), cert. dismissed, — N.C. —, 631 S.E.2d 136 (2006).

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), and the petition was sustained on all three grounds, when the mother objected to findings as to only one ground on appeal, the other findings were binding, under N.C. R. App. P. 10, and, as only one ground had to be found to terminate parental rights, it was unnecessary to consider the mother's appellate argument as to the ground she challenged. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Defendant's challenge to denial of defendant's motion to suppress was not reviewable because defendant failed to assign error to any of the trial court's finding of fact or conclusions of law. State v. Tadeja, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1503 (Aug. 5, 2008).

Where plaintiff failed to assign any error whatsoever in the record on appeal as required by subsection (a) and subdivision (c)(1), the omission was fatal to the appeal. Shook v. County of Buncombe, 125 N.C. App. 284, 480 S.E.2d 706 (1997).

Exceptions appearing only under purported assignments of error, and not duly noted in the record as required by this rule, are ineffective. State v. White, 82 N.C. App. 358, 346 S.E.2d 243 (1986), cert. denied, 323 N.C. 179, 373 S.E.2d 124 (1988), the court nevertheless exercising its discretion to consider the errors assigned.

Party may not, after trial and judgment, comb through transcript of proceedings and randomly insert exception notation in disregard of the mandates of subsection (b) of this rule. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986).

Under the "silent record" rule, the appellate court will presume that the court applied the proper evidentiary standard. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Failure to Cite Pages Not So Egregious As to Warrant Dismissal. — Although petitioner failed to cite in the record on appeal the record pages corresponding to each of her assignments of error, the appellate court was able to determine the issues in the case; therefore, as petitioner's violation of the N.C. Rules of Appellate Procedure was not so egregious as to invoke dismissal, the appellate court would review the issues pursuant to N.C. R. App. P. 2. Davis v. Macon County Bd. of Educ., 178 N.C. App. 646, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

Subcontractor's violations of N.C. R. App. 28(b)(4) and (b)(6) and 10(c) were not so egregious as to require dismissal of the appeal, and the subcontractor was ordered to pay the costs of printing the appeal under N.C. R. App. P. 34(b), as N.C. R. App. P. 2 had to be applied cautiously; therefore, its application inherently was limited, State v. Hart, 644 S.E.2d 201 (2007), suggested no similar limitation on the application of N.C. R. App. P. 25 and N.C. R. App. P. 34, and there was no reason to engraft any limitation beyond the language contained within the rules. McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Failure to Address Deficiency in Record. — The court would not rule on the plaintiff's contention that the final judgment reflected an "oversight or omission regarding the proper designation of defendant," where the portion of the court's denial of a new trial mentioning this rule was been marked out and where the plaintiff did not address this fact or seek to have the record properly made up. Collins v. St. George Physical Therapy, 141 N.C. App. 82, 539 S.E.2d 356, 2000 N.C. App. LEXIS 1286 (2000).

Failure to Specify Enumerated Findings of Fact or Conclusions of Law. — While defendants failed to specify any enumerated findings of fact or conclusions of law, as required by N.C. R. App. P. 10(c)(1) but did refer to the page of the record where the disputed finding of fact was located, the court chose to review the assignments of error given the provision in N.C. R. App. P. 2 allowing the court to review an appeal despite rules violations. Davis v. Columbus County Schs., 175 N.C. App. 95, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005).

Attorney did not comply with N.C. R. App. P. 10 by specifically challenging the trial court's findings of fact, but instead included a number of broadside assignments of error generally challenging the findings of fact supporting the trial court's imposition of G.S. 1A-1-11, sanctions against him; given the fact that the rules regarding the assignment of error to a trial court's findings of fact had been in effect for 18 years, the appellate court choose not to exercise its discretion to waive compliance with those rules. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Failure to Raise Argument. — When a teacher challenging the nonrenewal of her contract did not raise a specific argument regarding the trial court's standard of review in her assignment of error, the appellate court would not address the issue. Davis v. Macon County Bd. of Educ., 178 N.C. App. 646, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

Failure to provide legal bases for assignments of error, and merely reciting that the decision on appeal was erroneous, constituted gross and substantial violations of N.C. R. App. P. 10(c)(1), and dismissal was traditionally appropriate for such violations, but monetary sanctions were warranted based on remand from the North Carolina Supreme Court for reconsideration of a prior order dismissing the assignments of error. Odom v. Clark, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1554 (Aug. 19, 2008).

Failure to Assign Error. — Husband seeking review of a trial court's ruling on the husband's motion to modify the husband's alimony obligation waived the husband's right to challenge the trial court's conclusions of law because the husband did not assign error to those conclusions, so the conclusions of law were binding on an appellate court. Dodson v. Dodson, 185 N.C. App. 265, 647 S.E.2d 638, 2007 N.C. App. LEXIS 1683 (2007).

Defendant's assertion that the trial judge committed prejudicial error by allowing a detective to alter or supplement a transcript of a taped conversation between defendant and defendant's brother offered in evidence by the state was not preserved for appellate review because at no time did defendant's trial counsel object to the detective's testimony in this regard; also, the general objection that defendant's trial attorney made before the detective testified to the jury did not include as grounds for the objection the changes or additions to the transcript that the detective described while testifying on voir dire. State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628, 2007 N.C. App. LEXIS 1720 (2007).

Because defendant did not assign error on appeal with regard to a drug conviction, any issues related to that conviction were not reviewed on appeal pursuant to N.C. R. App. P. 10. State v. Marshall, — N.C. App. —, 656 S.E.2d 709, 2008 N.C. App. LEXIS 277 (2008).

In a suit between a lender and a broker who shared ownership of a corporation, where the lender alleged that the broker breached fiduciary duties by failing to disclose the identity of a prospective property buyer, but the broker eventually put the prospective purchaser in touch with the lender, there was no valid claim for breach of fiduciary duty, because the lender did not challenge the finding of the trial court that there was no evidence of any damage to the corporation. Bluebird Corp. v. Aubin, — N.C. App. —, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

On appeal in a workers' compensation case, defendants, an employer and its workers' compensation carrier, did not assign error to a conclusion of law pursuant to N.C. R. App. P. 10(a); thus, the arguments regarding that conclusion of law were not properly before the appellate court. Further, even after the claimant, in his appellate brief, pointed out the lack of an assignment of error, defendants did not move to amend the record on appeal to add an assignment or error and did not ask, in their reply brief, for the appellate court to apply N.C. R. App. P. 2; thus, the arguments were not addressed on appeal. Hunter v. Apac/Barrus Constr. Co., — N.C. App. —, 656 S.E.2d 652, 2008 N.C. App. LEXIS 274 (2008).

Although defendant did not identify record page on which each exception appeared as required under subsection (c) of this rule and N.C.R.A.P., Rule 28(b)(5), these omissions were not so egregious as to invoke dismissal. Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

Where defendant made an assignment of error to the denial of his motion to suppress without making a reference to his inculpatory statement, the legal basis of his argument, and making reference to the record, but did provide general references to the transcript of the hearing, he had not complied with subdivision (c) of this rule, but the court would address his argument in its discretion in the interest of justice. State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996).

Effect of Delay from Incorrect Sentence Calculation. — Because of the potential impact on defendant's sentence from an incorrect prior record level calculation and because of the substantial delay defendant had endured in having his appeal heard, the appellate court choose to invoke N.C. R. App. P. 2 notwithstanding defendant's failure to properly set forth his assignment of error. State v. Mullinax, 180 N.C. App. 439, 637 S.E.2d 294, 2006 N.C. App. LEXIS 2384 (2006).

Listing of Exceptions. — This rule requires that all assignments of error should be followed by a listing of the exceptions on which they are based, and that these exceptions should be identified by the pages of the record at which they appear; exceptions not listed properly should be deemed abandoned. Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981).

Numbering of Exceptions. — Where the defendant numbered two assignments of error as assignment "sixty" and briefed only one of them, the court could not review the other. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Guarantor's appealed was dismissed because the guarantor failed to comply with N.C. R. App. P. 10 and N.C. R. App. P. 28 by failing to: (1) separate each question presented within the argument section of the brief; (2) reference each assignment of error with numbers and pages where they appeared in the record on appeal; (3) support the arguments with stated or cited authority; (4) provide a full and complete statement of the facts; and (5) number each assignment of error separately in the record on appeal. Consol. Elec. Distribs., Inc. v. Dorsey, 170 N.C. App. 684, 613 S.E.2d 518, 2005 N.C. App. LEXIS 1078 (2005).

Record for Review of Sustained Objection. — When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980); State v. Wilhite, 58 N.C. App. 654, 294 S.E.2d 396, appeal dismissed and cert. denied, 307 N.C. 129, 297 S.E.2d 403 (1982), rev'd on other grounds, 308 N.C. 798, 303 S.E.2d 788 (1983), cert. denied, 322 N.C. 485, 370 S.E.2d 236 (1988).

Record References. — Court declined to dismiss petitioner's appeal when his brief contained appropriate record references for each of his arguments and those record references referred to the order appealed from. Bobbitt v. N.C. State Univ., — N.C.

App. —, 635 S.E.2d 463, 2006 N.C. App. LEXIS 2164 (2006).

Although an employer and its insurance carrier claimed on appeal that in awarding workers' compensation benefits to an employee, the Full Commission of the North Carolina Industrial Commission erred in omitting relevent stipulated documents from the transcript of the evidence prepared by the Industrial Commission, the assignment of error did not specify which documents should have been included in the transcripts and failed to provide specific record or transcript references. Consequently, the assignment of error did not comply with the requirements of N.C. R. App. P. 10(c), and was dismissed. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007).

Writing in a numbered exception next to a finding of fact or conclusion of law does not raise a legal issue as to its validity; to raise a legal issue on appeal as to the validity of a finding of fact or conclusion of law, in addition to making an exception, it is also necessary to state by an assignment of error why the finding or conclusion is claimed to be erroneous. Alexvale Furn., Inc. v. Alexander & Alexander, 93 N.C. App. 478, 378 S.E.2d 436, cert. denied, 325 N.C. 228, 381 S.E.2d 783 (1989).

The trial court's findings of fact are deemed to be supported by competent evidence and are conclusive on appeal where defendant does not bring forth in the record any of the testimony or evidence in the case. Bethea v. Bethea, 43 N.C. App. 372, 258 S.E.2d 796 (1979), cert. denied, 299 N.C. 119, 261 S.E.2d 922 (1980).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Review Limited to Theories and Constitutional Questions Presented Below. — The theory upon which a case is tried in the lower court must control in constructing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

One assignment of error is enough to raise one question of law under subsection (c) of this rule and N.C.R.A.P., Rule 28(b), even when it questions the correctness of many rulings of the trial court. Pate v. Thomas, 89 N.C. App. 312, 365 S.E.2d 704, cert. denied, 322 N.C. 482, 370 S.E.2d 227 (1988).

Exceptions Deemed Abandoned by Failure to State Grounds. — Where plaintiff assigned as error certain admissions and exclusions of evidence and the denial of her motion to set aside the jury verdict, without stating the grounds upon which the errors were assigned as required by the rules and demonstrated by examples in Appendix C, plaintiff's exceptions upon which assignments of error were based would be deemed abandoned. Kimmel v. Brett, 92 N.C. App. 331, 374 S.E.2d 435 (1988).

Although defendant's assignments of error set out in the record on appeal did not conform to subsection (c), pursuant to the court's discretionary power in Appellate Rule 2, they elected to review the merits of defendants' appeal. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), cert. denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

In former board members' derivative action suit against a non-profit corporation and current members of its board of directors, the former board members abandoned and failed to preserve for review any issues pertaining to their individual claims as they did not assign error to the trial court's order of summary judgment, nor present any arguments on appeal, pertaining to their individual claims against. Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

When neither the assignments of error nor the cross-assignments of error in appellate briefs provided any legal basis for the error alleged, and record references did not provide the appellate court with any additional understanding of the legal basis for the alleged errors, the assignments of error essentially amounted to no more than an allegation that "the court erred because its ruling was erroneous," and such an assignment of error was designed to allow counsel to argue anything and everything they desired in their brief on appeal. but none of the assignments of error complied with N.C.R. App. P. 10, so the issues presented in the briefs were not properly preserved for appeal, and this failure subjected the parties' appeals and cross-appeals to dismissal. Hubert Jet Air, LLC v. Triad Aviation, Inc., 177 N.C. App. 445, 628 S.E.2d 806, 2006 N.C. App. LEXIS 932 (2006).

Wife's appeal was subject to dismissal under circumstances in which, in violation of N.C. R. App. P. 10(c), she failed to specify the legal basis upon which her assignments of error were assigned; the wife asserted that the trial court erred in its findings of fact, but did not state on what legal ground the trial court erred. Bennett v. Bennett, 180 N.C. App. 675, 638 S.E.2d 243, 2006 N.C. App. LEXIS 2508 (2006).

Putative wife's cross-appeal was dismissed because she failed to set forth any assignments of error in the record on appeal. Hurston v. Hurston, — N.C. App. —, 635 S.E.2d 451, 2006 N.C. App. LEXIS 2130 (2006).

Assignment of Error Held Sufficient. — Assignment of error stating that the trial judge erred in his utilization of a 1946 conviction, opinion statements by police officers and other improper factors in determining aggravating factors during the sentencing of the defendant was sufficient to state the basis upon which error was assigned, although more detail would have been helpful. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Plaintiff's appeal, which stated three separate errors in one assignment, failed to state the statutory authority exceeded, the procedure violated and the error of law committed, and failed to provide "clear and specific record or transcript references" relating to each alleged error, violated the Rules of Appellate Procedure, and would be dismissed. Bowen v. North Carolina Dep't of Health & Human Servs., 135 N.C. App. 122, 519 S.E.2d 60 (1999).

In a negligence action against an air carrier, an assignment of error which stated that the trial court erred in not allowing plaintiff's expert witness to testify as to her opinion that the pilot had not suffered any physical incapacitation, while allowing defendant's witnesses to testify as to their opinion that the pilot had suffered some form of incapacitation, was argumentative and not concisely stated, thus violating this rule. Wachovia Bank & Trust Co. v. Southeast Airmotive, Inc., 91 N.C. App. 417, 371 S.E.2d 768 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230 (1989).

Where each of plaintiff's assignments of error stated that the trial court had erred in granting summary judgment to the defendant as to plaintiff's individual claims, the notice of appeal sufficed as an assignment of error directed to the order of summary judgment. Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 595 S.E.2d 778, 2004 N.C. App. LEXIS 816 (2004).

Assignment of error regarding jury instruction overruled where the record did not reflect whether the plaintiff made a timely objection to the instruction on the doctrine of sudden emergency. McNeil v. Hicks, 119 N.C. App. 579, 459 S.E.2d 47 (1995).

The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where the defendants did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

Appellants' assignment of error contending three separate and distinct errors in a single assignment of error violated the provisions of N.C. R. App. P. 10(c)(1) subjecting their appeal to dismissal. Anthony v. City of Shelby, 152 N.C. App. 144, 567 S.E.2d 222, 2002 N.C. App. LEXIS 904 (2002).

Since the mother and father did not assign as error the argument that the two social workers' testimony was inadmissible hearsay and should not have been admitted, that issue was not properly preserved for review; such errors had to be set out in the record on appeal. In re Morales, 159 N.C. App. 429, 583 S.E.2d 692, 2003 N.C. App. LEXIS 1518 (2003).

North Carolina Department of Transportation's assignment of error was overruled because the Department assigned error to the trial court's conclusion of law under a different theory in the record on appeal. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

Appellate court had to dismiss the one business partner's assignments of error one through three and eight through nine, as the one business partner omitted the relevant record and transcript references, and those omissions amounted to substantial violations of the appellate rules. Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004).

Trial court did not commit plain error by failing to intervene ex mero motu to prevent the State from questioning one of the victims' daughters, as the assignment of error submitted by defendant referred to the entirety of the daughter's testimony rather than to any particular portions of her testimony; this broad brush approach failed to distinguish between those parts of the testimony that were relevant to the crimes from those parts dealing with personal matters about the family. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Husband's appeal was dismissed, in part, because the assignment of error in his appellate brief violated N.C. R. App. P. 10(c) in that, although the assignment of error stated the basis on which the trial court dismissed the complaint — for a lack of jurisdiction — the husband failed to state the specific legal basis for the alleged error; further, by making a blanket statement in his brief that the trial court erred in dismissing his complaint on jurisdictional grounds was fatally overbroad, vague, and unspecific. Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Homeowner violated N.C. R. App. P. 10(c)(1) and her appeal was dismissed as she failed to state any legal basis for her assignments of error as to a directed verdict, a judgment notwithstanding the verdict, a motion to dismiss, a request for findings of fact and conclusions of law, a conversion claim, and the failure to award judgment interest. Jones v. Harrelson & Smith Contrs., LLC, 180 N.C. App. 478, 638 S.E.2d 222, 2006 N.C. App. LEXIS 2521 (2006), rev'd, 362 N.C. 226, 657 S.E.2d 352 (2008).

Because a seller was appealing a summary judgment order, an assignment of error claiming that a trial court's grant of summary judgment to the buyers was in violation of the North Carolina Rules of Civil Procedure and was arbitrary and capricious and an abuse of discretion was sufficient; the seller's appeal was not subject to dismissal on grounds that the assignment of error did not comport with the requirements of N.C. R. App. P. 10. Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

Under N.C. R. App. P. 10(a), a seller preserved an argument regarding the procedural timing of a summary judgment order, but failed to preserve a substantive argument regarding the basis for an order as the seller's assignment of error stated that the trial court erred in entering both a default judgment and a summary judgment in the same matter, the procedural posture of the matter was not suitable for both types of judgments, and the improper rendering of summary judgment removed a trial court level procedural remedy otherwise available to the seller, instead forcing the seller to pursue an appeal. Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

Seller's assignment of error stating that trial court's judgment ordering the seller to convey real property well in advance of receiving payment for same was in error as it exceeded the express terms of the contract the buyers were seeking to enforce and exceeded what would be required of the seller under North Carolina law sufficiently directed the appellate court's attention to the particular error about which the question was made and complied with N.C. R. App. P. 10(c)(1) Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

When consumers sued a debt collector for negligent infliction of emotional distress and various statutory violations, and the trial court dismissed all of the consumers' claims on summary judgment, the consumers' notice of appeal from the summary judgment order was itself sufficient to assign error because an appeal from an order granting summary judgment only raised whether, on the face of the record, there was any genuine issue of material fact and whether the collector was entitled to judgment as a matter of law. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

Contrary to the state's argument, defendant's assignment of error was not substantially brief or vague, but in fact defendant referenced specific statutes and the applicable transcript and record page numbers; defendant's assignment of error plainly and concisely stated a specific trial court error. State v. Lindsay, 185 N.C. App. 314, 647 S.E.2d 473, 2007 N.C. App. LEXIS 1715 (2007).

Assignments of Error Held Insufficient. — Plaintiff's purported assignments of error violated the provisions of subsection (c)(1). Bustle v. Rice, 116 N.C. App. 658, 449 S.E.2d 10 (1994).

In a bond forfeiture case, a surety's substantive due process issue was not preserved for appellate review because it was not designated as an assignment of error. State v. Ferrer, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Appeal was dismissed where administrator violated appellate rules by, inter alia, failing to number the assignments of error or make specific record references; moreover, the second stated assignment of error did not state plainly, concisely, and without argumentation the legal basis upon which error was assigned. Viar v. N.C. DOT, 359 N.C. 400, 610 S.E.2d 360, 2005 N.C. LEXIS 360 (2005).

Purported assignment of error that simply stated that the appellant assigned "as error the following entry: Entry of the Order for Modification of Alimony filed October 7, 2004," with no record references and no statement of legal basis for the assignment of error, did not comply with N.C. App. Proc., Rule 10; suspending the rules pursuant to N.C. App. Proc., Rule 2 would have involved the court in creating the appeal, and would not have been fair to the appellee. Broderick v. Broderick, 175 N.C. App. 501, 623 S.E.2d 806, 2006 N.C. App. LEXIS 188 (2006).

Appeal was subject to dismissal where, inter alia, a former husband setout 119 assignments of error, purporting to assign error to almost every finding of fact and conclusion of law made by the trial court, where each finding or conclusion was the subject of three identical assignments of error, where assignments of error referenced following each question were not pertinent to the legal issues presented, and where the former husband's assertion that a given finding, conclusion, or ruling was "erroneous as a matter of law" failed to identify issues actually briefed on appeal. Walker v. Walker, 174 N.C. App. 778, 624 S.E.2d 639, 2005 N.C. App. LEXIS 2586 (2005), cert. denied, — N.C. —, 632 S.E.2d 774 (2006).

Husband failed to preserve issues for appellate review where he set out 119 assignments of error, purporting to assign error to almost every finding off act and conclusion of law made by the trial court; the assignments of error followed a repetitive pattern, used the same phrasing, included no reference to issues briefed on appeal, and failed to state plainly the legal basis upon which error was assigned. Walker v. Walker, — N.C. App. —, 620 S.E.2d 911, 2005 N.C. App. LEXIS 2390 (2005).

Former bank employee's cross-appeal from discovery orders entered in her wrongful termination action was dismissed because her single assignment of error did not comport with N.C. R. App. P. 10(c)(1); the broadside assignment of error encompassed at least three, if not more, cognizable and specific legal reasons why the trial court allegedly erred. Isom v. Bank of Am., N.A., 177 N.C. App. 406, 628 S.E.2d 458, 2006 N.C. App. LEXIS 970 (2006).

When defendant's assignments of error did not identify the issue briefed on appeal, but were broad, vague, and unspecific, the arguments were beyond the scope of appellate review. State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006), affirmed in part, reversed in part on other grounds, and remanded, 361 N.C. 309, 644 S.E.2d 201 (2007).

Homeowner's claim that the denial of his motion to continue when a university was permitted to intervene in his appeal from a town council's order closing a road violated his rights under N.C. Const., Art. I, §§ 18, 19 was not properly preserved for appellate review because his assignment of error made no reference to any constitutional provision or violation of constitutional rights. Houston v. Town of Chapel Hill, 177 N.C. App. 739, 630 S.E.2d 249, 2006 N.C. App. LEXIS 1199 (2006).

Many of the assignments of error in a property owner's appellate brief failed to comply with N.C.R.A.P., Rule 10(c)(1) because he did not construct arguments for the appellate court to properly evaluate; therefore, when viewed in tandem with the owner's other failures to comply with the North Carolina Rules of Appellate Procedure, the nature and significance of the owner's rules violations warranted dismissal of his appeal. Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007).

Attorneys' assignment of error asking whether the North Carolina Disciplinary Hearing Commission erred in its evidentiary rulings during the proceeding was super-generic, and did not comply with N.C. R. App. P. 10(c), which stated that an assignment of error had to direct the attention of the appellate court to the particular error about which the question was made, with clear and specific record or transcript references. N.C. State Bar v. Rossabi, — N.C. App. —, 645 S.E.2d 387, 2007 N.C. App. LEXIS 1173 (2007).

Appellate court refused to use its discretion under N.C. R. App. P. 2 to overlook a company's numerous and egregious appellate rule violations as: (1) the company failed to respond to an LLC's motion to dismiss the company's appeal; (2) none of the company's assignments of error in the original record on appeal or in an addendum to the record on appeal contained any clear and specific record or transcript references; (3) in the argument section of its brief, the company stated the question presented but failed to reference any assignments of error pertinent to the question in violation of N.C. R. App. P. 28(b)(6); (4) the company's failure to state the grounds for appellate review violated Rule 28(b)(4); and (5) the company's failure to state the applicable standard of review for each question presented violated Rule 28(b)(6). Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 183 N.C. App. 389, 645 S.E.2d 212, 2007 N.C. App. LEXIS 1167 (2007), rev'd 362 N.C. 191, 657 S.E.2d 361 (2008).

Poker club owner's assignment of error was not set out in the record in accordance with N.C.R.A.P. 10(a); the assignment of error was insufficient under N.C.R.A.P. 10(c)(1) because it was broad, vague, and unspecific, and the owner also failed to include clear or specific record or transcript references directing the appellate court to the assigned error. Joker Club, L.L.C. v. Hardin, 183 N.C. App. 92, 643 S.E.2d 626, 2007 N.C. App. LEXIS 838 (2007).

Because an attorney's assignment of error did not comport with his argument in his brief, his argument was subject to dismissal under N.C. R. App. P. 10(c)(1). In re Key, — N.C. App. —, 643 S.E.2d 452, 2007 N.C. App. LEXIS 799 (2007), cert. denied, 361 N.C. 428, 648 S.E.2d 506 (2007).

Defendant's assignment of error as to defendant's reasons for being in jail when a search was conducted failed to state legal grounds for the challenge as required by N.C. R. App. P. 10(c)(1) and was dismissed, as no "manifest injustice" for purposes of N.C. R. App. P. 2 resulted from the refusal to suspend the appellate rules. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Owner's two assignments of error claiming that it was error to enter judgment and to enter an order denying the owner's post-trial motions simply because the judgment and order were error were rejected because it did not state a legal basis upon which the error was assigned as required by N.C. R. App. P. 10(c)(1). Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

As an employer and two of its officers violated N.C. R. App. P. 10(c)(1) and 28(b)(6) in their brief by failing to include clear and specific record references in their assignments of error, and in failing to set forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, dismissal of the appeal was warranted; review in the interests of justice under N.C. R. App. P. 2 was declined, as the appeal did not present exceptional circumstances. Capps v. NW Sign Indus. of N.C., Inc., — N.C. App. —, 652 S.E.2d 372, 2007 N.C. App. LEXIS 2268 (2007).

Employer's third assignment of error was dismissed because the employer merely contended that the Full Commission of the North Carolina Industrial Commission erred in omitting relevant stipulated documents from the transcript of the evidence prepared by the Industrial Commission. In effect, the assignment of error did not comply with N.C. R. App. P. 10(c)(1) because the assignment failed to specify which documents should have been included in the transcripts and failed to provide specific record or transcript references. Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

Basis upon Which Error Assigned Insufficient. — Where plaintiff stated that the court "erred to plaintiff's prejudice," this was not a sufficient basis upon which to assign error. Kimmel v. Brett, 92 N.C. App. 331, 374 S.E.2d 435 (1988).

Where no assignment of error corresponded to the issue presented, the matter was not properly presented for consideration by the Supreme Court. State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992).

In a sexual abuse prosecution, defendant's argument that the trial court improperly admitted victim testimony under G.S. 8C-1, N.C. R. Evid. 404(b) without making specific findings of fact as to "sufficient similarity" and "remoteness in time" could not be considered, under N.C. R. App. P. 10(a), because this was not made the basis of any assignment of error in the record. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Where plaintiff in workers' compensation case, proceeding in forma pauperis, failed to present any assignments of error within the record, and neither the exceptions nor the assignments of error which plaintiff relied on were set forth at the conclusion of the record on appeal, the Court of Appeals, in order to prevent any manifest injustice to plaintiff, would nonetheless review the merits of his appeal. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

Where appellants failed to assign error in the record to the trial court's decision to permit the jury to read a deposition, the appellate court would not address that argument, under N.C. R. App. P. 10(a). Floyd v. McGill, 156 N.C. App. 29, 575 S.E.2d 789, 2003 N.C. App. LEXIS 35 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 364 (2003).

Where Assignment of Error Did Not Reference Record. Neighbor's only assignment of error in record on appeal lacked references to the record or transcript as required by N.C. R. App. P. 10(c)(1); further, the neighbor's brief contained no reference to the lone assignment of error nor the numbers and pages by which it appeared in the record, in violation of N.C. R. App. P. 28(b)(6), and the appeal was dismissed. Walsh v. Town of Wrightsville Beach Bd. of Alderman, 179 N.C. App. 97, 632 S.E.2d 271, 2006 N.C. App. LEXIS 1685 (2006), rev'd and remanded, 361 N.C. 348 (2007), for further consideration in light of State v. Hart, 361 N.C. 309, 644 S.E.2d 201 (2007).

Homeowner violated N.C. R. App. P. 10(c)(1) and her appeal was dismissed as she failed to support her assignments of error regarding the exclusion of evidence with any record page reference to the order she purported to appeal; the appeal was therefore abandoned pursuant to N.C. R. App. P. 28(b)(6). Jones v. Harrelson & Smith Contrs., LLC, 180 N.C. App. 478, 638 S.E.2d 222, 2006 N.C. App. LEXIS 2521 (2006), rev'd, 362 N.C. 226, 657 S.E.2d 352 (2008).

Citation of Authorities in Assignments of Error Precluded. — Even though a wife claimed that the husband abandoned the majority of his arguments by failing to cite to supporting authority in his assignments of error to the appellate court, the husband had indeed complied with N.C. R. App. P. 28(b)(6) by presenting arguments to the appellate court which contained citations of the authorities upon which he relied; moreover, contrary to the wife's assertions, an appellant was specifically precluded by N.C. R. App. P. 10(c)(1) from including argument in his assignments of error. Morris v. Gray, 181 N.C. App. 552, 640 S.E.2d 737, 2007 N.C. App. LEXIS 258 (2007).

Widow's claim that the clerk of the superior court did not comply with the procedural requirements of the Elective Share Act, G.S. 30-3.4, when he resolved the widow's action seeking an elective share on the parties' cross-motions for summary judgment was not properly before the court of appeals because the record did not contain any indication that the widow ever objected to the clerk's resolving the case on summary judgment prior to appealing. Pope v. Rollins (in re Estate of Pope), — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1626 (Sept. 2, 2008).

B. Jury Instructions.

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by statute. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Waiver by Failure to Present Question on Appeal. — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

When defendant orally requested an instruction that it was legal to possess a controlled substance pursuant to a prescription, his claim on appeal that the trial court did not give this instruction could not be considered because the instruction was not submitted to the trial court in writing, as required by G.S. 15A-1231(a), and the substance of the proposed instruction was not contained in the appellate record. State v. Sanders, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005).

Where trial judge's refusal to give requested instruction did not deprive defendants of an alternative basis in law for the verdict in their favor, the appellate court would not decide it. Segrest v. Gillette, 96 N.C. App. 435, 386 S.E.2d 88 (1989), rev'd on other grounds, 331 N.C 97, 414 S.E.2d 334 (1992).

Failure to Except Forecloses State Appeal and Federal Habeas Corpus. — Petitioner's failure to comply with valid state procedural requirements, in that he failed to except to the "presumption of malice" instruction and the alleged burden-shifting instructions in his assignments of error as required by this rule, and failed to otherwise raise the issue in his appeal, foreclosed both direct and collateral attack in the North Carolina courts, and was an adequate and separate state ground for denying federal habeas corpus relief on those claims. Watson v. North Carolina, 509 F. Supp. 850 (E.D.N.C. 1981).

Peremptory Instructions. — Where the record revealed that after an alternate juror was released, the court asked counsel for the State and counsel for defendant if they had any objections to the jury instructions as given and neither attorney objected, the issue of peremptory instructions was not properly preserved by defendant for review. State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991).

Allegedly Erroneous View of the Law. — Trial court did not commit prejudicial error by presenting an allegedly erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on a North Carolina case rather than on several Georgia cases cited in plaintiffs' brief, because there was no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774, cert denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Failure to Instruct at Defendants Request Not Error. — Where record reflected that at the conference on instructions, defendant specifically requested the trial court not to submit the offense of non-felonious breaking or entering as a lesser included offense, he was barred by subsection (b)(2) from assigning as error the failure of the trial court to instruct the jury on the lesser included offense. State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

Failure to Demonstrate Prejudice. — Where the record did not include a transcript containing defendants' objection and where defendants failed to make a timely motion to ensure that witness testimony supporting their theory of the case be made available to the jury, defendants' failed to carry their burden of demonstrating that prejudice resulted from the jury's erroneous receipt, in spite of defendants' objections, during deliberations of an unredacted copy of the police report. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479, 1999 N.C. App. LEXIS 1176 (1999).

Because the instructions given by the trial court contained purposes not charged in the respective indictments, the instructions were erroneous; however, upon an examination of the instructions and the record in its entirety, the appellate court determined that the defect was not a fundamental error since a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment, and the error in the instructions was not prejudicial. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, — U.S. —, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Failure to except to jury instructions. — Because plaintiffs had not objected to an instruction at trial, they failed to preserve the issue for appellate review. Jernigan v. Herring, 179 N.C. App. 390, 633 S.E.2d 874, 2006 N.C. App. LEXIS 1901 (2006).

C. Sufficiency of Evidence.

Failure to Renew Motion at Close of Evidence. — Defendant's conviction and sentence on a charge of first-degree murder pursuant to G.S. 14-17 was upheld; defendant's argument that the trial court erred in denying his motion to dismiss for insufficient evidence pursuant to G.S. 15A-954 was waived because defendant failed to renew his motion at the close of all the evidence as required by N.C. R. App. P. 10(c)(3), the trial court properly excluded the victim's uncommunicated threats to defendant into evidence, because defendant failed to put on evidence of self-defense as was required to admit such evidence pursuant to G.S. 8C-1, N.C. R. Evid. 803(3), and defendant did not suffer any prejudice pursuant to G.S. 15A-1443(a) because defendant testified to substantially the same evidence that was contained in the uncommunicated threat. State v. Messick, 159 N.C. App. 232, 585 S.E.2d 392, 2003 N.C. App. LEXIS 1493 (2003).

Waiver of Right to Challenge Sufficiency of Evidence as to Particular Findings. — On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, then state which assignments support which questions in the brief. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

The assignment of error must clearly disclose the question presented. A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

A broadside exception presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

A broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Appeal Reduced to Broadside Attack. — Where defendant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law, and correctly assigned error individually to each excepted finding and conclusion, but then, rather than direct the Court of Appeals to the particular findings he challenged, he instead argued the general denial of his Rule 41(b) motion, he thereby reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Therefore the only question presented was whether the findings of fact supported the conclusions of law and whether the conclusions supported the judgment. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Assignment of only the granting of defendant's motion for summary judgment as error was a broadside assignment, since it did not state any specific basis for the alleged error, as this rule requires, and the only questions it raised were whether the facts found by the court supported the judgment and whether any error of law appeared on the face of the record. Pamlico Properties, IV v. Seg Anstalt Co., 89 N.C. App. 323, 365 S.E.2d 686 (1988).

Assigning error to the signing of a judgment presents only the question of whether an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 622, 323 S.E.2d 922 (1984).

Respondent was precluded from challenging the sufficiency of the evidence where he moved to dismiss the juvenile petitions at the close of the State's evidence, but went on to present evidence and failed to renew his motion at the close of all evidence. In re Davis, 345 N.C. App. 749, 483 S.E.2d 440 (1997).

D. Plain Error.

Meaning of "Plain Error". — The term "plain error" does not simply mean obvious or apparent error. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

The adoption of the "plain error" rule to allow for review of some assignments of error normally barred by waiver rules such as subdivision (b)(2) of this rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate subdivision (b)(2) of this rule which is not the intent or purpose of the "plain error" rule. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

The "plain error" rule permits review of a very narrow range of errors notwithstanding a defendant's failure to object at trial to the jury charge. State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984).

Even Though Such Errors Were Not Brought to Attention of Court. — The "plain error" rule, adopted in State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983) as an exception to subdivision (b)(2) of this rule, provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), cert. denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582, aff'd, 318 N.C. 390, 348 S.E.2d 788 (1986).

The plain error rule waives subdivision (b)(2) of this rule and allows review of fundamental errors or defects in jury instructions affecting substantial rights which were not brought to the attention of the trial court. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

To mitigate the potential harshness of subdivision (b)(2) of this rule, the plain error rule allows the appellate court to cure errors or defects affecting substantial rights which were not brought to the attention of the court below. This rule, however, is always to be applied cautiously and only in the exceptional case where the claimed error is a fundamental error. State v. Oliver, 73 N.C. App. 118, 325 S.E.2d 682, cert. denied, 313 N.C. 513, 329 S.E.2d 401 (1985).

In a death penalty case, when defendant did not object to the use of raw psychological data released to the prosecution under G.S. 15A-905(b) in the cross-examination of defendant's expert, defendant's appellate objection that the data was misused during that cross-examination was reviewed for plain error, under N.C. R. App. P. 10(c)(4). State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Plain error must fall within these areas: (1) A fundamental error, meaning something so basic, so prejudicial, so lacking in its elements that justice cannot be done; or (2) a grave error, which must amount to a denial of a fundamental right of the accused; or (3) an error which has resulted in a miscarriage of justice; or (4) an error that denies appellant a fair trial; or (5) an error that seriously affects the fairness, integrity or public reputation of judicial proceedings; or (6) where it can be fairly said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Reilly, 71 N.C. App. 1, 321 S.E.2d 564 (1984), aff'd, 313 N.C. 499, 329 S.E.2d 381 (1985).

The plain error rule is not available in civil cases. Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989).

Plain Error Rule May Allow Relief Without Objection. — On rare occasions the "plain error" rule may allow a party relief even though no objection was made. Before relief will be granted under the "plain error" rule, however, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

Because defendant failed to object to the jury instruction on how to consider an aggravating factor, the appellate court reviewed his argument for plain error under N.C.R.A.P. 10(c)(4); however,, defendant did not show plain error because the evidence against him was overwhelming, and even if the appellate court assumed that the instruction was erroneous, it could not have been concluded that without it the jury would have reached a different verdict. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984); State v. McCoy, 320 N.C. 581, 359 S.E.2d 764 (1987).

The plain error rule will be applied only in exceptional circumstances where the error was sufficiently fundamental and prejudicial to amount to a miscarriage of justice or the denial of a fair trial, or where it can fairly be said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Riddle, 316 N.C. 152, 340 S.E.2d 75 (1986); State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986); State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. State v. Torain, 316 N.C. 111, 340 S.E.2d 465, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

The "plain error" rule is only applied in exceptional cases. State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986).

In order for the Supreme Court to grant a new trial under the "plain error" exception to subdivision (b)(2) of this rule, a judge's charge must be so fundamentally flawed that it can be fairly said that the mistake probably had an impact on the defendant's conviction. State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986).

In order to consider an assignment of error under the plain error rule, an appellate court must determine that the alleged error tilted the scales and caused the jury to reach its verdict convicting the defendant. State v. Dixon, 321 N.C. 111, 361 S.E.2d 562 (1987).

Before granting a new trial to a defendant under the plain error rule, the appellate court must be convinced that absent the alleged error, a jury probably would have reached a different verdict. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

The test for "plain error" places a much heavier burden upon defendant than that imposed by G.S. 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Where a defendant fails to assert plain error in his assignments of error he has waived even plain error review. State v. Moore, 132 N.C. App. 197, 511 S.E.2d 22 (1999).

Defendant was not entitled to plain error review of the admission of a police officer's testimony of an out-of-court statement he took from a crime victim because defendant did not ask the court to review the admission of the victim's out-of-court statements for plain error. Constitutional issues not raised and passed upon at trial are not be considered for the first time on appeal N. C. R. App. P. 10(c)(4) State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Failure to Adequately Allege Plain Error. — Trial court properly allowed the State to cross-examine defendant regarding his prior out-of-state conviction; defendant failed to preserve the issue of review pursuant to N.C. R. App. P. 10, and defendant failed to show that plain error applied, as defendant failed to show that different outcome would have been likely if the evidence had not been admitted. State v. Ayscue, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Waiver of Plain Error Argument. — Under

N.C. R. App. P. 10(c)(4), when defendant's objection to certain evidence was not preserved for appeal, he was also not entitled to plain error review because he did not "specifically and distinctly" allege plain error in his assignments of error. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

While a defendant was not entitled to plain error review because he did not object to a restitution ordered and did not assert plain error in his assignment of error in violation of N.C.R. App. P. 10(c)(4), because the issue raised important questions concerning the trial court's authority to order restitution in a criminal case, the appellate court addressed his contentions in its discretion under N.C. R. App. P. 2. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

Defendant waived the argument that the trial court erred when it failed to provide the jury with a written copy of the jury instructions, as defendant did not object to the alleged error, and although defendant, in an assignment of error, argued pursuant to N.C. R. App. P. 10(c)(4) that the error was plain error, defendant did not argue in defendant's brief that the instructions amounted to plain error pursuant to N.C. R. App. P. 28(a). State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003), appeal dismissed, cert. denied sub nom. State v. Scercy, 357 N.C. 581, 589 S.E.2d 363 (2003).

Because defendant did not object at trial to a statement by the trial court, he failed to preserve the issue for appeal. Though the issue could have been reviewed for plain error, pursuant to N.C. R. App. P. 10(c)(4), because defendant did not argue plain error on appeal, he therefore waived his right to plain error. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Defendant's claim that he was deprived of his constitutional rights under the confrontation clause by the admission of out-of-court statements was waived under N.C. R. App. P. 10(b)(1) because defendant lodged only a general objection but did not object on constitutional grounds but did not assert on appeal plain error, as permitted under Rule 10(c); thus, plain error review was waived, and defendant's constitutional argument was not properly before the court on appeal. State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78, 2007 N.C. App. LEXIS 17 (2007), cert. denied, appeal dismissed, 361 N.C. 364, 644 S.E.2d 555 (2007).

Plain error in the context of jury instructions occurs when the instructional mistake had a probable impact on the jury's finding that defendant was guilty. If this occurred, such a plain error would deprive defendant of his fundamental right to a fair trial. State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77 (1985), cert. denied, 316 N.C. 198, 341 S.E.2d 572 (1986).

The plain error rule does not negate subdivision (b)(2) of this rule, and rarely will an improper instruction which was not objected to at trial justify reversal. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Even after the adoption of the "plain error" rule, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), cert. denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582 aff'd, 318 N.C. 390, 348 S.E.2d 788 (1986).

It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

A prerequisite to the court engaging in a "plain error" analysis is the determination that the instruction complained of constitutes "error" at all. State v. Torain, 316 N.C. 111, 340 S.E.2d 465, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986).

To obtain relief under the "plain error" rule, defendant must show both that a particular instruction was error and that this error had a probable impact on the jury's finding of guilt. State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Even when the "plain error" rule is applied, an improper instruction will rarely justify reversal of a criminal conviction when no objection was made in the trial court. State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (1994).

There was no plain error in the trial judge instructing the jury that a box cutter was a deadly weapon based on the victim's testimony that the defendant attempted to cut the victim's face with a box cutter so the victim covered his face with his hands, sustaining six cuts on his hands which required eight stitches; additionally, the box cutter the defendant used was observed by the trial judge and the jury. State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

Lesser-Included Offense Instruction Without Objection Reviewed for Plain Error. — Plain error standard of review applies when reviewing a submission to the jury, without objection, of a lesser-included offense. State v. Drew, 162 N.C. App. 682, 592 S.E.2d 27, 2004 N.C. App. LEXIS 247 (2004).

Plain error standard of review applies when reviewing a submission to the jury, without objection, of a lesser included offense. State v. Drew, 162 N.C. App. 682, 592 S.E.2d 27, 2004 N.C. App. LEXIS 247 (2004).

Review of Instructions to Determine If Plain Error Was Committed. — Where instructions were not objected to before the jury retired, as required by subdivision (b)(2) of this rule, court would review them only for the limited purpose of determining whether "plain error" was committed. State v. Tabron, 78 N.C. App. 424, 337 S.E.2d 186 (1985).

Appellate review was limited to plain error because the defendant failed to object to the jury instructions. State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380, 2003 N.C. App. LEXIS 187 (2003), cert. denied, 357 N.C. 254, 583 S.E.2d 43 (2003).

Where defendant was afforded ample opportunity to request that the trial judge specify whether a bat could be one of the dangerous weapons used in connection with a robbery and since defendant did not object at trial to the jury's charge on the issue, the appellate court applied plain error review to defendant's claim that the verdict was ambiguous due to the fact that both a gun and a bat were used during the robbery, but it was unclear which weapon the jury determined was the dangerous weapon. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Failure to Give Instruction on Lesser Included Offense Was Not Error. — Trial court did not commit plain error by not giving an instruction on attempted second-degree murder. Since defendant was not charged with assault with a deadly weapon with intent to kill under a separate indictment, the trial court was not required to give a jury instruction on that offense. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Defendant failed to show the trial court committed plain error by not instructing ex mero motu on attempted voluntary manslaughter, assault with a deadly weapon with intent to kill, and attempted second-degree murder. Defendant failed to show evidence of legal provocation as there was no assault or threatened assault on defendant prior to his firing of the weapon. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Plain Error Shown. — The failure of the trial court to include an instruction on either simple assault or assault inflicting serious injury, where jury was instructed on the offense of assault with a deadly weapon, was plain error entitling defendant to a new trial. State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987).

Trial court committed plain error in failing to instruct the jury on conspiracy to commit common law robbery as the jury was properly instructed on robbery with a dangerous weapon and common law robbery, apparently based on the conflicting evidence regarding whether the gun used was real or fake; the same conflicting evidence directly pertained to defendant's charge of conspiracy to commit common law robbery as there was conflicting evidence as to whether the agreement was that the person who committed the robbery would use a real or a fake gun. State v. Carter, 177 N.C. App. 539, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

While the erroneous admission of defendant's purported confession did not rise to plain error as to other drug related charges, it did amount to plain error as to the charge of maintaining a dwelling for purposes of keeping or selling a controlled substance, as it was probable the jury would not have convicted defendant absent the purported confession. State v. Spencer, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1533 (Aug. 19, 2008).

Plain Error Not Shown. — Where the trial judge's initial instruction created the mistaken impression that to convict defendant of murder, defendant himself must have actually done the shooting, and to convict defendant of attempted armed robbery, defendant had to have been holding the gun, and only the next morning did the judge correctly instruct the jury as to the elements of the crimes under a theory of acting in concert, the initial instruction was in fact favorable to defendant, and the plain error rule would not be applied thereto. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

While defendant's constitutional rights were violated when the prosecutor cross-examined him concerning his silence after he was arrested and advised of his constitutional rights, given the peculiar facts of the case, such error did not cause the jury to reach a different verdict than it would have reached otherwise. Therefore, the defendant did not carry his burden of showing "plain error." State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986), indicating, however, that such prosecutorial tactics may often amount to "plain error" and require a new trial.

Although it was error for the trial court not to instruct the jury as to defendant's right to stand his ground if it believed his testimony and found that he was not the aggressor, where this error was not properly preserved for review by reason of defendant's failure to comply with subdivision (b)(2) of this rule, upon review of the record as a whole, such error did not constitute "plain error." State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

In prosecution for assault with a deadly weapon inflicting serious injury, while the trial court should have included an instruction that defendant had no duty to retreat in his own home, the failure to give such an instruction did not constitute "plain error" under the circumstances. State v. Lilley, 318 N.C. 390, 348 S.E.2d 788 (1986).

In light of the fact that the trial court (1) repeatedly instructed the jury that they had to find that the defendant acted with malice in order to find him guilty of second degree murder, and (2) instructed the jury that if the State failed to prove the defendant acted with malice, then defendant could be guilty of no more than voluntary manslaughter, the court's misstatement that second degree murder was killing without malice in the final mandate did not constitute plain error. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Judge's failure to give instruction on accident in a murder prosecution was error; however, where defendant's testimony was contradicted by State's witness, defendant was impeached by his prior inconsistent statements and his past criminal activity, and defendant's story completely lacked the ring of truth, no plain error was found. State v. Loftin, 322 N.C. 375, 368 S.E.2d 613 (1988).

Where instruction given in first degree rape case was essentially the pattern jury instruction in N.C.P.I.—Crim. 101.36, there was no error, under the "plain error" doctrine or otherwise. State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

Where the only issue before the jury was whether a shooting was accidental or intentional, judge's remark at end of instruction that "of course, pointing a gun at a person is not lawful conduct," did not affect the proceeding so that without the statement the verdict would have been different; therefore, there was no plain error. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Erroneous admission of hearsay did not constitute plain error such as would warrant granting defendant a new trial, where there was sufficient other competent evidence by which the jury could have reached its verdict. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

The court did not commit plain error in instructing the venire on accomplice testimony during voir dire. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Defendant's contention that the trial court erred in failing to exclude testimony prejudicially tainted by homosexual innuendo was without merit. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 513 U.S. 1089, 115 S.Ct. 750, 130 L.Ed. 2d 650 (1995).

Testimony that defendant had beaten witness and had stolen things from her and her children, and that she was afraid to leave him because there would be trouble when he found her, was relevant to prove that witness' fear of defendant was the reason she waited as long as she did before coming forward to tell of the crime charged, and it was not plain error to admit the testimony. State v. Lamb, 342 N.C. 151, 463 S.E.2d 189 (1995).

Admission of statements by a capital murder defendant's former co-employees was not plain error, where the statements were made shortly after a shooting spree at the business from which he recently had been fired, all to the effect that the speakers thought that the defendant would return for revenge, but it could not be said that the statements tainted the results at trial. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Trial court did not commit plain error in its charge to the jury for robbery with a firearm and attempted armed robbery, because restatement on acting in concert clarified any confusion. State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999).

Defendant failed to show that the prosecutor's statements to the jurors at voir dire, in the context of the entire record, rose to the level of plain error such that a different result probably would have been reached but for the prosecutor's statements, or that the prosecutor's statements constituted error so fundamental as to result in a miscarriage of justice or denial of a fair trial. State v. Anderson, 355 N.C. 136, 558 S.E.2d 87, 2002 N.C. LEXIS 14 (2002).

Defendant was not prejudiced by the procedural calendaring device of dismissal with leave as the procedure was intended not to suspend or hamper prosecution of the case, but rather to facilitate its continuance during a period of time when the defendant was absent. Accordingly, arraigning the defendant, who was fully aware of the charges against him, though the charges had been dismissed with leave and had not yet been reinstated, did not amount to the denial of a fair trial; therefore, there was no plain error in the trial court's decision to permit the defendant to be tried on charges that had been dismissed with leave at the time of the arraignment. State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003).

It was the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court; where defendant failed to object to the trial court's instruction on the elements of attempted second-degree rape, the instruction was reviewed for plain error, but was not found to have been improper despite defendant's contention that the instruction was flawed because it (1) failed to define penetration, and (2) failed to adequately explain the intent to commit intercourse. State v. Farmer, 158 N.C. App. 699, 582 S.E.2d 352, 2003 N.C. App. LEXIS 1230 (2003).

While the State's statements regarding acting in concert were incorrect, the error did not rise to the level of plain error; the State's representation of the law while questioning the witness misstated the law by representing that mere presence at the scene of the crime and knowledge thereof was sufficient to find defendant guilty. State v. Poag, 159 N.C. App. 312, 583 S.E.2d 661, 2003 N.C. App. LEXIS 1504 (2003), appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 857 (2003).

Defendant failed to demonstrate that instructing the jury on acting in concert constituted plain error; the evidence in the record tended to show that defendant traveled to the store with three friends and suggested that they rob the store, defendant entered the store and shot the owners, took money from the cash register, and left the scene in the vehicle along with the others. State v. Poag, 159 N.C. App. 312, 583 S.E.2d 661, 2003 N.C. App. LEXIS 1504 (2003), appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 857 (2003).

Trial court did not commit plain error in permitting the store-owner's wife to identify defendant at trial; the evidence showed that the wife had personal knowledge of defendant stemming from her perception of him gained during the robbery, and her perception of defendant during the robbery was sufficient to provide a basis for her in-court identification of defendant. State v. Poag, 159 N.C. App. 312, 583 S.E.2d 661, 2003 N.C. App. LEXIS 1504 (2003), appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 857 (2003).

Where defendant did not object to the trial court's instructions or request any corrections or additional instructions at trial, the appellate court only reviewed the instructions for plain error; since the weight of the marijuana was not an element of the offense of manufacture of marijuana, G.S. 90-95(a)(1), it was unnecessary to include any reference to weight in the applicable instruction. State v. Lemonds, 160 N.C. App. 172, 584 S.E.2d 841 (2003).

Defendant's claim that the trial court erred in allowing a victim of his armed robbery to testify as to how she felt when the gun was placed to her head was reviewed by plain error because he had not preserved that issue for review by having raised it in the trial court, pursuant to N.C. R. App. P. 10(b)(1); the court found that the testimony was relevant, pursuant to G.S. 8C-1, N.C. R. Evid. 401, in that her testimony as to her fear for her life and her intimidation proved the main element of the offense of robbery with a dangerous weapon in violation of G.S. 14-87. State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003).

Appellate court applied a plain error review because defendant failed to preserve his assignment of error regarding the admission of letters into evidence for review; given the additional evidence against defendant, the admission of the letters did not have a probable impact on the jury's finding of defendant's guilt. State v. Curry, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Trial court did not commit plain error by failing to intervene ex mero motu to stop the district attorney from continuing an improper closing argument after defendant's objection was sustained, as the instructional error did not have a probable impact on the jury's finding of guilt, in light of the fact that the evidence presented to the jury contained ample evidence of defendant's heroin use and involvement in the offenses charged. State v. Goblet, 173 N.C.

App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

Where the State presented substantial evidence of guilt of second-degree sexual offense through the testimony of a cellmate, which was corroborated by two other inmates who heard defendant bragging about the sexual assault, the trial court did not commit plain error in admitting evidence of defendant's prior acts, despite defendant's claim that the trial court failed to use a balancing test. State v. Locklear, 174 N.C. App. 547, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

Appellate court affirmed defendant's first-degree rape conviction, where defendant did not object to the jury instruction, because, even if the trial court erred by instructing the jury that a knife was a dangerous weapon as a matter of law, the trial court's instruction did not amount to plain error as, in light of the entire record, particularly the victim's testimony that she knew it was a knife that defendant took from his pocket, that she asked him not to hurt her upon seeing the knife, and that she was scared, the jury likely would have found that the victim reasonably believed the knife to be a dangerous or deadly weapon. State v. Cartwright, 177 N.C. App. 531, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006), review denied, 360 N.C. 578, 635 S.E.2d 902 (2006).

Trial court did not commit plain error under N.C. R. App. P. 10(c)(4) when the indictment charged that defendant confined, restrained and removed the victim and the jury was instructed that to convict of kidnapping based on a finding that defendant restrained or removed the victim because the indictment alleging all three theories was sufficient and put defendant on notice that the state intended to show that defendant committed kidnapping in any one of the three theories; the jury instruction correctly allowed any one of the three theories to serve as the basis for a finding of kidnapping. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Officer's reference to defendant's invocation of his right to remain silent was not plain error since the officer's testimony regarding defendant's exercise of defendant's right to silence was incidental to the officer's testimony in its entirety; it was doubtful that the jury assigned heavy weight to defendant's exercise of his right to silence in light of the evidence against defendant. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Trial court did not commit plain error by admitting under G.S. 8C-1-602 a victim's testimony that defendant shot the victim even though the victim did not see defendant shoot the victim, since the victim's testimony was based on what the victim perceived as the shooting occurred, and the victim's brother testified that he also heard defendant's voice shortly after the shooting and that he had known defendant "since the day he was born"; the brother had sufficient personal knowledge to identify defendant and his opinion was rationally based on his perception of the shooting under G.S. 8C-1-701. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Admission of a detective's testimony about information given to another detective by a confidential informant did not violate defendant's Sixth Amendment rights because the statement was not testimonial, but was offered to explain the presence at a restaurant of the officers; a second detective's testimony was also not plain error as it was offered to explain that detective's presence outside of defendant's apartment, rather than for the truth of the matter asserted and the testimony did not violate N.C. R. Evid. 802 because the statements were admissible to explain the presence of the detectives, rather than to prove that defendant sought to sell cocaine. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

Prosecutor's elicitation of testimony from the victim regarding the fact that the victim's daughter had recently passed away and that the victim was very close to her young, motherless grandchildren did not amount to plain error because, given the evidence presented, there was not a reasonable probability that the jury would have reached a different verdict had the disputed testimony been excluded. State v. Patterson, 182 N.C. App. 102, 641 S.E.2d 376, 2007 N.C. App. LEXIS 485 (2007).

Admission of the testimony of two officers was not plain error in which the officers testified that defendant's girlfriend told them that: (1) defendant came home to get a long gun with a scope, telling her that he was going hunting; (2) defendant was drunk, irate, bleeding from the face, and that he fell out the door; and (3) defendant and the victim did not get along and that defendant was becoming more uncontrollable; the absence of the girlfriend's statements would not have changed the jury's verdict. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Admission of an officer's testimony that defendant "did not want to make any statements" after being read defendant's Miranda rights was not plain error because the state made only one brief reference to defendant's post-arrest silence and the state did not reinforce the improper evidence in closing arguments. State v. Loftis, 185 N.C. App. 190, 649 S.E.2d 1, 2007 N.C. App. LEXIS 1701 (2007).

Although detective's testimony was improperly admitted because the testimony tended to vouch for the veracity of the State's main witness, the admission of that evidence did not amount to plain error in a case where defendant was charged with and convicted of sex offenses, as there was enough other evidence to impeach defendant's credibility that the jury had ample evidence to disbelieve defendant quite apart from the detective's testimony. State v. Gobal, — N.C. App. —, 651 S.E.2d 279, 2007 N.C. App. LEXIS 2199 (2007).

Admission of the testimony of three witnesses that the alleged assault against each witness took place within one year of the attack on a victim, and that defendant used substantially the same method of restraining each witness during the attack, employing defendant's greater size and strength, limiting the witness's breathing, making dire threats against the witness, and calling each witness after the attack was not plain error under N.C. R. App. P.10(c)(4), and was proper under G.S. 8C-1, N.C. R. Evid. 403 and 404(b). State v. Simmons, — N.C. App. —, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (July 1, 2008).

The plain error doctrine was not applicable

to statements made without objection, outside the presence of the jury, during witness voir dire. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Plain Error Review Held Appropriate. — Because defendant did not object to the trial court's submission of any of three aggravating circumstances of commission of kidnapping, pecuniary gain, or commission of other crimes of violence, either alone or in combination with one another, defendant's claim that the aggravating circumstances were based on the same evidence and were inherently duplicitous was reviewed for plain error. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, — U.S. —, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

It was plain error for a medical expert to bolster the credibility of the victim in violation of G.S. 8C-1, N.C. R. Evid. 702(a), so defendant did not have to preserve the claim for review pursuant to N.C.R. App. P. 10(b)(1); however, the error did not prejudice defendant as the State presented sufficient evidence from other sources to establish the victim's credibility. State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Because the admission of a police officer's opinion testimony was error, the appellate court had to determine whether the error was plain error pursuant to N.C. R. App. P. 10(c)(4), as defendant did not object to the admission of the officer's statements at trial. State v. Turnage, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 886 (May 6, 2008).

Plain error review was not appropriate where a party had failed to object to statements made by the other party during jury voir dire. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Statement was inadmissible hearsay and therefore erroneously admitted, but did not constitute plain error such as would warrant granting defendant new trial, as there was sufficient other competent evidence by which jury could have reached its verdict. Court must be convinced that, absent error, jury probably would have reached different verdict. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Admission of Testimony Not Plain Error. — The court's admission of state-proffered hearsay testimony during the sentencing proceeding as rebuttal to the hearsay evidence offered by defendant in support of the (f)(4) mitigating circumstance and a nonstatutory mitigating circumstance that defendant requested, i.e. based on his contentions that someone else pulled the trigger and that his role in the murders was relatively small, did not result in plain error where other evidence existed from which the jury could infer that he shot and killed the victims. State v. Lemons, 352 N.C. 87, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000), cert. denied, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001).

Where defendant did not object to the prosecutor cross-examining him as to his alleged prior assaults, the appellate court's review of the record and transcripts satisfied that court that the defendant did not meet the test for finding plain error because the State presented strong evidence of defendant's guilt through the testimony of three eye witnesses who were present when the victim, a police officer, was shot, with all three giving consistent testimony identifying defendant as the shooter; therefore it was not possible for the appellate court to say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

N.C.R.A.P., Rule 2, Rather Than Plain Error Rule, Applies to Certain Cases. — At least for all trials conducted after State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, 322 N.C. 243, 367 S.E.2d 644 (1988) and before Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), Supreme Court will decline to require that error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), be reviewed under plain error standard when defendant failed to object at trial to error, and will instead apply N.C.R.A.P., Rule 2. State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990).

The plain error doctrine was not extended to child custody cases. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

No Cumulative Plain Error Review Available. — The court refused to apply the plain error doctrine on a cumulative basis where defendant was assigning error to unrelated admissions of evidence to which he did not object, and the trial court made no affirmative ruling on the admissibility of any of them. None of the errors complained of, individually, met the standard required by State v. Odom, 307 N.C. 655, 300 S.E.2d 375. State v. Holbrook, 137 N.C. App. 766, 529 S.E.2d 510, 2000 N.C. App. LEXIS 495 (2000).

For discussion of "plain error rule," see In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

V. CROSS-ASSIGNMENTS BY APPELLEE.

The purpose of cross-assignments of error is to allow review of actions or omissions by the trial court which deprive the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal is taken. St. Clair v. Rakestraw, 67 N.C. App. 602, 313 S.E.2d 228 (1984), aff'd in part and rev'd in part, 313 N.C. 171, 326 S.E.2d 19 (1985).

Purpose of Subsection (d). — Subsection (d) of this rule introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Carawan v. Tate, 304 N.C. 696, 286 S.E.2d 99 (1982).

List of Cross-Assignments Not Necessary on Appeal from Summary Judgment. — Just as appellant from entry of summary judgment is not required to list exceptions and assignments of error in the record on appeal, an appellee is not required to list cross-assignments of error on appeal from summary judgment. Cieszko v. Clark, 92 N.C. App. 290, 374 S.E.2d 456 (1988).

Issue Preserved by Cross-Assignment. — The plaintiff's cross-assignment of error on defendant's appeal preserved plaintiff's challenge to the trial court's decision to allow defendants to file a defense bond, where the decision possibly deprived the plaintiff of an alternative basis in law for supporting the judgment. Swan Quarter Farms, Inc. v. Spencer, 133 N.C. App. 106, 514 S.E.2d 735 (1999).

Failure to Make Cross-Assignment. — Employee's motion for fees and expenses on appeal was not properly raised as a cross-assignment of error; moreover, even if it had been properly raised, an appellate court declined in its discretion to issue such an order. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Trial court dismissed an the temporary employees' action against state agencies purely on the grounds of sovereign immunity under G.S. 1A-1-12(b)(1) and declined to address the state agencies' motion to dismiss the employees' claims pursuant to G.S. 1A-1-12(b)(6); because the agencies did not cross-assign error with respect to the Rule 12(b)(6) motion, the question of the availability of state constitutional claims was not before the appellate court under N.C.R.A.P. 10(d). Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 644 S.E.2d 10, 2007 N.C. App. LEXIS 845 (2007).

Because the plaintiffs did not cross-appeal from a portion of a judge's nonfinal summary judgment order, the issue contained in that part of the order was not before the appellate court pursuant to N.C.R.A.P. 10(a). Cail v. Cerwin, 185 N.C. App. 176, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

Juvenile's argument that a district court abused the court's discretion by failing to make specific findings of fact on each of the factors enumerated in G.S. 7B-2203(b) and by considering the desirability of trying the juvenile and his codefendant in the same court could not be a basis for upholding a superior court's decision that the district court abused its discretion in transferring the juvenile's case for trial as an adult because the juvenile did not cross-assign error to the superior court's failure to address those concerns; the alleged errors were not set out in the superior court's order as its basis for the determination that the district court abused the court's discretion. In re E.S., — N.C. App. —, 663 S.E.2d 475, 2008 N.C. App. LEXIS 1501 (Aug. 5, 2008).

After plaintiffs proposed additional theories of standing for a nonprofit association, the trial court did not address any theory other than associational standing, and plaintiffs had not cross-assigned error to the failure to find standing on those bases. Consequently, those contentions were not properly preserved for review under N.C. R. App. P. 10(d). Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 872 (May 6, 2008).

Issue Not Preserved by Cross-Assignment. — Because plaintiff's cross-assignment of error did not present an alternative basis upon which to support the judgment, the question argued therein was not properly before the Court of Appeals; the proper method to have preserved this issue for review would have been a cross-appeal. Stanback v. Westchester Fire Ins. Co., 68 N.C. App. 107, 314 S.E.2d 775 (1984).

Where in her cross-assignments of error the defendant did not contend that the trial court's order deprived her of additional bases supporting the court's order, but rather, that certain portions of the order were erroneous, the proper means by which to raise such an attack would have been an independent appeal, rather than a cross-assignment of error, and defendant's cross-assignments of error were therefore overruled. Whedon v. Whedon, 68 N.C. App. 191, 314 S.E.2d 794 (1984), rev'd on other grounds, 313 N.C. 200, 328 S.E.2d 437 (1985).

Where defendants did not appeal from judgment, challenges thereto were not properly raised by cross-assignments of error, which under subsection (d) of this rule are reserved for errors which deprived the appellee of an alternative basis in law for supporting the judgment. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

In cross-assignment of error, plaintiffs did not present alternative basis in law for supporting judgment. Instead, plaintiffs contended that trial court erred in refusing to set aside jury verdicts as too small. Therefore, plaintiffs' contention is not properly before court on appeal. Proper method to have preserved issue for review would have been cross-appeal. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

The petitioner's argument that the relief granted by the trial court was inadequate could not be made by cross-assignment of error under this rule but was required to be made by cross-appeal, since the argument did not relate to an alternative basis in law for supporting the judgment, order, or other determination from which the appeal was taken. Neal v. Fayetteville State Univ., 131 N.C. App. 377, 507 S.E.2d 574 (1998).

Where trial court's sole conclusion of law denying defendant's motion to compel arbitration was that no agreement to arbitrate existed and plaintiff had not cross-assigned error to the trial court's failure to find as an alternate basis for its decision that arbitration agreement was egregious and violative of her constitutional rights, the appellate court could not consider this issue on appeal. Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 516 S.E.2d 879, 1999 N.C. App. LEXIS 671 (1999), cert. denied, 350 N.C. 832, 539 S.E.2d 288 (1999), cert. denied, 528 U.S. 1155, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000).

Judgment creditor's assignment of error contending that the trial court erred in refusing to dismiss an appeal was not properly before the appellate court under N.C. R. App. P. 10(d), because the judgment creditor did not present an alternative basis in law for supporting the order. State v. McCarn, 151 N.C. App. 742, 566 S.E.2d 751, 2002 N.C. App. LEXIS 868 (2002).

Home sellers' cross-assignment of error was not proper under N.C. R. App. P. 10(d) because it did not address the order entered by the trial court from which the home buyer appealed. Birmingham v. H&H Home Consultants & Designs, Inc., — N.C. App. —, 658 S.E.2d 513, 2008 N.C. App. LEXIS 646 (Apr. 1, 2008).

Employee's request to the Court of Appeals of North Carolina for an award of fees pursuant to G.S. 97-88 was not properly raised as a cross-assignment of error, pursuant to N.C. R. App. P. 10(d), and as such, the employee failed to show any entitlement to an award; moreover, even assuming that the employee had properly moved for expenses and fees under G.S. 97-88, the appeals court declined to issue an order. Roset-eredia v. F.W. Dellinger, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1019 (May 20, 2008).

Cross-Assignments of Error Dismissed for Lack of Alternative Basis in Law. — Appellate court dismissed appellee's cross-assignments of error because one cross-assignment of error concerned claims that the trial court erred in its findings of fact and conclusions of law and the other cross-assignment of error concerned an evidentiary argument; accordingly, neither cross-assignment provided an alternate basis in law, and the proper method to have raised these issues would have been by cross-appeal. City of Charlotte v. Whippoorwill Lake, Inc., 150 N.C. App. 579, 563 S.E.2d 297, 2002 N.C. App. LEXIS 575 (2002).

Since a landowner's arguments on appeal in challenging the amount it was awarded as damages for a trespass to property attempted to show how the trial court erred in its findings of fact and conclusions of law, and since those arguments did not provide an alternate basis for supporting the trial court's award of damages, the landowner improperly raised that challenge in across-assignment of error. The correct method for the landowner to have raised that question on appeal was to have raised the issue on a cross appeal, but the landowner failed to properly cross-appeal, so the court found that the landowner waived the appellate court's consideration of the damage issue and the appellate court dismissed the landowner's cross-assignment of error. CDC Pineville, LLC v. UDRT of N.C., LLC, 174 N.C. App. 644, 622 S.E.2d 512, 2005 N.C. App. LEXIS 2617 (2005), cert. denied, — N.C. —, 630 S.E.2d 925 (2006).

Cross-Assignment Not Properly Preserved for Review. — Farm's cross-assignment of error as to the North Carolina Industrial Commission's conclusion that plaintiff was entitled to temporary total disability benefits was not properly preserved for appellate review pursuant to N.C. R. App. P. 10, because the farm was seeking affirmative relief rather than arguing an alternative basis in law for supporting the judgment. Outerbridge v. Perdue Farms, Inc., 181 N.C. App. 50, 638 S.E.2d 564, 2007 N.C. App. LEXIS 40 (2007).

Issues for Cross-Appeal Not Proper Cross-Assignments. — The cross-assignments of error made by defendant/realtors' board were rejected because the issues it attempted to raise, the dismissal of its "wrongful civil proceeding" claim and the denial of its request for attorney's fees, should have been raised by cross-appeal. Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 134 N.C. App. 468, 518 S.E.2d 28 (1999).

Plaintiff's attempt to argue that the Commission erred both in concluding that the defendant insurer's policy did not cover plaintiff's North Carolina injuries, and in failing to assess a 10% late payment penalty against the defendant pursuant to G.S. 97-18 failed, because he did not file a cross-appeal and because neither of his cross-assignments of error, if sustained, would provide an alternative basis for upholding the Commission's order and award. Harrison v. Tobacco Transp., Inc., 139 N.C. App. 561, 533 S.E.2d 871, 2000 N.C. App. LEXIS 996 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 96 (2000).

Where the hospital, whose motion for a directed verdict was granted in the trial court, filed cross-assignments of error on appeal, the inadmissibility of the expert testimony put forth by the infant, mother, and father was not an alternative basis in law to support the directed verdict; as such, this was not the proper subject of a cross-assignment of error under N.C. R. App. P. 10(d). Pope v. Cumberland County Hosp. Sys., 171 N.C. App. 748, 615 S.E.2d 715, 2005 N.C. App. LEXIS 1357 (2005).

Since a landowner's arguments on appeal in challenging the amount it was awarded as damages for a trespass to property attempted to show how the trial court erred in its findings of fact and conclusions of law, and since those arguments did not provide an alternate basis for supporting the trial court's award of damages, the landowner improperly raised that challenge in across-assignment of error. The correct method for the landowner to have raised that question on appeal was to have raised the issue on a cross appeal, but the landowner failed to properly cross-appeal, so the court found that the landowner waived the appellate court's consideration of the damage issue and the appellate court dismissed the landowner's cross-assignment of error. CDC Pineville, LLC v. UDRT of N.C., LLC, 174 N.C. App. 644, 622 S.E.2d 512, 2005 N.C. App. LEXIS 2617 (2005), cert. denied, — N.C. —, 630 S.E.2d 925 (2006).

Former wife's cross-assignments of error related to an equitable distribution order were not considered because under N.C. R. App. P. 10(d), the claims did not constitute an alternative basis for supporting the judgment and instead attempted to show how the trial court erred in its findings; thus, the wife should have filed a cross-appeal and complied with appropriate appellate rules. Joyce v. Joyce, 180 N.C. App. 647, 637 S.E.2d 908, 2006 N.C. App. LEXIS 2502 (2006).

Failure to Cross-Appeal. — Where plaintiffs, in their cross-assignment of error, did not present an alternative basis in law for supporting judgment, but instead, contended that the trial court erred in refusing to set aside the jury verdict as too small, plaintiffs' contention was not properly before the court on appeal. The proper method to have preserved the issue for review would have been a cross-appeal. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Where neither of plaintiff/appellee's cross-assignments of error, if sustained, would provide an alternative basis for upholding the judgment, the plaintiff should have cross-appealed in order to properly present the alleged errors for appellate review. Mann Contractors v. Flair with Goldsmith Consultants-II, Inc., 135 N.C. App. 772, 522 S.E.2d 118, 1999 N.C. App. LEXIS 1244 (1999).

Since a landowner's arguments on appeal in challenging the amount it was awarded as damages for a trespass to property attempted to show how the trial court erred in its findings of fact and conclusions of law, and since those arguments did not provide an alternate basis for supporting the trial court's award of damages, the landowner improperly raised that challenge in across-assignment of error. The correct method for the landowner to have raised that question on appeal was to have raised the issue on a cross

appeal, but the landowner failed to properly cross-appeal, so the court found that the landowner waived the appellate court's consideration of the damage issue and the appellate court dismissed the landowner's cross-assignment of error. CDC Pineville, LLC v. UDRT of N.C., LLC, 174 N.C. App. 644, 622 S.E.2d 512, 2005 N.C. App. LEXIS 2617 (2005), cert. denied, — N.C. —, 630 S.E.2d 925 (2006).

Failure to Cross-Appeal Lack of Conclusions. — Where trial court erroneously failed to render conclusions concerning all statutory grounds for review raised by the petition for review, petitioners' failure to cross-appeal any such error to the appellate court waived its consideration on appeal. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572, rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

VI. DECISIONS UNDER PRIOR LAW.

A. Exceptions.

Editor's note. — *The cases cited below were decided under former Rule 21, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 21, Rules of Practice in the Court of Appeals of North Carolina.*

Rule Mandatory. — This rule is mandatory. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Appeal Dismissed for Failure to Follow Rule. — The court will dismiss the appellant's case when he fails to assign error as required by this rule. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912); Maddillon Engine & Thresher Co. v. Thomas, 170 N.C. 680, 87 S.E. 327 (1915); In re Bailey, 180 N.C. 300, 103 S.E. 896 (1920).

The appellee's motion to dismiss the appeal because, (1) the exceptions are not "briefly and clearly stated and numbered," (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal, (3) the index is not placed at the front of the record, will be allowed. Davis v. Wall, 142 N.C. 450, 55 S.E. 350 (1906). See also Jones v. Atlantic Coast Line R.R., 153 N.C. 419, 69 S.E. 427 (1910).

Rule Cannot Be Waived. — The rule requiring the assignment of error in the record on appeal is for the benefit of the court, and counsel cannot waive it. Southern Spruce Co. v. Hunnicutt, 166 N.C. 202, 81 S.E. 1079 (1914); Parrott v. Hardesty, 169 N.C. 667, 86 S.E. 582 (1915).

An Assignment of Error Alone Will Not Suffice. — Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for the Supreme Court to decide. State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962).

An assignment of error must be based on an exception duly noted. — State v. Hitchcock, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced ex mero motu. Bulman v. Southern Baptist Convention, 248 N.C. 392, 103 S.E.2d 487 (1958).

Assignments of error purporting to be supported by exceptions which appear nowhere in the record except in the purported assignments of error are ineffective and will not be considered on appeal. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Bost v. Citizens Nat'l Bank, 1 N.C. App. 470, 162 S.E.2d 158 (1968); Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

An assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 9. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Court Will Not Consider Error Not Subject of Exception or Assignment. — The Court of Appeals will not consider an error in the charge and the evidence which has not been made the subject of an exception or assignment of error. State v. Moore, 6 N.C. App. 596, 170 S.E.2d 568 (1969).

Appellant Must Point Out Error by Exception. — It is the duty of an appellant who asserts prejudicial error to point out the asserted error by exception. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

The exceptions which are bona fide shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error not supported by exceptions present no question of law for the Supreme Court to decide. Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

An exception which is not assigned as error is deemed abandoned. Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962).

Assignment of Error Must Be Clearly Stated. — Assignments of error must be clearly and intelligently stated so that the court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. Myrose v. Swain, 172 N.C. 223, 90 S.E. 118 (1916); State v. Burton, 256 N.C. 464, 124 S.E.2d 108 (1962); Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); Jenks v. Morrison, 258 N.C. 96, 127 S.E.2d 895 (1962); Jones v. Saunders, 257 N.C. 118, 125 S.E.2d 350 (1962); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95

(1967); State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

What the Supreme Court requires is that exceptions which are presented to the court for decision shall be stated clearly and intelligibly by the assignment of error, and not be referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the court is not sent scurrying through the entire record to find the matters complained of. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961).

Rule 9 and this rule require that asserted error must be based on an appropriate exception, and must be properly assigned. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Assignments of error to a charge which do not set forth the part of the charge challenged do not comply with the rules of practice in the Supreme Court. State v. Dixon, 256 N.C. 698, 124 S.E.2d 821 (1962); Samuel v. Evans, 264 N.C. 393, 141 S.E.2d 627 (1965); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

An exception must point out some specific part of the charge as erroneous. Jenkins v. Gaines, 272 N.C. 81, 157 S.E.2d 669 (1967).

Duty to Prepare Assignment of Error. — The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and, if there is an assignment of error not supported by an exception, it will be disregarded. Worley v. Laurel River Logging Co., 157 N.C. 490, 73 S.E. 107 (1911); Allred v. Kirkman, 160 N.C. 392, 76 S.E. 244 (1912); McLeod v. Gooch, 162 N.C. 122, 78 S.E. 4 (1913).

An assignment of error must present a single question of law for consideration by the court. Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

An assignment which attempts to raise several different questions is broadside. Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962).

Broadside Exceptions Ineffectual. — An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion is a broadside exception and ineffectual because of noncompliance with Rule 9 and this rule. Columbus County v. Thompson, 249 N.C. 607, 107 S.E.2d 302 (1959); Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961); State v. Burell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962); Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

And may not be aided by the assignment of error. — Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

Broadside Assignment of Error to Findings of Fact Improper. — Where plaintiff's assignment of error as to the judge's findings of fact was: "For that the judge of the superior court made certain findings of fact, which findings of fact are not supported by the evidence and which findings are contrary to the evidence," it was a broadside assignment of error, which failed to point out or designate in the assignment of error the particular rulings to which exceptions were taken, so that the Supreme Court could see the alleged error made by the judge. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Exceptions Too General. — Where the plaintiff files a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings, adverse to it and appeals," is too general to be considered. Rutherford County Comm'rs v. Erwin, 140 N.C. 193, 52 S.E. 785 (1905).

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail. Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445 (1913).

An exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct. Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Jenkins v. Gaines, 272 N.C. 81, 157 S.E.2d 669 (1967).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

The failure to except leaves nothing to review. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

Scope of Review Where Assignments of Error to Findings of Fact Are Insufficient. — Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the questions whether the findings support the court's inferences and conclusions of law and judgment, and whether error appears on the face of the record. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

When no exception has been taken to a finding of fact, such finding is presumed to be supported by competent evidence and is binding on appeal. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

Appeal Is to Judgment If No Exceptions Preserved. — In the absence of any exceptions, or when exceptions have not been preserved in accordance with the requirements of the rules, the appeal will be taken as an exception to the judgment. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

An appeal to the Supreme Court is itself an exception to the judgment or to any other matter of law appearing on the face of the record. Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); State v. Hitchcock, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

The only question raised by an exception to the judgment is whether error of law appears upon the face of the record. Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962).

Exceptions Must Be Set Out and Numbered. — Exceptions relied upon in the statement of the case must be set out and numbered. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

Reference by Number Insufficient. — This rule must be complied with to have the appeal considered by the court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. Porter v. American Cigar Box Lumber Co., 164 N.C. 396, 80 S.E. 443 (1913).

A statement purporting to be assignments of error appearing in the record just after the statement of the case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on trial, such exceptions themselves not being sufficiently stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed. Thompson v. Seaboard Air Line R.R., 147 N.C. 412, 61 S.E. 286 (1908).

It is entirely proper to group more than one exception under one assignment, when all the exceptions relate to a single question of law. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

But If Exceptions Relate to Distinct Parts of Charge and Any Part Is Correct, Assignment Fails. — Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

Reference to Page. — Where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page — of the record;" and the giving of proper page will not cure its insufficiency. Rogers v. Jones, 172 N.C. 156, 90 S.E. 117 (1916); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments Not Based on Exceptions Considered in Capital Case. — Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case, wherein the life of defendant is at stake, assignments of error not so based nevertheless will be considered. State v. Herring, 226 N.C. 213, 37 S.E.2d 319 (1946).

Agreement of Counsel. — Where the record shows that the solicitor agreed that the statement of case on appeal, containing an exception to his argument to the jury and an assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948).

An exception to the signing of the judgment presents nothing for review except whether or not the court's conclusion of law is supported by the finding or findings of fact; such exception does not challenge the correctness of any findings of fact. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

Exception to Issues Submitted. — Where a cause was tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of court regulating appeals. McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

Questions Discussed in Brief Only. — A question discussed in the brief but not presented by any exception or assignment of error cannot be considered. Coon v. Southern Ry., 171 N.C. 759, 88 S.E. 510 (1916); Needham v. Southern Ry., 171 N.C. 765, 88 S.E. 511 (1916).

When Complaint Does Not State Cause of Action. — A defendant, without filing exception on appeal from an adverse judgment, may move to dismiss the action on the ground that the complaint does not state a cause of action. Lloyd v. North Carolina R.R., 151 N.C. 536, 66 S.E. 604 (1909).

This is not true of an objection for misjoinder of cause of action. Wright v. Kinney, 123 N.C. 618, 31 S.E. 874 (1898).

B. Evidence.

Exceptions to Evidence. — The assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves. Thompson v. Seaboard Air Line R.R., 147 N.C. 412, 61 S.E. 286 (1908); Carter v. Reaves, 167 N.C. 131, 83 S.E. 248 (1914).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Exception Not Considered Where No Objection or Request Made. — The failure of the court to restrict the admission of testimony competent for the purpose of corroboration is not error where defendant neither objects to the admission of the testimony nor requests that its admission be restricted. State v. Perry, 226 N.C. 530, 39 S.E.2d 460 (1946); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955).

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

When it is claimed that findings of fact made by the trial judge are not supported by the evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors. Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950); Putnam

v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Failure to refer in the charge to the difference between substantive evidence and corroborative evidence and to define each of these terms is not ground for exception. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958).

An assignment of error relating to restrictions placed on cross-examination does not comply with this rule and Rule 9 if it does not contain any question put to any witness on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Evidence Competent for Some Purpose. — When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. Tise v. Town of Thomasville, 151 N.C. 281, 65 S.E. 1007 (1909).

A general objection to evidence cannot be sustained if the evidence is competent for any purpose. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

Objecting Party to Request Restricted Consideration of Evidence. — When evidence competent for one purpose only and not for another is offered, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Goodson, 273 N.C. 128, 159 S.E.2d 310 (1968).

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. State v. Corl, 250 N.C. 252, 108 S.E.2d 608 (1959).

When evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. Hill v. Bean, 150 N.C. 436, 64 S.E. 212 (1909).

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. State v. McKinnon, 223 N.C. 160, 25 S.E.2d 606 (1943).

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. State v. Walker, 226 N.C. 458, 38 S.E.2d 531 (1946); Humphries v. Queen City Coach Co., 228 N.C. 399, 45 S.E.2d 546 (1947).

Exception Not Considered. — A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. Whitehurst v. Padgett, 157 N.C. 424, 73 S.E. 240 (1911); Perry v. Branning Mfg. Co., 176 N.C. 68, 97 S.E. 162 (1918); Singleton v. Roebuck, 178 N.C. 201, 100 S.E. 313 (1919).

When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. Chrisco v. Yow, 153 N.C. 434, 69 S.E. 422 (1910); Cooper v. Seaboard Air Line R.R., 163 N.C. 150, 79 S.E. 418 (1913).

Where several witnesses testified to certain facts which the trial judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all of the testimony of that class. Liles v. Fosburg Lumber Co., 142 N.C. 39, 54 S.E. 795 (1906).

Exceptions to Unanswered Questions. — Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency. Wallace v. Barlow, 165 N.C. 676, 81 S.E. 924 (1914); Hamlet Ice Co. v. J.A. Jones Constr. Co., 194 N.C. 407, 139 S.E. 771 (1927), cert. denied, 360 N.C. 531, — S.E.2d — (2006).

Objection That Instruction Insufficient. — Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. Plemmons v. Murphey, 176 N.C. 671, 97 S.E. 648 (1918).

Unsupported Statements of Appellant. — A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. State v. Freeze, 170 N.C. 710, 86 S.E. 1000 (1915).

Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. State v. Jones, 182 N.C. 781, 108 S.E. 376 (1921).

Rule 11. Settling the record on appeal.

(a) *By agreement.* Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By appellee's approval of appellant's proposed record on appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 30 days (35 days in capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By agreement, by operation of rule, or by court order after appellant's objection or amendment.* Within 30 days (35 days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in his request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the word ing of a statement or narration required or permitted by these rules,there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing there with pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1) and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple appellants; single record on appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) *[Reserved.]*

(f) *Extensions of time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c). (Adopted June 13, 1975; Amended November 27, 1984 — 11(a), (c), (e), and (f) — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; Amended December 8, 1988 — 11(a), (b), (c), (e), and (f) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 26, 1990 — 11(b), (c), (d) — effective October 1, 1990; Amended March 6, 1997 — 11(c) — effective upon adoption March 6, 1997; Amended November 21, 1997 — 11(a) — effective February 1, 1998; Amended May 6, 2004 — 11(b), 11(c), 11(d) — effective May 12, 2004; January 25, 2007 — 11(c), paras. 1, 2, 5, 6; added paras. 3, 4, 8 — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Note on the 1988 Amendment. — Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the present version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

Time Schedule. — The time schedule set out in this rule is designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976).

The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension. State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976).

Trial Court Loses Jurisdiction to Settle the Record After Notice of Appeal. — While the recorded judgment did not reflect the judgment rendered by the trial court in open court, the trial court lacked jurisdiction to correct its judgment after defendant had given notice of appeal and the record on appeal had been filed with the appellate court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297, 2000 N.C. App. LEXIS 892 (2000).

Once the record on appeal has been filed with the appellate court, motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297, 2000 N.C. App. LEXIS 892 (2000).

The action of the trial judge in settling the record is final and will not be reviewed on appeal. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Appellant bears the burden of seeing that the record on appeal is properly settled and filed with the court. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

Good Faith Compliance With Settling Record. — Plaintiff law firm's appeal was not dismissed because law firm acted in good faith to verify that all modifications to a proposed record were incorporated to the satisfaction of defendants, a former associate and her new law firm, and promptly filed the record two days after verifying with defendants that the record was settled, consistent with N.C. R. App. 11 and 12.

Failure to Settle Record. — Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

Trial court's denial of appellee's motion to dismiss an appeal 36 days after the notice of appeal was filed, under N.C. R. App. P. 11, for a failure to settle the record in accordance with N.C. R. App. P. 9 within 35 days of the notice, was proper because the appellant substantially complied with the requirements of N.C. R. App. P. 7 regarding filing a transcript of the trial court proceedings. Spencer v. Spencer, 156 N.C. App. 1, 575 S.E.2d 780, 2003 N.C. App. LEXIS 30 (2003).

Prior to filing a record on appeal with the appellate court, the husband improperly requested the trial court to settle the record, as the trial court had no authority in the instant case to do so, and the appeal was,therefore, dismissed; the husband did not contend pursuant to N.C. R. App. P.11(c) that materials proposed for inclusion in the record or for filing with the record were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, and the wife's challenge to the documents at issue dealt with whether they were relevant to the issues on appeal, which the trial court was barred by N.C. R. App. P. 11(c) from considering. Carson v. Carson, 177 N.C. App. 277, 628 S.E.2d 439, 2006 N.C. App. LEXIS 873 (2006).

Where the parties could not agree to the wife's proposed amendment of the record on appeal, the two documents to which the wife's objections pertained, pursuant to N.C. R. App. P. 11(c), should have been filed with the record on appeal as exhibits, and the appeal was dismissed for failure to comply with this rule; the husband erred in filing those documents with the record rather than as exhibits. Carson v. Carson, 177 N.C. App. 277, 628 S.E.2d 439, 2006 N.C. App. LEXIS 873 (2006).

Failure to Show Specific Prejudice Arising from a Missing Verbatim Transcript. — Where the record lacked any indication of the content of the proceeding as it pertained to defendant's waiver of counsel, and defendant failed to show specific prejudice arising from the missing verbatim transcript, defendant's argument that he was prejudiced by the court reporter misplacing the notes and transcript of the probation revocation hearing was without merit. State v. Quick, 179 N.C. App. 647, 634 S.E.2d 915, 2006 N.C. App. LEXIS 2026 (2006).

Failure to Respond to Defendants' Objections to Record Affected Time for Appeal. — The court dismissed the appeal of plaintiffs, administratrix and relatives of deceased infant, who failed to file and settle the record within the time limit required by this rule, where although plaintiffs timely served the proposed record on appeal on defendants, they failed to respond to defendants's objections and proposed amendments or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal 13 days later (10 days as per N.C.R. A. P., Rule 11(c) plus 3 days as per N.C.R. App. P., Rule 27(b)) since defendants served their objections and amendments by United States mail, and plaintiffs should have filed the record on appeal within 15 days after that. Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232, 2000 N.C. App. LEXIS 1267 (2000).

Court of Appeals Determines Question of Compliance. — Upon appeal, the opinion of Court of Appeals, not the clerk of the superior court, determines whether service of the proposed record was properly made within the required time, whether the record on appeal was properly settled, and, under former subsection (e), whether the record was certified by the clerk of the superior court within ten days after settlement. In re Rogers, 44

N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Opposing Counsel of Record at Commitment Hearing. — Under former G.S. 122-58.24 (see now G.S. 122C-270), the staff attorney of the Attorney General who represents the State at a commitment hearing is the opposing counsel of record within the meaning of N.C.R.A.P. Rule 26 and should be served with the proposed record on appeal as required by this rule where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served on opposing counsel of record for the petitioner by the respondent appellant. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of former section (e) of this rule, or to comply with the mandate of N.C.R.A.P. Rule 12(a), works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Failure to Comply Restored Jurisdiction to Trial Court. — Where defendant properly gave notice of appeal on September 1, 1978, but between that date and November 28, 1978, when judgment was entered, a period of 88 days, he took no steps to perfect that appeal, i.e., contrary to the mandate of section (a) of this rule defendant neither tendered a proposed record on appeal within 30 days, nor did he seek any extension of time to settle such a record as permitted by N.C.R.A.P. Rule 27(c), defendant's failure to perfect his appeal constituted an abandonment which reinvested the trial court with jurisdiction to render further order in the cause. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Where the record on appeal contains two conflicting narratives of the evidence, the appeal should be dismissed for failure to bring forward a "settled" record as required under N.C.R.A.P., Rule 9 and this rule; however, where defendant did not assert that the trial court's findings quoted were unsupported by sufficient evidence at the custody hearing below, but instead asserted the trial court's conclusions were erroneous or were not supported by the findings actually made, under these limited circumstances, a narrative of evidence or a verbatim transcript was not necessary to understand defendant's assignment of error; therefore, the appellate court addressed the merits of his assignments of error. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. — Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

The filing of two records when there should have been but one and the inclusion in both records of matter which should not have been included has placed an unnecessary burden on this court and has imposed upon the State an expense which was not necessary for the protection of defendants' rights to full appellate review. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

Counsel Taxed for Redundant Record. — By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Court Presumed to Have Acted Correctly Where Record Silent. — Where the record is silent as to whether a jury instruction conference was in fact held, the defendant must hold himself accountable. The defendant, as appellant, has the duty under this rule to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to subsection (a) of this rule acknowledging the trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to subsection (c) of this rule. Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Time Period Held Inapplicable. — Where the trial court allowed defendant 45 days to serve objections or file a counter-proposed record on appeal, the 15-day period of this rule was inapplicable. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

Extension Held Ineffective. — Trial court's order extending the time during which plaintiffs could serve proposed record on appeal was ineffective where it was made after the expiration of the 35-day period during which plaintiffs were required by subsection (b) of this rule to serve the proposed record on appeal, it was made upon plaintiffs' oral motion in violation of N.C.R.A.P., Rule 27(c)(1), and the record did not reflect that the other parties, the defendant and third-party defendant, were given notice or an opportunity to be heard as required by N.C.R.A.P., Rule 27(c)(1). Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991).

Order dismissing a landlord's appeal in a summary ejectment proceeding was proper because the landlord failed to timely file the record on appeal as required by N.C. R. App. P. 12(a); because the landlord made only an oral motion to extend the time to serve the record after the time for service of the record had expired, the trial court lacked authority to grant the motion. Cadle Co. v. Buyna, 185 N.C. App. 148, 647 S.E.2d 461, 2007 N.C. App. LEXIS 1716 (2007).

Extension of Time Proper. — It was not an abuse of discretion by the trial judge to deem plaintiffs' service of the record timely under N.C. R. App. P. 11 because N.C. R. App. P. 27 allowed the trial judge to grant an extension of time to serve the record on appeal even after the deadline for service had passed. Robbins v. Ingham, — N.C. App. —, 635 S.E.2d 610, 2006 N.C. App. LEXIS 2160 (2006), cert. denied, appeal dismissed, 361 N.C. 221 (2007).

Failure to Perfect Appeal — Illustrative Cases. — Where defendant gave oral notice of appeal on January 4, 1988 (date of initial judgment), and tendered her proposed record on appeal pursuant to subsection (b) of this rule 139 days later, the court did not address defendant's first issue because the appeal from the trial court's initial judgment was not properly perfected. Woods v. Shelton, 93 N.C. App. 649, 379 S.E.2d 45 (1989) (effective for judgment entered prior to July 1, 1989).

Failure of Period to Run. — Subsection (a) provides that the time in which the record of a case on appeal must be filed runs from the date of the court reporter's certification of delivery of the transcript and if the court reporter fails to certify that the transcript has been delivered within the 60-day period permitted by Rule 7(b), the 35-day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript; therefore, since the court reporter had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the appeal, the defendant's 35-day period to serve the record on appeal never began to run. Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994), cert. granted in part and denied in part, writ of supersedeas allowed, 338 N.C. 311, 450 S.E.2d 487 (1994).

Dismissal for Failure to Comply. — Where the trial court's purported extension of time to file the records on appeal was ineffective, and where the records on appeal were not filed within the times mandated by the Rules of Appellate Procedure, each parties' appeals were dismissed for failure to comply with the rules. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

Corporation's appeal was dismissed as an executor served a corporation with amendments and objections to the proposed record, but there was no indication that the corporation filed for judicial settlement of the record within the time prescribed by N.C. R. App. 11(c); the corporation continued to discuss the record with the executor, who attempted to cooperate while expressly reserving the right to assert an "untimely docketing of (the) record," and the corporation filed the record after concurrence on the record was reached, which was well after the time limitations set forth in N.C. R. App. 11(c) and 12(a). White v. Carver, 175 N.C. App. 136, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

One page letter not record on appeal. — Husband's appeal was subject to dismissal under circumstances in which a one-page letter sent by the husband to the wife's counsel, listing certain pleadings, did not comply with N.C. R. App. P. 9 and N.C. R. App. P. 11, and was not in fact his proposed record on appeal; the record on appeal filed with the appellate court was never in fact served on the wife as a proposed record on appeal. Day v. Day, 180 N.C. App. 685, 637 S.E.2d 906, 2006 N.C. App. LEXIS 2496 (2006).

Notice to Defendant and Counsel. — The failure to give the defendant or his counsel notice of a hearing to settle the appellate record did not violate due process, where defendant's presence was not required, and defense counsel was present and fully examined the deputy clerk on the method and manner by which jurors were sworn. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999), cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Sanctions Imposed for Multiple Errors. — Homeowners' attorney was ordered to pay double the printing costs of an appeal under N.C. R. App. P. 34(b) due to the violation of N.C. R. App. P. 9,11, 12, 28(b)(4), 28(b)(6), and 28(b)(5), which was substantial under N.C. R. App. P. 25, but not so gross as to warrant dismissal against an insurance agent.

Appeal Not Treated as Petition for Certiorari. — Notice of appeal was ineffective as to an insurer, and was not treated as a petition for a writ of certiorari under N.C. R. App. P. 21(a)(1), in part,due to the homeowners' violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5).

Applied in State v. Cottingham, 30 N.C. App. 67, 226 S.E.2d 387 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); State v. Wilson, 31 N.C. App. 323, 229 S.E.2d 314 (1976); Hudson v. Hudson, 31 N.C. App. 547, 230 S.E.2d 188 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); Smith v. Smith, 103 N.C. App. 488, 405 S.E.2d 912 (1991); Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995); Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999); Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222, 2001 N.C. App. LEXIS 14 (2001); Lancaster v. Maple St. Homeowners Ass'n, 156 N.C. App. 429, 577 S.E.2d 365, 2003 N.C. App. LEXIS 194 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 272 (2003); State v. Kirby, — N.C. App. —, 653 S.E.2d 174, 2007 N.C. App. LEXIS 2450 (2007); Yorke v. Novant Health, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1620 (Sept. 2, 2008); Mason v. Dwinnell, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 908 (May 6, 2008).

Quoted in Patterson v. Strickland, 139 N.C. App. 510, 515 S.E.2d 915 (1999).

Stated in John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6 (1985)

Cited in State v. Cumber, 32 N.C. App. 329, 232

S.E.2d 291 (1977); State v. Davis, 36 N.C. App. 648, 244 S.E.2d 480 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986); Roanoke Chowan Regional Hous. Auth. v. Vaughan, 81 N.C. App. 354, 344 S.E.2d 578 (1986); von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988); State ex rel. Thornburg v. Currency in Amount of $52,029.00 in U.S. Currency, 324 N.C. 276, 378 S.E.2d 1 (1989); State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997); Pollock v. Parnell, 126 N.C. App. 358, 484 S.E.2d 864 (1997); Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998); Fenz ex rel. Gladden v. Davis, 128 N.C. App. 621, 495 S.E.2d 748 (1998); Groves v. Community Hous. Corp. of Haywood County, 144 N.C. App. 79, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001); State v. Berryman, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), aff'd, — N.C. —, 624 S.E.2d 350 (2006); McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007); Joker Club, L.L.C. v. Hardin, 183 N.C. App. 92, 643 S.E.2d 626, 2007 N.C. App. LEXIS 838 (2007); In re E.P, 183 N.C. App. 301, 645 S.E.2d 772, 2007 N.C. App. LEXIS 1163 (2007).

Rule 12. Filing the record; Docketing the appeal; Copies of the record.

(a) *Time for filing record on appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of record on appeal.* The appellant shall file one copy of the record on appeal, one copy of a transcript designated pursuant to Rule 9(c)(2), three copies of each exhibit designated pursuant to Rule 9(d), and three copies of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3). Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. (Adopted June 13, 1975; Amended November 27, 1984 — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; Amended December 8, 1988 — 12(a) and (c) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended March 6, 1997 — 12(c) — effective upon adoption March 6, 1997; Amended May 1, 2003 — 12(c); January 25, 2007 — 12(a), (c) — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Legal Periodicals. — For a survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Compliance Universally Mandatory. — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

Section (e) of this rule contemplates review of petitions for writ of certiorari to review motions for appropriate relief that have been denied; those allowed may be reviewed by the State Supreme Court. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Notice Provision Jurisdictional. — The provisions of this rule as it read prior to amendment effective July 1, 1989, requiring that no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken was jurisdictional and it imposed a limit on the aggrieved party's right to appeal. Only the appropriate appellate court could extend this 150-day time limit. State v. Ward, 61 N.C. App. 747, 301 S.E.2d 507, cert. denied, 309 N.C. 825, 310 S.E.2d 357 (1983).

Counsel's failure to timely file the record on appeal amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of former Rule 11(e), or to comply with the mandate of subsection (a) of this rule, works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Failure to Settle Record. — Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

Time for Filing Record. — Appellant was not entitled to use all the time less than 150 days and then file a record on appeal that had not been settled as required by N.C.R.A.P., Rule 11. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988) (decided prior to 1989 amendment.)

Corporation's appeal was dismissed as an executor served a corporation with amendments and objections to the proposed record, but there was no indication that the corporation filed for judicial settlement of the record within the time prescribed by N.C. R. App. 11(c); the corporation continued to discuss the record with the executor, who attempted to cooperate while expressly reserving the right to assert an "untimely docketing of (the) record," and the corporation filed the record after concurrence on the record was reached, which was well after the time limitations set forth in N.C. R. App. 11(c) and 12(a). White v. Carver, 175 N.C. App. 136, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

Failure to Respond to Defendants's Objections to Record Affected Time for Appeal. — The court dismissed the appeal of plaintiffs, administratrix and relatives of deceased infant, who failed to file and settle the record within the time limit required by this rule, where although plaintiffs timely served the proposed record on appeal on defendants, they failed to respond to defendants's objections and proposed amendments or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal 13 days later (10 days as per N.C.R. A. P., Rule 11(c) plus 3 days as per N.C.R. A. P., Rule 27(b)) since defendants served their objections and amendments by United States mail, and plaintiffs should have filed the record on appeal within fifteen days after that. Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232, 2000 N.C. App. LEXIS 1267 (2000).

Failure to timely file the record on appeal was not excused by personal conflicts of class counsel such as a district court hearing, a $1.4 million real estate closing, a mayoral debate, and a tight race for the office of mayor; class counsel also failed to file their motion for extension of time within the deadline prescribed for the record on appeal and their writ of certiorari was filed after the appellate court's first opinion in the case. Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222, 2001 N.C. App. LEXIS 14 (2001).

Appellant bears the burden of seeing that the record on appeal is properly settled and filed with the court. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

Good Faith Compliance With Settling Record. — Plaintiff law firm's appeal was not dismissed because law firm acted in good faith to verify that all modifications to a proposed record were incorporated to the satisfaction of defendants, a former associate and her new law firm, and promptly filed the record two days after verifying with defendants that the record was settled, consistent with N.C. R. App. 11 and 12. Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

Settling the Record. — Record on appeal was not settled until defendant signed a Stipulation and Settlement of the Record on Appeal. Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659, cert. denied, 327 N.C. 634, 399 S.E.2d 121 (1990), aff'd, 328 N.C. 327, 401 S.E.2d 366 (1991).

Appeal Not Treated as Petition for Certiorari. — Notice of appeal was ineffective as to an insurer, and was not treated as a petition for a writ of certiorari under N.C. R. App. P. 21(a)(1), in part, due to the homeowners' violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5).

Appeal would be dismissed where record on appeal was not filed in the appellate court within 150 days from the giving of notice of appeal under this rule as it read prior to amendment effective July 1, 1989. Appellant's motion for a new trial or a modification of the judgment pursuant to G.S. 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's G.S. 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980).

Dismissal of an earlier attempt to appeal was proper where plaintiff failed to file and docket the record in the appellate court within 150 days, under this rule as it read prior to amendment effective July 1, 1989. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

Regardless of the time limits set by the trial court, plaintiff had no longer than 150 days after giving notice of appeal to file the appeal record with the appellate court; the 150-day time limit may be extended only by an appropriate appellate court. Roberts v. Roberts, 97 N.C. App. 319, 388 S.E.2d 164 (1990) (decided prior to 1989 amendment).

Order to Extend Time for Serving Record on Appeal Held Proper. — Although counsel for the State erred in calculating the initial filing date, the judge properly entered his ex parte order extending the time for serving the proposed record on appeal where the State complied with N.C.R.A.P., Rule 27(c)(1) by giving oral and written notice of its motion to extend time to serve the proposed record on appeal, and it complied with the initial 15-day time limit specified in subdivision (a) of this rule, and with the outside time limit of 150 days in which to file the settled record on appeal from the time of oral notice of appeal. State ex rel. Thornburg v. Currency in Amount of $52,029.00 in U.S. Currency, 324 N.C. 276, 378 S.E.2d 1 (1989) (decided prior to 1989 amendment).

Order Extending Time to Serve Record Ineffective. — Order dismissing a landlord's appeal in a summary ejectment proceeding was proper because the landlord failed to timely file the record on appeal as required by N.C. R. App. P. 12(a); because the landlord made only an oral motion to extend the time to serve the record after the time for service of the record had expired, the trial court lacked authority to grant the motion. Cadle Co. v. Buyna, 185 N.C. App. 148, 647 S.E.2d 461, 2007 N.C. App. LEXIS 1716 (2007).

Time of Docketing. — Pursuant to subsection (b) an appeal is docketed upon the time of filing the record on appeal. Watson v. Watson, 118 N.C. App. 534, 455 S.E.2d 866 (1995).

Sanctions Awarded for Multiple Errors. — Homeowners' attorney was ordered to pay double the printing costs of an appeal under N.C. R. App. P. 34(b) due to the violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5), which was substantial under N.C. R. App. P. 25, but not so gross as to warrant dismissal against an insurance agent.

Applied in Boone v. Fuller, 30 N.C. App. 107, 226 S.E.2d 191 (1976); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); State v. Crouch, 41 N.C. App. 612, 255 S.E.2d 192 (1979); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); In re Farmer, 52 N.C. App. 97, 277 S.E.2d 880 (1981); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981); Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988); Hale v. Leisure, 100 N.C. App. 163, 394 S.E.2d 665 (1990); In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004); S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1537 (Aug. 19, 2008).

Quoted in State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Stated in Coleman v. Arnette, 48 N.C. App. 733, 269 S.E.2d 755 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989); Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991)

Cited in State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983); In re Easement of Right of Way, 90 N.C. App. 303, 368 S.E.2d 639 (1988); Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988); Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988); Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — *The cases cited below were decided under former Rule 17, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 5, Rules of Practice in the Court of Appeals of North Carolina.*

This rule is mandatory, not directory, and must be uniformly enforced. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Rule May Not Be Ignored or Dispensed with. — Neither the judges, nor the solicitors, nor the attorneys, nor the parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Rule Determines Time for Docketing Record on Appeal. — The time for docketing the record on appeal in the Court of Appeals is determined by this rule and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

The case on appeal, and the countercase or exceptions, and the settlement of the case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Effect of Noncompliance. — Where defendant fails to docket the record on appeal within the time provided by this rule, the appeal is subject to dismissal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969); State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969); Laws v. Palmer, 4 N.C. App. 510, 167 S.E.2d 49 (1969); North Carolina State Bar v. Temple, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520, 25 L. Ed. 2d 820 (1970); Kurtz v. Allstate Ins. Co., 6 N.C. App. 625, 170 S.E.2d 496 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); Harrell v. Brinson, 7 N.C. App. 197, 171 S.E.2d 798 (1970); State v. Bocage, 8 N.C. App. 64, 173 S.E.2d 638 (1970); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970); State v. Daughtry, 8 N.C. App. 318, 174 S.E.2d 76 (1970); State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed in compliance with this rule, and there was no order extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for failure to comply with the rules. Young v. State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

Failure to Docket. — When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee is entitled, upon motion, to have the appeal docketed and dismissed. Rose v. Shaw, 105 N.C. 126, 10 S.E. 1055 (1890).

It is not discretionary with the Supreme Court to refuse to dismiss an appeal where appellant has failed to docket the case within the time required by this rule, but such refusal can only be based on sufficient legal excuse for the delay. Hewitt v. Beck, 152 N.C. 757, 67 S.E. 586 (1910); Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920).

An appeal from the conviction of a capital felony will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the rules of the Supreme Court regulating such matters, after an examination of the record of errors appearing on its face. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927); State v. Thomas, 195 N.C. 458, 142 S.E. 474 (1928); State v. Clyburn, 195 N.C. 618, 143 S.E. 129 (1928); State v. Newsome, 196 N.C. 16, 144 S.E. 300 (1928); State v. Sentell, 208 N.C. 140, 179 S.E. 456 (1935); State v. Day, 215 N.C. 566, 2 S.E.2d 569 (1939); State v. Mayes, 216 N.C. 542, 5 S.E.2d 722 (1939); State v. Moore, 216 N.C. 543, 5 S.E.2d 719 (1939); State v. Mitchell, 216 N.C. 544, 5 S.E.2d 723 (1939); State v. Young, 216 N.C. 626, 5 S.E.2d 847 (1939); State v. Morrow, 220 N.C. 441, 17 S.E.2d 507 (1941); State v. Blue, 221 N.C. 36, 18 S.E.2d 697 (1942); State v. Wilfong, 222 N.C. 746, 24 S.E.2d 629 (1943). See State v. Alexander, 224 N.C. 478, 31 S.E.2d 357 (1944); State v. Taylor, 224 N.C. 479, 31 S.E.2d 367 (1944); State v. Buchanan, 224 N.C. 626, 31 S.E.2d 774 (1944); State v. Brooks, 224 N.C. 627, 31 S.E.2d 754 (1944).

Extension of Time for Filing. — To avoid dismissal, the appellant must get his appeal docketed within time, but the Supreme Court may, in its discretion, grant further time for filing the record if appellant filed the record proper in time and then moves for certiorari, showing delay was not attributable to him. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Extension of Time for Docketing Record. — The trial tribunal, upon motion by appellant, and upon a finding of good cause therefor, may enter an order extending the time for docketing the record on appeal in the Court of Appeals. However, this cannot be accomplished by an order allowing additional time to serve case on appeal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

An extension of time to docket the record on appeal cannot be accomplished by an extension of time to serve the case on appeal. Kurtz v. Allstate Ins. Co., 6 N.C. App. 625, 170 S.E.2d 496 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970); State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Appellee Must Obey Rules. — A motion to dismiss an appeal upon the ground that the appellant did not cause the same to be docketed in accordance with this rule will not be granted where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the rule must himself observe it. Barbee v. Green, 91 N.C. 158 (1884).

When Motion to Dismiss May Be Made. — A motion to docket and dismiss an appeal may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term. In re Burwell's Will, 123 N.C. 125, 31 S.E. 382 (1898).

A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of court to which the appeal is returnable, and before the case is docketed. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911).

A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed. Worth v. City of Wilmington, 131 N.C. 532, 42 S.E. 964 (1902).

When Motion Allowed in Capital Case. — In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the court, the motion of the Attorney General to docket and dismiss, under this rule, is allowed. State v. Poole, 223 N.C. 394, 26 S.E.2d 858 (1943).

Where appellant did not docket the appeal or file transcript of the record on appeal within the time allowed, and failed to comply with mandatory rules of practice in the Supreme Court, the motion of the Attorney General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to disclose error. State v. Scriven, 232 N.C. 198, 59 S.E.2d 428 (1950). See State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

Where defendant fails to file statement of case on appeal or apply for writ of certiorari within the time allowed, the appeal will be dismissed on motion of the Attorney General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. State v. Garner, 230 N.C. 66, 51 S.E.2d 895 (1949); State v. Lewis, 230 N.C. 539, 53 S.E.2d 528 (1949).

Where a defendant convicted of a capital felony fails to file case on appeal in the superior court, the motion of the Attorney General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. State v. Nelson, 226 N.C. 529, 39 S.E.2d 391 (1946).

Appellant Not Entitled to Notice of Dismissal Motion. — An appellee entitled to move for the dismissal of an appeal because of appellants' failure to file transcript of record within the required time, is not required to give appellants notice of such motion. Johnston v. Whitehead, 109 N.C. 207, 13 S.E. 731 (1891); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Duty of Clerk Where Judgment Stayed But Appeal Not Docketed. — Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed, the clerk of the superior court wherein the case is tried should certify the facts to the Attorney General, to the end that he may move to docket and dismiss the appeal under this rule. State v. Watson, 208 N.C. 70, 179 S.E. 455 (1935).

Case on Appeal Unnecessary. — A motion to docket and dismiss an appeal will be allowed where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal. S.R. Fowle & Son v. Mitchell, 149 N.C. 581, 62 S.E. 311 (1908).

Agreement of Parties. — Where the parties have entered into a written agreement or an oral agreement not denied, that the appellee will not move to dismiss under this rule the Supreme Court will uphold the agreement and a motion to dismiss will be denied. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917).

When Appellant Has Abandoned Appeal. — When it appears from the record on file in the Supreme Court that the appellant has abandoned his appeal below, no motion to dismiss is necessary, and it will therefore be disallowed. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911).

Withdrawal of Appeal. — Defendant's motion to withdraw his appeal may be allowed by the Court of Appeals in its discretion. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

The superior court had no authority to permit or allow a defendant to withdraw an appeal to the Court of Appeals after the appeal is docketed here. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Motion to Reinstate. — Where an appeal has been dismissed under this rule, the appellant, applying for a reinstatement upon the ground that the trial judge has failed to settle the case, must show that he has had his record proper docketed in the Supreme Court, as required by the rules, or his motion will be denied. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912).

A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed. McDowell v. J. S. Kent Co., 153 N.C. 555, 69 S.E. 626 (1910).

Where an appeal has been dismissed for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial judge on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. Parker v. Southern Ry., 121 N.C. 501, 28 S.E. 347 (1897).

A brief entitled "Reply to Argument of Appellees" that was filed with the clerk of the Court of Appeals after argument in that court was not considered where appellant failed to obtain leave of the court as required by this rule. Roughton v. Jim Walter Corp., 8 N.C. App. 325, 174 S.E.2d 389 (1970).

Rule 13. Filing and service of briefs.

(a) *Time for filing and service of briefs.*

(1) *Cases other than death penalty cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

(2) *Death penalty cases.* Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant in a criminal appeal which includes a sentence of death shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of a defendant-appellant's brief. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (3) shall be filed and served within 21 days after service of the brief of the State-appellee.

(b) *Copies reproduced by clerk.* A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) *Consequence of failure to file and serve briefs.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court. (Adopted June 13, 1975; Amended October 7, 1980 — 13(a) — effective January 1, 1981; Amended November 27, 1984 — 13(a) and (b) — effective February 1, 1985; Amended June 30, 1988 — 13(a) — effective September 1, 1988; Amended June 8, 1989 — 13(a) — effective September 1, 1989; Amended May 1, 2003 — 13(a)(1), (b); Amended August 23, 2005 — 13(a)(1), (2) — effective September 1, 2005.)

CASE NOTES

Failure to File Brief. — Borrower's failure to file a brief with the appellate court violated N.C. R. App. P. 13 and N.C. R. App. P. 28(b), and as a result, the appeal was dismissed. Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

In a custody proceeding, a parent's appeal was dismissed because the parent's brief was not filed within 30 days after the record on appeal was mailed and no extension had been sought. Simmons v. Arriola, 160 N.C. App. 671, 586 S.E.2d 809, 2003 N.C. App. LEXIS 1911 (2003).

Dismissal of appeal was required where additional time to file appellate brief was sought and granted, but appellants did not file that brief until 23 days after it was due — which was one week after the opposing parties filed a motion to dismiss the appeal; appellants' egregious violation of N.C. R. App. P. 13, together with other appellate rules violations and the lack of any significant issues or errors requiring appellate review, which would justify a waiver of their violations, required dismissal. Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Applied in In re Revocation of License to Operate Motor Vehicle of Church, 29 N.C. App. 511, 224 S.E.2d 697 (1976); Burris v. Shumate, 77 N.C. App. 209, 334 S.E.2d 514 (1985); Carolina Place Joint Venture v. Flamers Charburgers, Inc., 145 N.C. App. 691, 552 S.E.2d 647, 2001 N.C. App. LEXIS 731 (2001); Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005); In re L.B., 181 N.C. App. 174, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007).

Stated in Aetna Cas. & Sur. Co. v. Continental Ins. Co., 110 N.C. App. 278, 429 S.E.2d 406 (1993)

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); Davis v. City of Archdale, 81 N.C. App. 505, 344 S.E.2d 369 (1986); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239 (1987); Fox v. Barrett, 90 N.C. App. 135, 367 S.E.2d 412 (1988); State v. Ellis, 100 N.C. App. 591, 397 S.E.2d 518 (1990); Alberti v. Manufactured Homes, Inc., 329 N.C. 727, 407 S.E.2d 819 (1991); United States Fid. & Guar. Co. v. Scott, 124 N.C. App. 224, 476 S.E.2d 404 (1996); Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997); State v. Dayberry, 131 N.C. App. 406, 507 S.E.2d 587 (1998); Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247, 2002 N.C. App. LEXIS 1253, cert. denied, 356 N.C. 615, 575 S.E.2d 26 (2002).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14. Appeals of right from Court of Appeals to Supreme Court under G.S. 7A-30.

(a) *Notice of appeal; filing and service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chairman of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) *Content of notice of appeal.*

(1) *Appeal based upon dissent in court of appeals.* In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is

asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) *Appeal presenting constitutional question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction.

(d) *Briefs.*

(1) *Filing and service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

(2) *Failure to file or serve.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court. (Adopted June 13, 1975; Amended January 31, 1977 — 14(d)(1); Amended October 7, 1980 — 14(d)(1) — effective January 1, 1981; Amended November 27, 1984 — 14(a), (b), (d) — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; Amended June 30, 1988 — 14(b)(2), (d)(1) — effective September 1, 1988; Amended June 8, 1989 — 14(d)(1) — effective September 1, 1989; Amended March 6, 1997 — 14(a) — effective July 1, 1997; Amended May 1, 2003 — 14(c)(2), (d)(1); Amended August 23, 2005 — 14(d)(1) — effective September 1, 2005.)

Editor's note. — The 1981 amendment to Rule 28 eliminated the right to incorporate by reference any argument contained in a brief filed in the Court of Appeals, which was formerly contained in subsection (d) of that rule.

CASE NOTES

Applied in Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Beck v. Carolina Power & Light Co., 307 N.C. 267, 297 S.E.2d 397 (1982); Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989); Squire v. Pol, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37246 (W.D.N.C. Sept. 13, 2005).

Stated in State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981)

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); G & S Bus. Servs., Inc. v. Fast Fare, Inc., 94 N.C. App. 483, 380 S.E.2d 792 (1989); Greer v. Beck, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19534 (M.D.N.C. Mar. 8, 2002); Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006); Dodd v. Auto. Ins. Co. of Hartford, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 12318 (W.D.N.C. Feb. 21, 2007).

Rule 15. Discretionary review on certification by Supreme Court under G.S. 7A-31.

(a) *Petition of party.* Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap. 1C.

(b) *Same; Filing and service.* A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) *Same; Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response. A motion for extension of time is not permitted.

(e) *Certification by Supreme Court; How determined and ordered.*

(1) *On petition of a party.* The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) *On initiative of the court.* The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) *Orders; Filing and service.* Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) *Record on appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note *de novo* any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Filing; Copies.* When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) *Filing and service of briefs.*

(1) *Cases certified before determination by Court of Appeals.* When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) *Cases certified for review of Court of Appeals determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

(3) *Copies.* A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) *Failure to file or serve.* If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) *Discretionary review of interlocutory orders.* An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) *Appellant, appellee defined.* As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant"

means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15. (Adopted June 13, 1975; Amended October 7, 1980 — 15(g)(2) — effective January 1, 1981; Amended November 18, 1981 — 15(a); Amended June 30, 1988 — 15(a), (c), (d), (g)(2) — effective September 1, 1988; Amended December 8, 1988 — 15(i)(2) — effective January 1, 1989; Amended June 8, 1989 — 15(g)(2) — effective September 1, 1989; Amended March 6, 1997 — 15(b) — effective July 1, 1997; Amended October 18, 2001 — 15(d) — effective October 31, 2001; Amended August 23, 2005 — 15(g)(2) — effective September 1, 2005.)

CASE NOTES

Rules Similar to United States Supreme Court's. — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683 (1991).

Improvidently Allowed. — Discretionary review, pursuant to G.S. 7A-31, of three protective orders was improvidently allowed; under N.C. R. App. P. 15(b), a husband's petition for review of those orders was not timely filed. Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

Applied in Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994); Watson v. Beck, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 16831 (M.D.N.C. Sept. 15, 2003); Squire v. Pol, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37246 (W.D.N.C. Sept. 13, 2005).

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986); Pearson v. Martin, 319 N.C. 449, 355 S.E.2d 496 (1987); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990); Greer v. Beck, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19534 (M.D.N.C. Mar. 8, 2002); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006); Wake Cares, Inc. v. Wake County Bd. of Educ., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 872 (May 6, 2008).

Rule 16. Scope of review of decisions of Court of Appeals.

(a) *How determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) *Scope of review in appeal based solely upon dissent.* Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) *Appellant, appellee defined.* As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16. (Adopted June 13, 1975; Amended November 3, 1983 — 16(a) and (b) — applicable to all notices of appeal filed in the Supreme Court on and after January 1, 1984; Amended June 30, 1988 — 16(a) and (b) — effective September 1, 1988; Amended July 26, 1990 — 16(a) — effective October 1, 1990.)

Legal Periodicals. — For 1984 survey of appellate procedure, "Appellate Rule 16(b) and New Requirements for Appeals of Right," see 63 N.C.L. Rev. 1074 (1985).

For article, "Appellate Rule 16(b): The Scope of Review in an Appeal Based Solely upon a Dissent in the Court of Appeals," see 24 N.C. Cent. L.J. 1 (2001).

For a brief discussion of the scope of review under this section, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Scope of Review Limited in Appeals of Right Based on Dissent. — The intent of subsection (b) of this rule, effective with notices of appeal filed in the Supreme Court on and after January 1, 1984, is to further ensure that in appeals of right based solely upon dissent, review by the Supreme Court shall be limited to those questions on which there was division in the intermediate appellate court. Such review has never been intended for claims on which that court has rendered unanimous decisions. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

Where a plaintiff's appeal is based solely on the existence of a dissent in the Court of Appeals, the scope of the Supreme Court's review on the plaintiff's appeal is limited to the issues raised in that dissent. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

On appeal to the Supreme Court pursuant to G.S. 7A-30(2) by defendant from a decision of the Court of Appeals, one judge dissenting, in which a majority of the panel found no error in defendant's convictions of felonious breaking and felonious larceny, where the dissent in the Court of Appeals disagreed only with the majority's treatment of the second question presented to that court, and defendant did not petition the Supreme Court for discretionary review of the other questions, only the second question was properly before the Supreme Court for review, notwithstanding defendant's attempt to bring forward other questions in his brief. State v. Reilly, 313 N.C. 499, 329 S.E.2d 381 (1985), considering also, however, the question of the sufficiency of the evidence on the question of guilt, in order to prevent manifest injustice.

Under G.S. 7A-30(2), only the issue raised in the dissent is properly before the Supreme Court for review. This rule defines the permissible scope of review in such cases. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986), addressing, nevertheless, additional issues which arise frequently in the administration of estates and must often be determined by the Department of Revenue under the court's residual power or authority under N.C.R.A.P., Rule 2.

When an appeal is taken pursuant to G.S. 7A-30(2), the scope of the Supreme Court's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from the opinion of the majority. State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987).

Where appeal was before the Supreme Court pursuant to G.S. 7A-30(2), review was limited to the issues raised in dissent. Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990).

Supreme Court of North Carolina's review of a decision of the Court of Appeals of North Carolina was limited solely to determining whether a trial court violated defendant's Sixth Amendment right to jury trial because the question specifically set out in the dissenting opinion in the Court of Appeals was that defendant's Sixth Amendment right to a jury trial was not violated by the trial court in defendant's sentencing. State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

An insurer's reliance on a per curiam decision by the North Carolina Supreme Court to claim that the court erred, inter alia, in disregarding a provision in an insured's policy specifically excluding damage occurring as a result of a landslide, was misplaced because the per curiam decision, which reversed a decision of the North Carolina Court of Appeals for the reasons stated in the dissenting opinion, appeared limited to a review of the sufficiency of a factual basis presented to survive summary judgment, and neither the dissenting opinion nor the appellant's brief to the North Carolina Supreme Court in that case had specifically addressed the validity of the underlying exclusionary language at issue, which was required under N.C. R. App. P. 16(b) to put the issue before the North Carolina Supreme Court for review. Dodd v. Auto. Ins. Co. of Hartford, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 12318 (W.D.N.C. Feb. 21, 2007).

Pursuant to N.C. R. App. P. 16(b), the Supreme Court of North Carolina, in reviewing an appeal based upon a dissent, considered only those issues that were a point of dispute set out in the dissenting opinion of the Court of Appeals of North Carolina. Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 362 N.C. 269, 658 S.E.2d 918, 2008 N.C. LEXIS 337 (2008).

Because the sole ground for the State's appeal of right was a dissenting opinion, an appellate court had to confine its consideration to the two issues that formed the basis of the dissent. State Ex Rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. —, — S.E.2d —, 2008 N.C. LEXIS 687 (Aug. 27, 2008).

Issues Not Set Out in Dissent. — Where an appeal of right is taken to the Supreme Court based solely on a dissent in the Court of Appeals, and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before the court. Such appeals are subject to dismissal. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

Petitioners whose cases come before the Supreme Court on discretionary review are limited by this rule to those questions they have presented in their briefs to the Court of Appeals. Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986).

This rule does not limit the state's right of appeal to only the matters which are the basis of the dissent in the court of appeals. State v. Kaley, 343 N.C. 107, 468 S.E.2d 44 (1996).

Questions Must First Be Presented in Court of Appeals. — The potential scope of review by the Supreme Court is limited by the questions properly presented for first review in the Court of Appeals. The attempt to smuggle in new questions is not approved. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Only Decision of Court of Appeals Is Before Supreme Court for Review. — After there has been a determination by the Court of Appeals, review by the Supreme Court, whether by appeal of right or by discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before the Supreme Court for review. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Effect of Equally Divided Supreme Court. — Where one member of the Supreme Court does not participate in the consideration or decision of a case, and the remaining six justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed, the decision of the Court of Appeals is affirmed without becoming a precedent. Wayfaring Home, Inc. v. Ward, 301 N.C. 518, 272 S.E.2d 121 (1980); Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980).

Administrative Hearing Review. — Substantial evidence in the record supported an administrative law judge's findings and its dismissal of a day care's petition for a contested case hearing where the day care filed nothing in nearly six months following the filing of the petition, despite receiving several orders from the administrative law judge to file and serve prehearing statements and other responses to motions. Lincoln v. N.C. HHS, Nutrition Branch, 172 N.C. App. 567, 616 S.E.2d 622, 2005 N.C. App. LEXIS 1804 (2005).

Applied in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984); In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984); Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986); State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987); Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988); State v. Anderson, 322 N.C. 22, 366 S.E.2d 459 (1988); State v. Sturkie, 325 N.C. 225, 381 S.E.2d 462 (1989); Hill v. Bechtel, 336 N.C. 526, 444 S.E.2d 186 (1994); City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994); Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000); Mann Media, Inc. v. Randolph County Planning Bd., 356 N.C. 1, 565 S.E.2d 9, 2002 N.C. LEXIS 544 (2002); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); In re R.L.C., 361 N.C. 287, 643 S.E.2d 920, 2007 N.C. LEXIS 417 (2007); State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

Quoted in Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17 (1994).

Stated in State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985)

Cited in Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Colonial Pipeline v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); State v. Atkins, 311 N.C. 272, 316 S.E.2d 306 (1984); Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Forsyth County Bd. of Social Servs. v. Division of Social Servs., 317 N.C. 689, 346 S.E.2d 414 (1986); State v. Lilley, 318 N.C. 390, 348 S.E.2d 788 (1986); State v. Kimbrell, 320 N.C. 762, 360 S.E.2d 691 (1987); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 321 N.C. 260, 362 S.E.2d 273 (1987); United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988); Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468 (1988); McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988); State v. Stone, 362 N.C. 50, 653 S.E.2d 414, 2007 N.C. LEXIS 1228 (2007).

Rule 17. Appeal bond in appeals under G.S. 7A-30, 7A-31.

(a) *Appeal of right.* In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) *Discretionary review of Court of Appeals determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary review by Supreme Court before Court of Appeals determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of

Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in forma pauperis.* No undertakings for costs are required of a party appealing in forma pauperis. (Adopted June 13, 1975; Amended June 19, 1978 — effective July 1, 1978; Amended July 26, 1990 — 17(a) — effective October 1, 1990.)

Note to July 1, 1978 Amendment. — Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449, which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181, upon which Rule 7 was based. Chap. 711 became effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

Legal Periodicals. — For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

Rule 18. Taking appeal; Record on appeal — Composition and settlement.

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) *Time and method for taking appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as he deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) *Composition of record on appeal.* The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order or opinion appeal is taken, the session at which the judgment, order or opinion was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency, including a Form 44 for all cases which originate from the Industrial Commission, to be filed with the agency to present and define the matter for determination;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the

form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) assignments of error to the actions of the agency, set out as provided in Rule 10;

(11) a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, where appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal.

(d) *Settling the record on appeal.* The record on appeal may be settled by any of the following methods:

(1) *By agreement.* Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By appellee's approval of appellant's proposed record on appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in his request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By agreement, by operation of rule, or by court order after appellee's objection or amendment.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal; but shall be filed by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal" along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 18(b) or 18(c); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional

requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(S p____)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 18(b) or 18(c) were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, than that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have filed amendments, objections, or a proposed alternative record on appeal, may in writing request that the agency head convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the agency head in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further procedures.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) *Extensions of time.* The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c). (Adopted June 13, 1975; Amended June 21, 1977; Amended October 7, 1980 — 18(d)(3) — effective January 1, 1981; Amended February 27, 1985 — applicable to all appeals in which the notice of appeal is filed on or after March 15, 1985; Amended July 26, 1990 — 18(b)(3), (d)(1) and (d)(2) — effective October 1, 1990; Amended March 6, 1997 —18(c)(2), (c)(4) — effective July 1, 1997; Amended November 21, 1997 — 18(c)(11) — effective February 1, 1998; Amended May 6, 2004 — 18(c)(1), (d)(2), (d)(3) — effective May 12, 2004; January 25, 2007 — 18(d)(2); 18(d)(3), paras. 1, 4, 5; added 18(d)(3), paras. 2, 3, 8 — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Editor's note. — The order of the Supreme Court of February 27, 1985, which amended this rule and Rule 20 and deleted Rule 19, provided that inasmuch as the rules affected make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments of February 27, 1985, would be applicable to all appeals in which the notice of appeal was filed on or after March 15, 1985.

CASE NOTES

A party may not circumvent the manner in which appeals are taken under G.S. 105-345(a) by relying on subdivision (b)(2) of this rule or other state or federal rules of civil procedure; therefore, the appropriate analysis for the time for taking such appeal lies in G.S. 105-345, where the appealing party has 30 days after the entry of the final order or decision to file its notice of appeal and exceptions, not from a party's receipt of a copy of the final order. In re Gen. Tire, Inc., 102 N.C. App. 38, 401 S.E.2d 391 (1991).

Timeliness of an employer's appeal from a decision of the North Carolina Industrial Commission was governed by because G.S. 97-86 provided for the timing of an appeal from a decision of the Full Commission of the North Carolina Industrial Commission. Strezinski v. City of Greensboro, — N.C. App. —, 654 S.E.2d 263, 2007 N.C. App. LEXIS 2562 (2007).

Record on appeal was not settled until defendant signed a Stipulation and Settlement of the Record on Appeal. Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990), aff'd, 328 N.C. 327, 401 S.E.2d 366 (1991).

Applied in State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979); State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981); Paschall v. North Carolina Dep't of Cor., 88 N.C. App. 520, 364 S.E.2d 144 (1988); Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Crouse v. Flowers Baking Co., 123 N.C. App. 555, 473 S.E.2d 372 (1996).

Stated in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981)

Cited in Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987); Rowan Health Properties, Inc. v. North Carolina Dep't of Human Resources, 89 N.C. App. 285, 365 S.E.2d 635 (1988); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999); Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002); Lancaster v. Maple St. Homeowners Ass'n, 156 N.C. App. 429, 577 S.E.2d 365, 2003 N.C. App. LEXIS 194 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 272 (2003); Smythe v. Waffle House, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006); Faison & Gillespie v. Lorant, — N.C. App. —, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007); In re Advance Am., Cash Advance Ctrs. of N.C. Inc., — N.C. App. —, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

OPINIONS OF ATTORNEY GENERAL

Industrial Commission. — The only specific authorities conferred on the chairman of the Industrial Commission are to settle records on appeal, certify in forma pauperis appeals, set appeal bonds, and designate deputies to sit on the Full Commission when necessary. See opinion of Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990).

Rule 19. [Reserved].

Editor's note. — Rule 19 was repealed by order of February 27, 1985, effective March 15, 1985.

The order of the Supreme Court of February 27, 1985, which repealed this section and amended Rules 18 and 20, provided that inasmuch as these rules make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments adopted February 27, 1985, would be applicable to all appeals in which the notice of appeal was filed on or after March 15, 1985.

Rule 20. Miscellaneous provisions of law governing in agency appeals.

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure. (Adopted June 13, 1975; Amended February 27, 1985 — effective March 15, 1985.)

Editor's note. — The order of the Supreme Court of February 27, 1985, which amended this rule and Rule 18 and repealed Rule 19, provided that inasmuch as the rules affected make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments of February 27, 1985, would be applicable to all appeals in which the notice of appeal was filed on or after March 15, 1985.

CASE NOTES

Applied in North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

ARTICLE V. EXTRAORDINARY WRITS

Rule 21. Certiorari.

(a) *Scope of the writ.*

(1) *Review of the judgments and orders of trial tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the judgments and orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) *Petition for writ; To which appellate court addressed.* Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) *Same; Filing and service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) *Response; Determination by court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Petition for writ in post conviction matters; To which appellate court addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the Court. In the event the petition is without merit, it shall be denied by the Court.

(f) *Petition for writ in post conviction matters — Death penalty cases.* A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition. (Adopted June 13, 1975; Amended November 18, 1981 — 21(a) and (e); Amended November 27, 1984 — 21(a) — effective February 1, 1985; Amended September 3, 1987 — 21(e) — effective for all judgments of the trial division entered on and after July 24, 1987; Amended December 8, 1988 — 21(f) — applicable to all cases in which the superior court order is entered on or after July 1, 1989; Amended March 6, 1997 — 21(c), (f) — effective July 1, 1997; Amended August 15, 2002 — 21(e).)

Cross References. — As to certiorari generally, see G.S. 1-269 and notes thereto.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Construction. — In considering N.C. R. App. P. 21 and G.S. 15A-1444, the appellate rules prevail over conflicting statutes. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

Rules Similar to United States Supreme Court's. — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 111 S. Ct. 693, 112 L. Ed. 2d 683 (1991).

Writ of Certiorari Limited. — While G.S. 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, the appellate court is limited to issuing a writ of certiorari in appropriate circumstances to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief, N.C. R. App. P. 21(a)(1). State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Court of Appeals of North Carolina lacked jurisdiction to hear the State Bar of North Carolina's appeal of a grant of summary judgment to an attorney in a disciplinary proceeding because G.S. 84-28(h) provided no appeal from a final order that did not impose discipline and in the instant case, no discipline had been imposed; further, certiorari was inappropriate because the case did not fall within the rubric of N.C. R. App. P. 21(a)(1) and the court declined to suspend the requirement of Rule 21(a)(1) using N.C. R. App. P. 2. N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

The Court of Appeals of North Carolina may only issue a writ of certiorari to review judgments and orders of trial tribunals in instances where: (1) the right to prosecute an appeal has been lost by failure to take timely action; (2) no right of appeal from an interlocutory order exists; or (3) for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief. N.C. R. App. P. 21(a)(1). State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830, 2003 N.C. App. LEXIS 1767 (2003).

When the North Carolina Industrial Commission exceeded its authority by finding a prior version of G.S. 97-26(b) unconstitutional, the question of the statute's constitutionality was not properly presented to an appellate court on appeal of the Commission's decision because, among other reasons, no party filed a certiorari petition, pursuant to N.C. R. App. P. 21, nor did a party seek suspension of the Rules of Appellate Procedure, under N.C. R. App. P. 2, nor did the Commission certify the question to the appellate court, under G.S. 97-86. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Since none of the circumstances set out in G.S. 15A-1444(e) applied to defendant's guilty plea, the court was without authority under N.C. R. App. P.21 to issue a writ of certiorari. State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006), cert. denied, — N.C. —, 631 S.E.2d 141 (2006).

When, after defendant was convicted of possession of cocaine and having attained the status of being an habitual felon, the trial court, sua sponte, granted a motion for appropriate relief, vacating the habitual felon conviction, and reducing defendant's sentence, finding the sentence violated defendant's rights under the Eighth and Fourteenth Amendments, the State's petition for a writ of certiorari did not satisfy the requirements of N.C. R. App. P. 21 as (1) the right to prosecute an appeal was not lost by failure to take timely action, (2) it was not shown that no right of appeal from an interlocutory order existed, and (3) review pursuant to G.S. 15A-1422(c)(3) of an order denying a motion for appropriate relief was not involved, nor was it appropriate for the appellate court to suspend the rules of appellate procedure, under N.C. R. App. P. 2. State v. Starkey, 177 N.C. App. 264, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

In a termination of parental rights proceeding, a father was not entitled to a writ of certiorari because he failed to serve a copy of the notice of appeal on a county department of social services as required under N.C. R. App. P. 3 and N.C. R. App. P. 26, and the provisions which would permit review under N.C. R. App. P. 21(a)(1) did not apply. In re A.C., — N.C. App. —, 643 S.E.2d 470, 2007 N.C. App. LEXIS 747 (2007).

Habeas Corpus Proceedings for Prisoners Under Sentence of Death or Life Imprisonment. — By analogy, subsection (b) of this rule and G.S. 7A-27(a) and repealed G.S. 15-180.2 were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977), decided prior to adoption of subsection (f) of this rule.

The Court of Appeals has authority to issue writ of certiorari to review trial court order "when no right of appeal from an interlocutory order exists." But where authority was exercised by another panel of the court with respect to the matters presented, its grant of certiorari is the law of the case and cannot be overruled by any panel of the Court of Appeals. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

Construing Rules 3, 27(c) and 21(a)(1) together, the court concluded that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Anderson v. Hollifield, 345 N.C. 480, 480 S.E.2d 661 (1997).

Although the trial court exceeded its authority and violated N.C.R. App. P. 27(c) when it entered an order on 12 September 1996 allowing defendant to appeal as of right from the judgments and sentences imposed on 16 June 1994, the Court of Appeals chose to suspend the Rules pursuant to subdivision (a)(1) of this rule and treat the otherwise untimely appeal as before them on a writ of certiorari. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

The Court May Treat Appeal as Writ of Certiorari. — Although the defendant, who was stripped of her jail credit for time in home detention, could not appeal under G.S. 15A-1444, the court elected to treat her appeal as a petition for a writ of certiorari and granted it, pursuant to this section. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

Patient substantially complied with N.C. R. App. P. 7 where he filed a corrected notice of appeal with the correct case number, the notice of appeal identified the sole issue on appeal, and the trial court ordered the patient to comply with the rules regarding service of the transcript within two days; the appellate court refused to disturb the trial court's order on appeal and to the extent that the errors cast any doubt on the appellate court's jurisdiction, it exercised its discretion and granted certiorari to review the patient's claims on their merits pursuant to N.C. R. App. P. 21. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

N.C. R. App. P. 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, it was not appropriate to treat the patient's appeal as a petition for a writ of certiorari because the patient's brief did not comply with the requirements of N.C. R. App. P. 21. Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

Although a guardian ad litem's motion to dismiss a mother's appeal of an order adjudicating her son neglected was granted, the court of appeals found that pursuant to N.C. R. App. P. 21(a)(1), the case was an appropriate one in which to exercise its discretion and allow the mother's petition for writ of certiorari because although the order involved only an initial adjudication of neglect, the disposition could be read as ordering Department of Social Services to cease reunification efforts with the mother, which was effectively, a termination of the mother's parental rights less than three months after the son's birth; review pursuant to a writ of certiorari was appropriate given the serious consequences of the adjudication order, the lack of any evidence that the mother contributed to the error depriving the appellate court of jurisdiction, and the need to resolve the ambiguity in the order's disposition. In re A.S., — N.C. App. —, 661 S.E.2d 313, 2008 N.C. App. LEXIS 1099 (2008).

Notice of appeal was ineffective as to an insurer, and was not treated as a petition for a writ of certiorari under N.C. R. App. P. 21(a)(1), in part, due to the homeowners' violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5).

Appellate Court Treated Uncertified Interlocutory Appeal as Petition for Writ of Certiorari. — Although appellants, trusts and trustees, failed to show that the trial court's antisuit injunction affected a substantial right that would be lost without immediate interlocutory review, in the interest of the administration of justice, the appellate court exercised its discretionary authority under N.C. R. App. P. 21(a) to treat the appeal as a writ of certiorari and address the merits of the appeal. Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002).

When a judgment setting aside an execution sale was not properly appealed because not all claims against all parties had been resolved and the trial court did not certify its order for immediate appeal under G.S. 1A-1, N.C. R. Civ. P. 54, nor was it shown that a substantial right was at issue, the appellate court elected to exercise its authority to review appellants' arguments pursuant to a grant of certiorari. Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

Interlocutory Appeal of Denial of Motion to Dismiss Reviewed Pursuant to Writ of Certiorari. — Motion to dismiss an interlocutory appeal of the denial of healthcare providers' motion to dismiss an administrator's wrongful death complaint was denied because the healthcare providers' petition for a writ of certiorari was granted. Reid v. Cole, — N.C. App. —, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. State v. McCoy, 171 N.C. App. 636, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

No Right to Appeal from Extension Orders. — On appeal from an order revoking probation, defendant did not waive his right to appeal because he had no right to appeal the extension orders. State v. Satanek, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 997 (May 20, 2008).

Appellant Did Not Show Grounds for Waiving Requirements of Rule. — Appellant was not entitled to certiorari review of a trial court's interlocutory order denying its motion to dismiss for lack of subject matter jurisdiction, as it did not comply with the requirements for a petition for writ of certiorari set out in N.C. R. App. P. 21(c), and did not point to any "manifest injustice" or compelling need "to expedite decision in the public interest," as required for suspension of the requirements of Rule 21 under N.C. R. App. P. 2. Burton v. Phoenix Fabricators & Erectors, Inc., 185 N.C. App. 303, 648 S.E.2d 235, 2007 N.C. App. LEXIS 1741 (2007).

Where the determination of the correctness of the judge's denial of plaintiffs' motion to amend was necessary to decide an appeal from a Rule 12(b)(6) dismissal, which motion was properly before the Court of Appeals, the court would treat the appeal of the denial of the motion to amend as a petition for certiorari under subdivision (a)(1) of this rule. Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269, cert. denied, 332 N.C. 345, 421 S.E.2d 148 (1992).

A writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where the right of appeal has been lost because of failure to take timely action or where no right to appeal from an interlocutory order exists. Graham v. Rogers, 121 N.C. App. 460, 466 S.E.2d 290 (1996).

Timeliness. — Where defendant did not move to withdraw a guilty plea pursuant to G.S. 15A-1024, did not give timely notice of appeal pursuant to G.S. 15A-1444, and did not petition for writ of certiorari pursuant G.S.15A-1444(e) and N.C. R. App. P. 21(c), any challenge to the original judgment was waived; since defendant waived the right to appeal by consenting to an initial extension of probation under G.S. 15A-1342, the trial court was entitled to revoke defendant's probation and activate the sentence under G.S. 15A-1344(d) after a second violation of probation. State v. Rush, 158 N.C. App. 738, 582 S.E.2d 37, 2003 N.C. App. LEXIS 1255 (2003).

Failure to Petition for Certiorari. — Once defendants' right to appeal from an order was lost for failure to timely perfect that appeal, the appropriate action would have been to petition the court of appeals for certiorari; because defendants had failed to do so, their argument was dismissed. N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Absence of Dismissal Does Not Necessarily Imply That Petition Was Timely. — It did not necessarily follow from the fact that a petition for certiorari was not dismissed that such petition was not untimely, as it was possible that the court might have opted to excuse the untimeliness as a matter of state law in order to rule on the merits. Allen v. Mitchell, 276 F.3d 183, 2001 U.S. App. LEXIS 27233 (4th Cir. 2001).

Motion to Dismiss Appeal Denied. — Court denied an estate administrator's motion to dismiss the healthcare providers' appeal from a denial of their motion to dismiss a wrongful death complaint because, even if the notice of appeal was untimely filed, the healthcare providers petitioned for a writ of certiorari that was granted. Reid v. Cole, — N.C. App. —, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

The court refused to grant a writ pursuant to this section where the Attorney General's appeal was interlocutory and where he had no right to appeal in the first place from the court's denial of his challenge to class action attorneys' fees. Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000).

The appellate court was without authority to issue remedial writs or grant a writ of certiorari in a county's appeal of juvenile court's orders requiring the county to pay for a juvenile delinquent's residential substance abuse and mental treatment; the County had not failed to take timely action, was not attempting to appeal from an interlocutory order, and was not seeking review pursuant to G.S. 15A-1422(c)(3) as was required by N.C. R. App. P. 21(a)(1). In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002), cert. denied, 356 N.C. 162, 568 S.E.2d 187 (2002).

No Authority to Review Trial Court's Denial of Defendant's Motion For a Writ of Habeas Corpus, Motion to Dismiss, or Denial of a Probable Cause Hearing. — Although defendant specifically conditioned his entire plea agreement on appellate review, defendant's right to appeal was limited to the motion to suppress evidence and did not provide for review of the other motions because they were not listed under N.C. R. App. P. 21; since defendant was entitled to the benefit of his bargain, his guilty plea was vacated and remanded, which placed defendant back in the position he was in before striking the illegal bargain to appeal issues not properly presented on appeal from his guilty plea. State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5, cert. granted, 357 N.C. 660, 589 S.E.2d 882 (2003).

Where denial of Rule 60(b) motion was in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21 the appeal was treated as a writ of certiorari. Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. State v. Jamerson, 161 N.C. App. 527, 588 S.E.2d 545, 2003 N.C. App. LEXIS 2188 (2003).

In a termination of parental rights case, even though a notice of appeal did not comply with G.S. 7B-1113 and N.C. R. App. P. 3, the court treated the petition as a request for a writ of certiorari because a mistake regarding the order appealed from was merely a scrivener's error. In re I.S., 170 N.C. App. 78, 611 S.E.2d 467, 2005 N.C. App. LEXIS 888 (2005).

Applied in State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981); Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982); Latch v. Latch, 63 N.C. App. 498, 305 S.E.2d 564 (1983); Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983); Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984); Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984); Coleman v. Interstate Cas. Ins. Co., 84 N.C. App. 268, 352 S.E.2d 249 (1987); Phelps v. Duke Power Co., 86 N.C. App. 455, 358 S.E.2d 89 (1987); Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988); Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988); Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176 (1991); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993); State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Leandro v. State, 122 N.C. App. 1, 468 S.E.2d 543, 1996 N.C. App. LEXIS 201 (1996), cert. granted, 343 N.C. 512, 472 S.E.2d 11 (1996), aff'd in part and rev'd in part, 346 N.C. 336, 488 S.E.2d 249 (1997); Mullis v. Sechrest, 126 N.C. App. 91, 484 S.E.2d 423 (1997), cert. granted, 346 N.C. 548, 488 S.E.2d 806 (1997), rev'd on other grounds, 347 N.C. 548, 495 S.E.2d 721 (1998); State v. Sexton, 141 N.C. App. 344, 539 S.E.2d 675, 2000 N.C. App. LEXIS 1410 (2000); Guthrie v. Conroy, 152 N.C. App. 15, 567 S.E.2d 403, 2002 N.C. App. LEXIS 874 (2002); Sack v. N.C. State Univ., 155 N.C. App. 484, 574 S.E.2d 120, 2002 N.C. App. LEXIS 1610 (2002); Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 574 S.E.2d 490, 2002 N.C. App. LEXIS 1615 (2002); Sturdivant v. Andrews, 161 N.C. App. 177, 587 S.E.2d 510, 2003 N.C. App. LEXIS 2003 (2003), cert. denied, cert. dismissed, 358 N.C. 242, 594 S.E.2d 34 (2004); Advanced Wall Sys. v. Highlande Builders. LLC, 167 N.C. App. 630, 605 S.E.2d 728, 2004 N.C. App. LEXIS 2320 (2004); State v. Edgerson, 164 N.C. App. 712, 596 S.E.2d 351, 2004 N.C. App. LEXIS 1013 (2004); Zaliagiris v. Zaliagiris, 164 N.C. App. 602, 596 S.E.2d 285, 2004 N.C. App. LEXIS 1041 (2004), cert. denied, 359 N.C. 643, 617 S.E.2d 662 (2005); Brown v. City of Winston-Salem, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005); In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005); Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, — N.C. App. —, 652 S.E.2d 378, 2007 N.C. App. LEXIS 2269 (2007).

Quoted in Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979); Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

Stated in Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980)

Cited in Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980); Pendley v. Ayers, 45 N.C. App. 692, 263 S.E.2d 833 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Moore v. Moody, 304 N.C. 719, 285 S.E.2d 811 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); State v. Crews, 302 S.E.2d 457 (N.C. 1983); Rudder v. Lawton, 62 N.C. App. 277, 302 S.E.2d 487 (1983); State v. Milby, 305 S.E.2d 189 (N.C. 1983); State v. Pitts, 307 S.E.2d 172 (N.C. 1983); Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984); State v. Couch, 325 S.E.2d 634 (N.C. 1985); State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986); Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); Clugh v. Lakewood Manor, 102 N.C. App. 757, 403 S.E.2d 534 (1991); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997); United States v. Howard, 115 F.3d 1151 (4th Cir. 1997); Ruff v. Parex, Inc., 131 N.C. App. 534, 508 S.E.2d 524 (1998); Lee v. Mutual Cmty. Sav. Bank, 136 N.C. App. 808, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157, 2000 N.C. App. LEXIS 1298 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001); Gibson v. Mena, 144 N.C. App. 125, 548 S.E.2d 745, 2001 N.C. App. LEXIS 332 (2001); State v. Dickson, 151 N.C. App. 136, 564 S.E.2d 640, 2002 N.C. App. LEXIS 654

(2002); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002); Davis v. N.C. Dep't of Crime Control & Pub. Safety, 151 N.C. App. 513, 565 S.E.2d 716, 2002 N.C. App. LEXIS 777 (2002); Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002); Williams v. Poland, 154 N.C. App. 709, 573 S.E.2d 230, 2002 N.C. App. LEXIS 1538 (2002); Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002); State v. Nance, 155 N.C. App. 773, 574 S.E.2d 692, 2003 N.C. App. LEXIS 21 (2003); In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003); State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003); Fowler v. Worsley, 158 N.C. App. 128, 580 S.E.2d 74, 2003 N.C. App. LEXIS 946 (2003); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., 185 N.C. App. 1, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007); Park East Sales, LLC v. Clark-Langley, Inc., — N.C. App. —, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. *— The cases cited below were decided under former Rule 34, Rules of Practice in the Supreme Court of North Carolina*

Rule Strictly Applied. — Failure to comply strictly with the regulations contained in this rule will result in a dismissal. In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964).

When Certiorari Should Be Applied for. — Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not at fault, he should file a transcript of the record proper and move for a certiorari for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917); Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922).

Further Time Not Matter of Right. — Where the record of a case on appeal is not docketed in the Supreme Court at the time required, it will be dismissed, but the court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a certiorari, showing that the delay was not attributable to himself. State ex rel. Mills v. National Sur. Co., 192 N.C. 52, 133 S.E. 172 (1926); Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

Effect of Agreement for Extension of Time. — Where the parties have agreed upon an extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move the Supreme Court for a certiorari upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. Baker v. Hare, 192 N.C. 788, 136 S.E. 113 (1926).

Legal Excuse Decided by Supreme Court. — Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a certiorari under the rule. State v. Johnson, 183 N.C. 730, 110 S.E. 782 (1922).

Question of Laches May Be Heard. — Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon. Stone v. Ledbetter, 191 N.C. 777, 133 S.E. 162 (1926).

Motion Too Late After Argument. — Where the plaintiff's motion for a certiorari was disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case, the plaintiff should again move the court for a writ before the call of the district to which the case belonged, and it comes too late after argument of the case. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912).

Motion Denied After Appeal Dismissed. — A motion for a certiorari to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed. Cox v. Kinston Carolina R.R. & Lumber Co., 177 N.C. 227, 98 S.E. 704 (1919).

When Appellee Prevents Timely Docketing of Appeal. — Where the appellant is prevented from docketing his appeal within the time prescribed, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of certiorari to bring up the case. Briggs v. Jervis, 98 N.C. 454, 4 S.E. 631 (1887).

Appellant Must Docket All of Available Record. — When the appeal is not docketed at or before the time prescribed, the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit, as to why the entire record cannot be docketed and move at that time for a certiorari. If he fails to do so, the appellee has the right to docket the certificate and have the appeal dismissed. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912); State v. Johnson, 183 N.C. 730, 110 S.E. 782 (1922); Hardy v. Heath, 188 N.C. 271, 124 S.E. 564 (1924).

Appellant's motion for a writ of certiorari will be denied where the petition is not verified and no transcript of the record has been filed nor any good reason shown for failure to file it. Critz v. Sparger, 121 N.C. 283, 28 S.E. 365 (1897); Rothchild v. McNichol, 121 N.C. 284, 28 S.E. 364 (1897).

Filing of Original Papers Insufficient. — A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a certiorari; and the filing of the original papers, which should remain in the office of the superior court, is insufficient. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

When Case on Appeal Not Prepared. — Where a case and counter-case are served within the time as extended by agreement, but neither is accepted, appellant must immediately request a settlement, file the record proper, and sue out certiorari; otherwise appellee may move to docket and dismiss. Waynesville Transp. Co. v. Waynesville Lumber Co., 168 N.C. 60, 84 S.E. 54 (1915); Washam & Patterson Motor Co. v. Reep, 186 N.C. 509, 119 S.E. 821 (1923).

Certiorari Denied When Case Unsettled in Agreed Time. — Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and counter-case, etc., that will prevent its being docketed in the time, and consequently no case has been settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. Waller v. Dudley, 193 N.C. 354, 137 S.E. 149 (1927).

Appeal by Person Without Counsel Treated as Petition for Certiorari. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964).

Failure to Pay Clerk's Fees. — The failure of the clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from laches. Critz v. Sparger, 121 N.C. 283, 28 S.E. 365 (1897).

Extent of Waiver by Consent. — The parties to an appeal, without the consent of the court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a certiorari; but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. Murphy v. Carolina Elec. Co., 174 N.C. 782, 93 S.E. 456 (1917).

Application for Certiorari in Criminal Case. — Where the appellant in a criminal action has failed to have his case docketed in the time required by the rules in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a certiorari, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. State v. Harris, 199 N.C. 377, 154 S.E. 628 (1930).

Rule 22. Mandamus and prohibition.

(a) *Petition for writ; To which appellate court addressed.* Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) *Same; Filing and service; Content.* The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) *Response; Determination by court.* Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative. (Adopted June 13, 1975.)

CASE NOTES

Damages Not Recoverable. — Employee's only remedy to enforce a legal right created by an administrative order for an employer to reinstate the employee to a comparable position to that from which she was terminated was through a writ of mandamus; however, damages were not recoverable by the employee in an action for an award of a writ of mandamus as a matter of law. Holroyd v. Montgomery County, 167 N.C. App. 539, 606 S.E.2d 353, 2004 N.C. App. LEXIS 2379 (2004), cert. denied, — N.C. —, 613 S.E.2d 690 (2005).

The failure of the trial court to enter an order is not a matter to be addressed on an appeal from that inaction, but instead is to be addressed through a writ of mandamus filed with the Court of Appeals. Stevens v. Guzman, 140 N.C. App. 780, 538 S.E.2d 590, 2000 N.C. App. LEXIS 1273 (2000), cert. granted, 353 N.C. 397, 547 S.E.2d 437 (2001), review dismissed, 354 N.C. 214, 552 S.E.2d 140 (2001).

Challenge to Zoning Decision. — Pursuant to a petition for certiorari, G.S. 1-269, or a writ of mandamus, N.C. R App. P. Art. V, R. 22, a town board's denial of an application for subdivision approval was reversed, because the application met the technical requirements of an open space district, and denial based on lack of consistency with other developments was arbitrary and capricious. William Brewster Co. v. Town of Huntersville, 161 N.C. App. 132, 588 S.E.2d 16, 2003 N.C. App. LEXIS 1978 (2003).

Mandamus Proper Remedy for Violation of Time Limit. — In appeals from adjudicatory and dispositional orders in which the alleged error is the trial court's failure to adhere to statutory deadlines set forth in G.S. 7B-807(b) and 7B-905(a), such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself; thus, a new hearing serves no legitimate purpose, does not remedy the error, and only exacerbates the error and causes further delay. Instead, a party seeking recourse for such error should petition for writ of mandamus pursuant to N.C. R. App. P. 22(a). In re T.H.T., — N.C. —, — S.E.2d —, 2008 N.C. LEXIS 686 (Aug. 27, 2008).

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Rule 23. Supersedeas.

(a) *Pending review of trial tribunal judgments and orders.*

(1) *Application — When appropriate.* Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) *Same — How and to which appellate court made.* Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) *Pending review by Supreme Court of Court of Appeals decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) *Petition: Filing and service; Content.* The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) *Response; Determination by court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) *Temporary stay.* Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve. (Adopted June 13, 1975; Amended December 1980 — 23(b) — effective January 1, 1981; Amended March 6, 1997 — 23(e) — effective July 1, 1997.)

CASE NOTES

Quoted in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Cited in North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982); Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997); Southern Furn. Hdwe., Inc. v. Branch Banking & Trust Co., 136 N.C. App. 695, 526 S.E.2d 197, 2000 N.C. App. LEXIS 143 (2000); Buncombe County ex rel. Blair v. Jackson, 138 N.C. App. 284, 531 S.E.2d 240, 2000 N.C. App. LEXIS 608 (2000); Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002).

Resentencing Jurisdiction Absent Stay. — Trial court had jurisdiction to conduct a resentencing hearing where even though the defendant had petitioned for discretionary review under N.C. R. App. P. 15(a), nothing in the record indicated that he had sought a writ of supersedeas under N.C. R. App. P. 23(b) and absent such a stay, G.S. 15A-1452(c) required the superior court to comply with the appellate court's mandate. State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007).

Rule 24. Form of papers: Copies.

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies. (Adopted June 13, 1975.)

CASE NOTES

Applied in State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003).

Cited in Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997).

ARTICLE VI. GENERAL PROVISIONS

Rule 25. Penalties for failure to comply with rules.

(a) *Failure of appellant to take timely action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N. C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for failure to comply with rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals. (Adopted June 13, 1975; Amended December 8, 1988 — effective July 1, 1989; Amended March 6, 1997 — 25(a) — effective upon adoption March 6, 1997.)

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Construction of Second Sentence. — The title and first and third sentences of what is now subsection (a) of this rule clearly indicate that the motions described in the second sentence are only those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal. The commentary makes this interpretation even clearer. Notably absent from the commentary is any suggestion that the drafters intended to alter existing case law. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Taken out of context, the second sentence of what is now subsection (a) of this rule might provide the trial court with authority to dismiss interlocutory appeals. However, elementary principles of construction require that words and phrases be interpreted contextually and in harmony with the underlying purposes of the whole. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The court lacks discretion under this rule to permit the notice of appeal to be served after the expiration of 10 (now 30) days following the entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The Rules of Appellate Procedure are mandatory and a party's failure to comply with them frustrates the review process and subjects the party to sanctions, which may include dismissal of the appeal. Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

The trial division possesses limited authority to dismiss appeals under this rule. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Sanctions Imposed on Counsel. — Pursuant to N.C. R. App. P. 25 and N.C. R. App. P. 34, defendant's counsel was ordered to personally pay the costs of defendant's appeal because counsel's statement of facts was neither full, complete, nor non-argumentative, as required by N.C. R. App. P. 28. State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007).

Homeowners' attorney was ordered to pay double the printing costs of an appeal under N.C. R. App. P. 34(b) due to the violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5), which was substantial under N.C. R. App. P. 25, but not so gross as to warrant dismissal against an insurance agent. Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Plaintiff's counsel violated N.C. R. App. P. Rule 9(a)(1)(e) and 9(c)(3)(b) by failing to provide a transcript of the summary judgment hearing with the record on appeal, and also violated Rule 9(a)(1)(c) and 9(b)(3), N.C.R. App. P. 10(c)(1), and N.C. R. App. P. 28(b)(3), (5), and (6). Due to the number and nature of the rules violations, the appellate court considered them "gross" or "substantial" and taxed costs to plaintiff's attorney under N.C.R. App. P. 25 and 34. Azar v. Presbyterian Hosp., — N.C. App. —, 663 S.E.2d 450, 2008 N.C. App. LEXIS 1313 (2008).

Tolling of Time for Appeal. — In order for the exception to the 30-day requirement under N.C.R.A.P., Rule 3 to have any effect, when a party makes a motion enumerated in the rule, the opposing party's time for appeal is tolled. If the motion is withdrawn, the opposing party has 30 days from the withdrawal to file an appeal. Landingham Plumbing & Heating of N.C., Inc. v. Funnell, 102 N.C. App. 814, 403 S.E.2d 604 (1991).

Extension of Time to Serve Proposed Record on Appeal. — The Court of Appeals would not allow plaintiffs' appeal to go forward, where the court previously had denied the plaintiffs' motion to extend the time within which to serve its proposed record on appeal, and permitting appeal would be tantamount to a retroactive grant of such extension. Webb v. McKeel, 132 N.C. App. 816, 513 S.E.2d 596 (1999).

Order dismissing a landlord's appeal in a summary ejectment proceeding was proper because the landlord failed to timely file the record on appeal as required by N.C. R. App. P. 12(a); because the landlord made only an oral motion to extend the time to serve the record after the time for service of the record had expired, the trial court lacked authority to grant the motion. Cadle Co. v. Buyna, 185 N.C. App. 148, 647 S.E.2d 461, 2007 N.C. App. LEXIS 1716 (2007).

Party's Failure to Issue Proper Notice Authorized Dismissal of Appeal in Termination Case. — Although a mother's oral notice of appeal in a termination case was timely under N.C. R. App. P. 3, and thus the trial court used invalid grounds for its order dismissing the mother's appeal, because valid grounds existed on which the trial court's order could have been based, N.C. R. App. P. 25(a) authorized the trial court's actions, and the error was harmless. In re J.L., 184 N.C. App. 750, 646 S.E.2d 861, 2007 N.C. App. LEXIS 1598 (2007).

Failure to Comply May Result in Dismissal. — Plaintiff's appeal, which stated three separate errors in one assignment, failed to state the statutory authority exceeded, the procedure violated and the error of law committed, and failed to provide "clear and specific record or transcript references" relating to each alleged error, violated the Rules of Appellate Procedure, and would be dismissed. Bowen v. North Carolina Dep't of Health & Human Servs., 135 N.C. App. 122, 519 S.E.2d 60 (1999).

Motion by defendants, a human services agency, a social worker, and a guardian ad litem, to dismiss plaintiff daughter's appeal from an order of sanctions and attorney's fees against her, was granted where, despite several extensions, the daughter repeatedly failed to comply with the North Carolina Rules of Appellate Procedure regarding the timely filing of an acceptable appellate brief. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

Even assuming for the sake of argument that the husband's appellate brief did not strictly comply with the North Carolina Rules of Appellate Procedure, it was within the appellate court's discretion as to whether dismissal was warranted as a sanction; since the husband's alleged violations were not sufficiently egregious to warrant dismissal, the appellate court declined to dismiss the husband's appeal and would review the husband's remaining assignment of error. Cotter v. Cotter, 185 N.C. App. 511, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Sanctions Other than Dismissal. — Dismissal of an appeal for failure to comply with N.C. R. App. P. 10(c)(1), 28(b)(4), and 28(b)(6) was reversed and remanded because the intermediate appellate court should have considered whether sanctions other than dismissal would have been appropriate pursuant to N.C. R. App. P. 25(b) or 34. If the court concluded that dismissal was the appropriate sanction, it may then have considered whether the circumstances of the case justified invoking N.C. R. App. P. 2 to reach the merits of the appeal. Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

Dismissal Upheld. — Dismissal of an earlier attempt to appeal was proper where plaintiff failed to file and docket the record in the appellate court within 150 days. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C 113, 377 S.E.2d 234 (1989), decided prior to the amendments to the rules effective July 1, 1989.

Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

Court would not address the merits of plaintiff's argument regarding alleged fraudulent conveyances because she violated N.C.R.A.P., Rule 28(b)(5), in that she failed to reference in her brief the assignment of error supporting the argument. Therefore, this part of plaintiff's appeal would be dismissed. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Dismissal Denied. — Judge properly denied school board's motion to dismiss appeal under this rule; sufficient good cause was shown to allow appeal to proceed where judge stated that he had heard arguments and considered material in the case file, and the proposed record on appeal, among other things, presented no factual dispute and only two questions of law. State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989).

Appellate court denied a motion by defendants, a human services agency, a social worker, and a guardian ad litem, to dismiss, based on rules violations and mootness, an appeal by plaintiff daughter brought in her capacity as the personal representative of her father's estate, because (1) although the appeal was subject to dismissal due to violations of the North Caroline Rules of Appellate Procedure regarding the filing of the appeal and the brief, the appellate court chose to exercise its discretion to review the matter in light of the fact that the daughter only obtained one extension of time to file the brief, the brief was filed within four days of the deadline, and the daughter asserted and documented the reason for the delay, and (2) the appeal was not rendered moot by a prior decision that similar claims in a prior action were not plausible, as that decision addressed only sanctions and involved a less-detailed complaint. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

Subcontractor's violations of N.C. R. App. 28(b)(4) and (b)(6) and 10(c) were not so egregious as to require dismissal of the appeal, and the subcontractor was ordered to pay the costs of printing the appeal under N.C. R. App. P. 34(b), as N.C. R. App. P. 2 had to be applied cautiously; therefore, its application inherently was limited, State v. Hart, 644 S.E.2d 201 (2007), suggested no similar limitation on the application of N.C. R. App. P. 25 and N.C. R. App. P. 34, and there was no reason to engraft any limitation beyond the language contained within the rules. McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Motions to dismiss appeal are made to the court from which the appeal was taken until the appeal has been docketed in the appellate court; where plaintiff's appeal was docketed in court of appeals on May 20, 1993, defendant's motion to dismiss filed over five months earlier, on December 2, 1992, was properly directed to the trial court. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363 (1994).

Length and Type Size of Brief. — Where appellate brief was 42 pages in length, thereby exceeding the 35 page limit, and counsel proffered minimal justification for the rule violation, the court imposed a fine and reimbursement for copying expenses to be paid by counsel personally. State v. Hudson, 123 N.C. App. 336, 473 S.E.2d 415 (1996), rev'd on other grounds, 345 N.C. 729, 483 S.E.2d 436 (1997).

Although violations of appellate rules regarding the type size and page length of briefs subjected the appeal to dismissal, the appellate court elected to hear the appeal, but sanctioned both parties' attorneys by taxing one-half of the printing costs to each of them. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

Sanctions were appropriate where counsel failed to follow rule that limited characters in a line of the appellate brief to 62 and did not file a substitute brief when notified. Hilliard v. Hilliard, 146 N.C. App. 709, 554 S.E.2d 374, 2001 N.C. App. LEXIS 1079 (2001).

Single Violation Not Substantial. — Where dominant tract owners were granted a prescriptive easement, the servient tract owner's counsel was ordered to pay the printing costs of the appeal pursuant to N.C. R. App. P. 34(b) because the servient tract owner did not provide an applicable standard of review or citation of authorities supporting such a standard in the appellate brief, and the single violation was not substantial. Caldwell v. Branch, 181 N.C. App. 107, 638 S.E.2d 552, 2007 N.C. App. LEXIS 91 (2007).

Although an employee's brief violated N.C. R. App. P. 28(b)(1) as the brief had no subject index, the minor violation did not warrant sanctions pursuant to N.C. R. App. P. 25 and 34. Gillis v. Montgomery County Sheriff's Dep't, — N.C. App. —, 663 S.E.2d 447, 2008 N.C. App. LEXIS 1314 (2008).

Applied in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980); McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988); Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991); Aetna Cas. & Sur. Co. v. Continental Ins. Co., 110 N.C. App. 278, 429 S.E.2d 406 (1993); King v. King, 112 N.C. App. 92, 434 S.E.2d 669 (1993); Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796 (1994); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); State v. Burke, 185 N.C. App. 115, 648 S.E.2d 256, 2007 N.C. App. LEXIS 1738 (2007); Meadows v. Iredell County, — N.C. App. —, 653 S.E.2d 925, 2007 N.C. App. LEXIS 2564 (2007); State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008); Odom v. Clark, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1554 (Aug. 19, 2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1555 (Aug. 19, 2008).

Quoted in Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000); Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232, 2000 N.C. App. LEXIS 1267 (2000); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222, 2001 N.C. App. LEXIS 14 (2001).

Stated in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981); Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684, 1999 N.C. App. LEXIS 1311 (1999)

Cited in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Rowan Health Properties, Inc. v. North Carolina Dep't of Human Resources, 89 N.C. App. 285, 365 S.E.2d 635 (1988); Williams v. Hillhaven Corp., 91 N.C. App. 35, 370 S.E.2d 423 (1988); State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), cert. denied, 347 N.C. 409, 496 S.E.2d 394 (1997); Paris v. Woolard, 128 N.C. App. 416, 497 S.E.2d 283 (1998), cert. denied, 348 N.C. 283, 502 S.E.2d 843 (1998); State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (1998); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000); Zenobile v. McKecuen, 144 N.C. App. 104, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001), cert. denied, 354 N.C. 75, 553 S.E.2d 214 (2001); State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003); Anthony v. City of Shelby, 152 N.C. App. 144, 567 S.E.2d 222, 2002 N.C. App. LEXIS 904 (2002); Miller v. B.H.B. Enters., Inc., 152 N.C. App. 532, 568 S.E.2d 219, 2002 N.C. App. LEXIS 960 (2002); Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004); McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007); State v. Hart, 361 N.C. 309, 644 S.E.2d 201, 2007 N.C. LEXIS 410 (2007); Selwyn Vill. Homeowners Ass'n v. Cline & Co., — N.C. App. —, 651 S.E.2d 909, 2007 N.C. App. LEXIS 2297 (2007); Capps v. NW Sign Indus. of N.C., Inc., — N.C. App. —, 652 S.E.2d 372, 2007 N.C. App. LEXIS 2268 (2007).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. *— The cases cited below were decided under former Rule 48, Rules of Practice in the Court of Appeals of North Carolina.*

For failure to docket record on appeal within the time prescribed by the rules, the appeal should be dismissed ex mero motu. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969); State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969), overruled on other grounds, State v. Baines, 324 N.C. 539, 380 S.E.2d 118 (1989).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed, and there was no order extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for failure to comply with the rules. Young v. State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

Pursuant to this rule, an appeal will be dismissed ex mero motu for failure to docket within the time prescribed. North Carolina State Bar v. Temple, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520, 25 L. Ed. 2d 820 (1970).

An appeal is dismissed by the Court of Appeals ex mero motu where the record on appeal is docketed more than the allowed time after the date of judgment appealed from and the record contains no order extending the time for docketing the record on appeal, an order allowing defendant additional time within which to prepare and serve the case on appeal being insufficient to extend the time for docketing the record on appeal. State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969).

A defendant's appeal to the Court of Appeals is subject to dismissal for failure to docket the record on appeal within the time allowed. State v. Bocage, 8 N.C. App. 64, 173 S.E.2d 638 (1970); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

Rule 26. Filing and service.

(a) *Filing.* Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this Rule.

(1) *Filing by mail:* Filing may be accomplished by mail addressed to the clerk, but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) *Filing by electronic means:* Filing in the appellate courts may be accomplished by electronic means by use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court.

In all cases where a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have their account drafted electronically by following the procedures described at the electronic filing site, or they must forward the applicable filing fee for their document by first class mail, contemporaneously with the transmission.

(b) *Service of all papers required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) *Manner of service.* Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel(s)'s correct and current electronic mail address(es) or service may be accomplished in the manner described previously in this subsection.

(d) *Proof of service.* Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) *Joint appellants and appellees.* Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) *Numerous parties to appeal proceeding separately.* When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) *Documents filed with Appellate Courts.*

(1) *Form of papers.* Papers presented to either appellate court for filing shall be letter size (8½ x 11″) with the exception of wills and exhibits. All printed matter must appear in at least 12 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. No more than 27 lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the Appendixes to these Appellate Rules. The format of briefs shall follow the additional instructions found in Appellate Rule 28(j).

(2) *Index required.* All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

(3) *Closing.* The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

(4) *Termination of Parental Rights and Juvenile Matters.* All documents and exhibits filed with the appellate court shall not include the name of a juvenile or any other identifying information, in compliance with Rule 3(b). (Adopted June 13, 1975; Amended May 5, 1981 — 26(g) — effective for all appeals arising from cases filed in the court of original jurisdiction after July 1, 1982; Amended February 11, 1982 — 26(c); Amended December 7, 1982 — 26(g) — effective for documents filed on and after March 1, 1983; Amended November 27, 1984 — 26(a) — effective for documents filed on and after February 1, 1985; Amended June 30, 1988 — 26(a) and (g) — effective September 1, 1988; Amended July 26, 1990 — 26(a) — effective October 1, 1990; Amended March 6, 1997 — 26(b), (g) — effective July 1, 1997; Amended November 4, 1999 — effective November 15, 1999; Amended October 18, 2001 — 26(g), para. 1 — effective October 31, 2001; Amended August 15, 2002; Amended October 3, 2002 — 26(g) — effective October 7, 2002; Amended May 1, 2003 — 26(a)(1); Amended May 6, 2004 — 26(g)(4) — effective May 12, 2004.)

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

Requirements of Rule 26(b) Not Jurisdictional. — Failure to serve the notice of appeal on or before the date of filing pursuant to Rule 26(b) does not automatically mandate dismissal, because failure to serve the notice of appeal "at or before the time of filing" is not a jurisdictional requirement Henlajon, Inc. v. Branch Hwys., Inc., 149 N.C. App. 329, 560 S.E.2d 598, 2002 N.C. App. LEXIS 187 (2002).

Failure to serve the notice of appeal required by N.C. R. App. P. 26 at or before the time of filing is not a jurisdictional requirement that automatically requires dismissal. In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

In a termination of parental rights proceeding, a father was not entitled to a writ of certiorari because he failed to serve a copy of the notice of appeal on a county department of social services as required under N.C. R. App. P. 3 and N.C. R. App. P. 26, and the provisions which would permit review under N.C. R. App. P. 21(a)(1) did not apply. In re A.C., — N.C. App. —, 643 S.E.2d 470, 2007 N.C. App. LEXIS 747 (2007).

When Papers Must Be Served. — This rule is interpreted as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of filing; therefore, service of notice of appeal on plaintiff's counsel was timely where service was made by depositing the notice in the mail on the same day, though several hours later, that notice was filed with the clerk of court. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Owner acknowledged that a competitor had not been served with the notice of appeal, the briefs, or the record on appeal as required by N.C. R. App. P. 26(b); the owner's excuse that the competitor had communicated a desire not to be served with anything related to the lawsuit was rejected as there was not authority for the proposition that a party's expression of a desire not to be served excused another party's failure to serve all required papers. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Notice of appeal must be served on opposing party either before the notice is filed or on the same day the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

Motion to Dismiss Appeal Denied Based on Date Discrepancy. — Trial court did not err in concluding the date indicating the date of service on the appellant's notice of appeal was sufficient to withstand the appellees' motion to dismiss based on the later date on the envelopes for the notice of appeal so that the trial court could find that the appeal was timely filed within the allotted time limit. Sellers v. Morton, — N.C. App. —, 661 S.E.2d 915, 2008 N.C. App. LEXIS 1167 (June 17, 2008).

The better practice is to file the Anders letter that an attorney sends to a client in the Court of Appeals of North Carolina, along with a certificate showing service on the attorney's client and other necessary parties. In re May, 153 N.C. App. 299, 569 S.E.2d 704, 2002 N.C. App. LEXIS 1130 (2002), aff'd, 357 N.C. 423, 584 S.E.2d 271 (2003).

Waiver of Service. — Failure to serve the notice of appeal was a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal. Hale v. Afro-American Arts Int'l, Inc., 335 N.C. App. 231, 436 S.E.2d 588 (1993).

No Certificate of Service. — When the father in a child support case failed to include in the record a certificate of service of the notice of appeal, this was a violation of N.C. R. App. P. 3 and N.C. R. App. P. 26, and the appeal was dismissed; the mother had not waived the father's failure to include the proof of service, and such a failure was not inconsequential. Ribble v. Ribble, 180 N.C. App. 341, 637 S.E.2d 239, 2006 N.C. App. LEXIS 2293 (2006).

Father's appeal of an order adjudicating his son as neglected and his daughter as abused and neglected was dismissed as the father failed to attach to the notice of appeal a certificate of service acknowledging service of all parties to the action as required by N.C. R. App. P. 3 and N.C. R. App. P. 26; a department of social services and a guardian ad litem did not waive the father's failure to include proof of service of his notice of appeal. In re C.T., 182 N.C. App. 166, 641 S.E.2d 414, 2007 N.C. App. LEXIS 501 (2007).

Creditor's appeal was deficient because there was no certificate of service appearing on or affixed to the N.C. R. App. P. 3 notice of appeal as was required by N.C. R. App. P. 26(d). That defect, along with other violations of the appellate rules, required dismissal of the creditor's appeal. McQuillin v. Perez, — N.C. App. —, 657 S.E.2d 924, 2008 N.C. App. LEXIS 532 (Mar. 18, 2008).

Service on Appointed Special Advocate for State. — Where, at a mental health hearing session, the State was represented by an appointed special advocate, which special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate, he alone was the "attorney of record" within the meaning of this rule, and the proposed record on appeal should be served on him as special advocate rather than the Attorney General. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Unauthorized Change to Papers. — In filing the record on appeal, an attorney for the Department of Revenue made an unauthorized change in the caption of the case in violation of this rule. State v. Sneed, 112 N.C. App. 361, 435 S.E.2d 579 (1993).

Type Size. — This rule requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with this rule, this rule governs and no brief shall be submitted in less than eleven point type. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. The numbering of the pages, as provided in Appendix B, is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Under this rule, all printed matter in briefs must appear in at least 11 point type, or the appeal is subject to dismissal. H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

Appellate rules governing the size of type to be used and the limitation on the number of pages to be included in appellate briefs prevent unfair advantage to any litigant and insure a level playing field for all parties on appeal. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

An appellate brief may not contain more than 65 characters and spaces per line, nor more than 27 lines of double-spaced text per page. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

A brief submitted in 11 point type will contain not more than 65 characters and spaces per line, and no more than 27 lines of double-spaced text per page. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

An appellate brief may be presented in the same type-setting as used by the Court of Appeals in its slip opinions - Courier 10 cpi - which insures no more than 65 characters per line and 27 lines per page, and Courier 10 cpi may be achieved in computer and word processing technology by using not smaller than size 12 Courier or Courier New font. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

Where all appellate briefs contained in excess of 91 characters per line in violation of APP-26(g), double costs would be assessed, with the first set to be shared equally among all parties, and the second to be paid in equal share by counsel for the parties. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

Improper Type Size. — Where petitioner submitted a brief utilizing 14 characters per inch type size instead of the ten characters mandated by subsection (g) double costs of the appeal were imposed. Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), cert. denied, 347 N.C. 409, 496 S.E.2d 394 (1997).

Sanctions were appropriate when counsel failed to follow rule that limited characters in a line of the appellate brief to 62, and they did not file a substitute brief when notified. Hilliard v. Hilliard, 146 N.C. App. 709, 554 S.E.2d 374, 2001 N.C. App. LEXIS 1079 (2001).

Characters Per Inch. — Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. This rule does not speak in terms of characters per inch; however, in order to provide a uniform construction of this rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of the Court of Appeals and the Supreme Court and the standard that will be applied to the briefs filed with the Court of Appeals. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Double Spacing. — Dismissal of an appeal was proper, where the appellant failed to double space the text of her brief and failed to set out in her brief references to the assignments of error upon which her presented issues and arguments were based. Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

Defendant's counsel was ordered to pay the costs of printing for an appeal of defendant's conviction of embezzlement, as defendant's brief was single-spaced in violation of N.C. R. App. P. 26(g), which was a mandatory rule. State v. Riley, 167 N.C. App. 346, 605 S.E.2d 212, 2004 N.C. App. LEXIS 2186 (2004).

Appellate brief violated N.C. R. App. P. 26(g) because the line spacing in the body of text shall failed to present double spacing between each line of text; although no more than 27 lines of double-spaced text was to appear on a page, the brief, on the other hand, contained pages with as many as 35 lines of text. Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Prospective Application of Construction of Rule. — Where the point size in defendants' appellate brief did not comply with this rule, but neither the rule nor the Court of Appeals had previously construed this rule, the court would consider the arguments presented in defendants' brief. This rule, as construed in this case, will be applied by the Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Review of Significant Issues Warranted Under N.C. R. App. P. 2. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), (d)(1)c., and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Sanctions Imposed. — Defendant's counsel was sanctions and was required to personally pay the printing costs of an appeal because he violated N.C. R. App. P. 26(g)(1) by single-spacing the argument section of his brief and because he failed to include a statement of the standard of review as required under N.C. R. App. P. 28(b)(6). State v. Lockhart, 181 N.C. App. 316, 639 S.E.2d 5, 2007 N.C. App. LEXIS 89 (2007).

Dismissal as Sanction. — Because appellant management company violated N.C. R. App. P. 28(b)(6), by failing to identify an assignment of error by the page where it appeared in the record following the question presented, and violated N.C. R. App. P. 26(g)(1), by submitting a brief that contained an improper index margin, double-spaced captions and headings, and no appendix page reference, and the appellant acknowledged its violations but made no attempt to correct, amend, or substitute its brief, the court declined to apply N.C. R. App. P. 2 and to review the merits of the appeal and instead dismissed it; nothing in the record or briefs demonstrated exceptional circumstances to suspend or vary the rules in order to prevent manifest injustice to a party, or to expedite a decision in the public interest. Selwyn Vill. Homeowners Ass'n v. Cline & Co., — N.C. App. —, 651 S.E.2d 909, 2007 N.C. App. LEXIS 2297 (2007).

Appeal Dismissed. — The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where the defendants did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

Applied in Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998); Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1, 2004 N.C. App. LEXIS 18 (2004); State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006); Odell v. Legal Bucks, LLC, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1619 (Sept. 2, 2008).

Stated in Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684, 1999 N.C. App. LEXIS 1311 (1999)

Quoted in Cato v. Cato, 118 N.C. App. 569, 455 S.E.2d 918 (1995).

Cited in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); Swilling v. Swilling, 99 N.C. App. 551, 393 S.E.2d 303 (1990); Surratt v.

Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Munn v. Munn, 112 N.C. App. 151, 435 S.E.2d 74 (1993); National Fruit Prod. Co. v. Justus, 112 N.C. App. 495, 436 S.E.2d 156 (1993); Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993); Dockery v. North Carolina Dep't of Human Resources, 120 N.C. App. 827, 463 S.E.2d 580 (1995); Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995); Webster Enters., Inc. v. Selective Ins. Co., 125 N.C. App. 36, 479 S.E.2d 243 (1996); Ferebee v. Hardison, 126 N.C. App. 230, 484 S.E.2d 857 (1997), rev'd in part, 347 N.C. 346, 492 S.E.2d 354 (1997); Paris v. Woolard, 128 N.C. App. 416, 497 S.E.2d 283 (1998), cert. denied, 348 N.C. 283, 502 S.E.2d 843 (1998); Matthews v. Food Lion, Inc., 135 N.C. App. 784, 522 S.E.2d 587, 1999 N.C. App. LEXIS 1229 (1999); Simmons v. Arriola, 160 N.C. App. 671, 586 S.E.2d 809, 2003 N.C. App. LEXIS 1911 (2003); In re A.B., 179 N.C. App. 605, 635 S.E.2d 11, 2006 N.C. App. LEXIS 2027 (2006).

Rule 27. Computation and extension of time.

(a) *Computation of time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional time after service by mail.* Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of time; By which court granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) *Motions for extension of time in the trial division.* The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) *Motions for extension of time in the appellate division.* All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

(d) *Motions for extension of time; How determined.* Motions for extension of time made in any court may be determined *ex parte,* but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. (Adopted June 13, 1975; Amended March 7, 1978 — 27(c); Amended October 4, 1978 — 27(c) — effective January 1, 1979; Amended November 27, 1984 — 27(a) and (c) — effective February 1, 1985; Amended December 8, 1988 — 27(c) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 26, 1990 — 27(c) and (d) — effective October 1, 1990; Amended October 18, 2001 — 27(c) — effective October 31, 2001.)

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

Construction with Other Rules. — Construing Rules 3, 27(c) and 21(a)(1) together, the court concluded that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Anderson v. Hollifield, 345 N.C. 480, 480 S.E.2d 661 (1997).

Appellant's Burden to Seek Extension of Time. — Appellant was required to seek an extension of time with the court under N.C. R. App. P. 27(c)(2) in order to obtain judicial settlement of the record on appeal outside of the time limit set by N.C. R. App. P. 11(c). The fact that a trial court judge may be unavailable to settle the record within the time set by Rule 11(c) does not relieve an appellant's burden of seeking an extension of time under the appellate rules. Yorke v. Novant Health, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1620 (Sept. 2, 2008).

The Time for Taking An Appeal May Not Be Enlarged by the Appellate Courts. — O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Appellate court lacked jurisdiction to hear defendant's appeal where defendant failed to give timely notice of appeal, and defendant's brief did not meet requirements of a petition for a writ of certiorari as set forth in N.C. R. App. P. 21(c); the appellate court declined to exercise its discretion under N.C. R. App. P. 2 to correct the defects in defendant's purported petition for writ of certiorari, and additionally, declined to exercise its discretion and denied defendant's purported petition for writ of certiorari. State v. McCoy, 171 N.C. App. 636, 615 S.E.2d 319, 2005 N.C. App. LEXIS 1319 (2005).

In calculating whether notice of appeal is timely given, the 10th (now 30th) day is not considered if it is a Saturday, Sunday, or legal holiday. In such case, the 10 (now 30) day period runs at the end of the next day that is not a Saturday, Sunday, or legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Appeal was dismissed where record on appeal was not filed in appellate court within 150 days from giving of notice of appeal. — Appellant's motion for a new trial or a modification of the judgment pursuant to G.S. 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's G.S. 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980), decided prior to amendments to the rules effective July 1, 1989.

Failure to Respond to Defendants's Objections to Record Affected Time for Appeal. — The court dismissed the appeal of plaintiffs, administratrix and relatives of deceased infant, who failed to file and settle the record within the time limit required by this rule, where although plaintiffs timely served the proposed record on appeal on defendants, they failed to respond to defendants's objections and proposed amendments or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal 13 days later (10 days as per N.C.R. A. P., Rule 11(c) plus 3 days as per N.C.R. A. P., Rule 27(b)) since defendants served their objections and amendments by United States mail, and plaintiffs should have filed the record on appeal within 15 days after that. Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232, 2000 N.C. App. LEXIS 1267 (2000).

Notice of Appeal Held Timely. — Notice of appeal filed on July 5, 1983, was timely, where the 10th day fell on Sunday, July 3, 1983, and the next day, July 4, 1983, was a legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984), decided prior to amendments to the rules effective July 1, 1989.

Notice Provision Contained in N.C.R.A.P., Rule 12 Is Jurisdictional. — The provisions of N.C.R.A.P., Rule 12, as it read prior to amendment effective July 1, 1989, requiring that "no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken" was jurisdictional and it imposed a limit on the aggrieved party's right to appeal. Only the appropriate appellate court could extend this 150-day time limit. State v. Ward, 61 N.C. App. 747, 301 S.E.2d 507, cert. denied, 309 N.C. 825, 310 S.E.2d 357 (1983).

Regardless of the time limits set by the trial court, plaintiff had no longer than 150 days after giving notice of appeal to file the appeal record with the appellate court; the 150-day time limit may be extended only by an appropriate appellate court. Roberts v. Roberts, 97 N.C. App. 319, 388 S.E.2d 164 (1990), decided under the rules as they read prior to 1989 amendments.

Motion to Extend Time. — All motions made to extend time, except for motions to extend the time for service of the proposed record on appeal subdivision (c)(1) of this rule, and motions to extend the time to produce the transcript under N.C.R. App. P. 7(b)(1), must be made to the court to which appeal has been taken. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

Order to Extend Time for Serving Record on Appeal Held Proper. — Although counsel for the State erred in calculating the initial filing date, the judge properly entered his ex parte order extending the time for serving the proposed record on appeal where the State complied with subdivision (c)(1) of this rule by giving oral and written notice of its motion to extend time to serve the proposed record on appeal, and it complied with the initial 15-day time limit specified in N.C.R.A.P., Rule 12(a), and the outside time limit of 150 days in which to file the settled record on appeal from the time of oral notice of appeal. State ex rel. Thornburg v. Currency in Amount of $52,029.00 in U.S. Currency, 324 N.C. 276, 378 S.E.2d 1 (1989).

It was not an abuse of discretion by the trial judge to deem plaintiffs' service of the record timely under N.C. R. App. P. 11 because N.C. R. App. P. 27 allowed the trial judge to grant an extension of time to serve the record on appeal even after the deadline for service had passed. Robbins v. Ingham, — N.C. App. —, 635 S.E.2d 610, 2006 N.C. App. LEXIS 2160 (2006), cert. denied, appeal dismissed, 361 N.C. 221 (2007).

Order to Extend Time for Serving Record on Appeal Held Ineffective. — Trial court's order extending the time during which plaintiffs could serve proposed record on appeal was ineffective where it was made after the expiration of the 35-day period during which plaintiffs were required by

N.C.R.A.P., Rule 11(b) to serve the proposed record on appeal, it was made upon plaintiffs' oral motion in violation of N.C.R.A.P., Rule 27(c)(1), and the record did not reflect the other parties, the defendant and third-party defendant, were given notice or an opportunity to be heard as required by N.C.R.A.P., Rule 27(c)(1). Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991).

Order dismissing a landlord's appeal in a summary ejectment proceeding was proper because the landlord failed to timely file the record on appeal as required by N.C. R. App. P. 12(a); because the landlord made only an oral motion to extend the time to serve the record after the time for service of the record had expired, the trial court lacked authority to grant the motion. Cadle Co. v. Buyna, 185 N.C. App. 148, 647 S.E.2d 461, 2007 N.C. App. LEXIS 1716 (2007).

Dismissal for Failure to Comply. — Where the trial court's purported extension of time to file the records on appeal was ineffective, and where the records on appeal were not filed within the times mandated by the Rules of Appellate Procedure, each parties' appeals were dismissed for failure to comply with the rules. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

Applied in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981); In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987); Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988); Hale v. Leisure, 100 N.C. App. 163, 394 S.E.2d 665 (1990); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222, 2001 N.C. App. LEXIS 14 (2001); In re L.B., 181 N.C. App. 174, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008); Sellers v. Morton, — N.C. App. —, 661 S.E.2d 915, 2008 N.C. App. LEXIS 1167 (June 17, 2008).

Quoted in Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993).

Stated in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981)

Cited in In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239 (1987); Woods v. Shelton, 93 N.C. App. 649, 379 S.E.2d 45 (1989); Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996); McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999); Groves v. Community Hous. Corp. of Haywood County, 144 N.C. App. 79, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001); State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Rule 28. Briefs: Function and content.

(a) *Function.* The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) *Content of appellant's brief.* An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) *A statement of the grounds for appellate review.* Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. However, in new briefs before the Supreme Court, a party need not reference assignments of error to the extent that party was the appellee (or cross-appellee) before the Court of Appeals and is urging the Supreme Court to reverse the Court of Appeals.

The argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, office address and telephone number.

(9) The proof of service required by Rule 26(d).

(10) The appendix required by Rule 28(d).

(c) *Content of appellee's brief; Presentation of additional questions.* An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, statement of the facts, or statement of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant. An appellee's brief may, but is not required to, include a reference to assignments of error as required by Rule 28(b)(6) for an appellant's brief.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment *n.o.v.* awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional questions.

(d) *Appendixes to briefs.* Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d). Verbatim portions of the transcript filed pursuant to this rule in an appeal of a termination of parental rights or juvenile matter must be modified to comply with the confidentiality provisions of Rule 3(b).

(1) *When appendixes to appellant's brief are required.* Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal the study of which are required to determine questions presented in the brief.

(2) *When appendixes to appellant's brief are not required.* Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) *When appendixes to appellee's brief are required.* Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if he were the appellant with respect to each such new or additional question.

(4) *Format of appendixes.* The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) *References in briefs to the record.* References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) *Joinder of multiple parties in briefs.* Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) *Additional authorities.* Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) *Reply briefs.* No reply brief will be received or considered by the Court, except in the following circumstances:

(1) The Court, upon its own initiative, may order a reply brief to be filed and served.

(2) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(3) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(2).

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may, within 14 days after service of such notification, file and serve a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief. Unless otherwise ordered by the Court, the motion for leave will be determined solely upon the motion and without responses thereto or oral argument. The clerk of the appellate court will notify the parties of the Court's action upon the motion, and, if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

(5) Motions for extensions of time in relation to reply briefs are disfavored.

(i) *Amicus curiae briefs.* A brief of an *amicus curiae* may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an *amicus curiae* brief shall present to the Court a motion for leave to file, served upon all parties. The motion shall state concisely the nature of the applicant's interest, the reasons why an *amicus curiae* brief is believed desirable, the questions of law to be addressed in the *amicus curiae* brief and the applicant's position on those questions. The proposed *amicus curiae* brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the *amicus curiae* shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the Court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an *amicus curiae* brief will be limited to points or authorities presented in the *amicus curiae* brief which are not presented in the main briefs of the parties. No reply brief of an *amicus curiae* will be received.

A motion of an *amicus curiae* to participate in oral argument will be allowed only for extraordinary reasons.

(j) *Page limitations applicable to briefs filed in the Court of Appeals.* Each brief filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or *amicus curiae,* formatted according to Rule 26 and the Appendixes to these Rules, shall have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) *Type.*

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (monospaced) type.

(B) *Type size.*

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than 10 characters per inch (12-point).

2. Proportionally spaced type (e.g., Times New Roman), must be 14-point or larger.

3. Documents set in Courier New 12-point type, or Times New Roman 14-point type will be deemed in compliance with these type-size requirements.

(2) *Document length.*

(A) *Length limitations on briefs filed in the Court of Appeals.* Every brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be subject to either a page limit or a word-count limit, depending on the type style used in the brief.

1. *Page limits for briefs using nonproportional type.* The page limit for a principal brief that uses nonproportional (e.g., Courier) type is 35 pages. The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is 15 pages, and the page limit for a reply brief permitted by Rule 28(h)(4) is 12 pages. Unless otherwise ordered by the Court, the page limit for an amicus curiae brief is 15 pages. A page shall contain no more than 27 lines of double-spaced text of no more than 65 characters per line. Covers, indexes, tables of authorities, certificates of service, and appendixes do not

count toward these page limits. The Court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

2. *Word-count limits for briefs in proportional type.* A principal brief that uses proportional type may contain no more than 8,750 words. A reply brief permitted by Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, and a reply brief permitted by Rule 28(h)(4) may contain no more than 3,000 words. Unless otherwise ordered by the Court, an amicus curiae brief may contain no more than 3,750 words. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit along with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or, in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

(k) *Termination of Parental Rights and Juvenile Matters.* No brief shall include the name of a juvenile or other identifying information, in compliance with Rule 3(b).

(Adopted June 13, 1975; Amended January 27, 1981 — repealed 28(d) — effective July 1, 1981; Amended June 10, 1981 — 28(b), (c) — effective October 1, 1981; Amended January 12, 1982 — 28(b)(4) — effective March 15, 1982; Amended December 7, 1982 — 28(i) — effective January 1, 1983; Amended November 27, 1984 — 28(b), (c), (d), (e), (g), (h) — effective February 1, 1985; Amended June 30, 1988 — 28(a), (b), (c), (d), (e), (h), (i) — effective September 1, 1988; Amended June 8, 1989 — 28(h), (j) — effective September 1, 1989; Amended July 26, 1990 — 28(h)(2) — effective October 1, 1990; Amended October 18, 2001 — 28(b)(4)-(10), (c), (j) —effective October 31, 2001; Amended October 3, 2002 — 28(j) — effective October 7, 2002; Amended May 6, 2004 — 28(d), (h), (j), (k) — effective May 12, 2004; Amended August 23, 2005 — 28(b)(6), (c), (h)(4) — effective September 1, 2005; January 25, 2007 — 28(b)(6), para. 1; 28(c), para. 1; 28(d)(3)(a), (b); 28(i), paras. 2, 3; 28(j)(2)(A)(1) & (2); added 28(d)(1)(d) — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Editor's note. — *Many of the cases below were decided prior to amendments of the rules effective July 1, 1989, deleting references to exceptions.*

Compliance Universally Mandatory. — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Appellant's failure to observe the mandatory Rules of Appellate Procedure frustrated the process of the appellate review, but did not cause the court to dismiss the case. May v. City of Durham, 136 N.C. App. 578, 525 S.E.2d 223, 2000 N.C. App. LEXIS 109 (2000).

Under this rule, appellate review is limited to the arguments upon which the parties rely in their briefs. — Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

The proviso to N.C.R.A.P., Rule 10(a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of this rule that a question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed and cert. denied, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

This rule requires that a question be presented and argued in the brief in order to obtain appellate review. Love v. Pressley, 34 N.C. App. 503, 239

S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

In a workers' compensation proceeding, an appeal by an employer and its insurance carrier was dismissed as interlocutory where the North Carolina Industrial Commission specifically reserved the issue of the amount of the compensation award for the employee; as the employer and carrier failed to include any grounds for appellate review in their brief, the appeal was dismissed. Watts v. Hemlock Homes of the Highlands, Inc., 160 N.C. App. 81, 584 S.E.2d 97, 2003 N.C. App. LEXIS 1666 (2003).

Because plaintiffs' counsel acknowledged that the evidence was insufficient to support a prima facie case of negligence for 10 of the 21 plaintiffs, and plaintiffs did not present any argument in support of their assignments of error regarding two other plaintiffs, an appeals court, pursuant to N.C. R. App. P. 28(b)(6), deemed abandoned plaintiffs' assignments of error with respect to 12 plaintiffs. Anderson v. Hous. Auth., 169 N.C. App. 167, 609 S.E.2d 426, 2005 N.C. App. LEXIS 546 (2005).

Because it was evident based on an insured's brief that the extent of his argument on appeal was that the trial court erred in entering summary judgment on his breach of contract claim, appellate review of the trial court's decision was limited to that argument pursuant to N.C. R. App. P. 28(a); the trial court's other rulings were affirmed without review. Digh v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, 654 S.E.2d 37, 2007 N.C. App. LEXIS 2577 (2007).

Plaintiff's brief only addressed the trial court's order granting defendant's motion for summary judgment. Thus, the plaintiff's remaining unargued assignments of error were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). Clay v. Monroe, — N.C. App. —, 658 S.E.2d 532, 2008 N.C. App. LEXIS 645 (Apr. 1, 2008).

This Rule Requires That a Question Be Presented and Argued in the Brief in order to Obtain Appellate Review — When a surety appealed the denial of its motion for relief from a forfeiture, it did not state the grounds for appellate review in its brief, as required by N.C. R. App. P. 28(b)(4). State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Neighbors' claim in their directed verdict motion that there was insufficient evidence as to whether property owners had an easement by prescription over the neighbors' property was not considered on appeal, as the jury failed to reach the issue and the neighbors failed to raise the issue in their brief on appeal. Boggess v. Spencer, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

The purpose of subsection (c) of this rule is to permit an appellee who obtains relief at trial to seek a new trial because of trial errors material to the claim upon which relief was granted, in lieu of having judgment n.o.v. entered on appeal when such relief is sought by the appellant. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

Assignments of error not argued in defendant's brief are deemed waived. State v. Lemonds, 160 N.C. App. 172, 584 S.E.2d 841 (2003).

Where, on appeal, the former deputy sheriff failed to present any argument in support of an assignment of error, the assignment of error was deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). Venable v. Vernon, 162 N.C. App. 702, 592 S.E.2d 256, 2004 N.C. App. LEXIS 250 (2004).

Where a criminal defendant asserted eight assignments of error, but failed to bring forth and argue six of them in his brief to the Court of Appeals of North Carolina Court, those assignments of error were deemed abandoned. State v. Drew, 162 N.C. App. 682, 592 S.E.2d 27, 2004 N.C. App. LEXIS 247 (2004).

In a bond forfeiture case, a surety's substantive due process issue was not preserved for appellate review because it was not designated as an assignment of error. State v. Ferrer, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Where an appellant does not present an argument in support of an assignment of error, the assignment of error is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Where an insurer appealed an order, and an insured also assigned error to the trial court's order denying the insurer's motion to compel discovery and for sanctions against the insured, the appellate court deemed the insured's assignments of error abandoned, pursuant to N.C. R. App. P. 28(b)(6), as he failed to offer any support in his brief for those arguments on appeal. Nationwide Mut. Fire Ins. Co. v. Bourlon, 172 N.C. App. 595, 617 S.E.2d 40, 2005 N.C. App. LEXIS 1789 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Where an employee made a claim for benefits before the North Carolina Industrial Commission (NCIC), arising from his exposure to asbestosis, and upon his death, his widow who was appointed as his administratrix, filed the necessary form for substitution into that proceeding, the employer and its insurer could not seek review of their claim that the form filed was insufficient to bring the issue of death benefits before the NCIC, as they failed to comply with N.C. R. App. P. 28(b)(6); they did not cite to any authority to support their contention, and accordingly, the court could not revisit the NCIC's determination on that issue. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

Although defendants had assigned error to an order, they had presented no argument in their brief addressing this assignment of error; therefore, it was deemed abandoned. N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

As defendants cited no statutory or common-law authority for their claim that full faith and credit should not be accorded to a Texas judgment because the underlying case was being appealed in Texas, this argument was dismissed under N.C. R. App. P. 28(b)(6). Mineola Cmty. Bank, S.S.B. v. Everson, — N.C. App. —, 652 S.E.2d 369, 2007 N.C. App. LEXIS 2306 (2007).

When a health system sought judicial review of the decision of the North Carolina Department of Health and Human Resources, Division of Facility Services, Certificate of Need Section to deny a health system's request for a certificate of need (CON) to build a hospital and to grant a CON to the system's competitor, the system's assignments of error to numerous of the Agency's findings of fact were abandoned, under N.C. R. App. P. 28(b)(6),because the system did not argue on appeal that any specific finding was unsupported by record evidence. Good Hope Health Sys., LLC v. N.C. HHS, — N.C. App. —, 658 S.E.2d 665, 2008 N.C. App. LEXIS 79 (2008).

Assignments of error listed in the record but not argued in appellants' brief or for which no authority was cited were deemed abandoned under N.C. R. App. P. 28(b)(6). Good Hope Health Sys., L.L.C. v. N.C. HHS, — N.C. App. —, 659 S.E.2d 456, 2008 N.C. App. LEXIS 700 (2008).

Two Ways to Preserve Exceptions in Brief. — Under this subsection, an appeal may be abandoned in two ways: (1) assignments of error are not set out in the appellant's brief, or (2) in support of which no reason or argument is stated or authority cited. Strader v. Sunstates Corp., 129 N.C. App. 562, 500 S.E.2d 752 (1998), cert. denied, 349 N.C. 240, 514 S.E.2d 274 (1998).

Where defendant's appellate brief contained arguments supporting only two of defendant's original 13 assignments of error, the 11 omitted assignments of error were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208, 2004 N.C. App. LEXIS 729 (2004).

Three Ways to Preserve Exceptions in Brief. — Provision in subdivision (b)(5) of this rule that exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned, is to be read in the disjunctive. It gives appellant at least three means of preserving exceptions in his or her brief; it does not require appellant to cite authority for every proposition put forward on appeal. State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986).

Review Confined to Exceptions Pertaining to Argument Presented. — The Rules of Appellate Procedure require that review be confined to those exceptions which pertain to the argument presented. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, modified on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Appellate Court's Decision Not to Consider Issues in Appeal. — Because the dispositive issue in a case was whether there was a genuine issue of material fact as to the effective date of the endorsement of a restriction to an insurance policy and because many of the appellants' other issues violated the appellate rules, the appellate court chose not to reach those other issues pursuant to N.C. R. App. P. 28(b)(6). Nationwide Mut. Fire Ins. Co. v. Mnatsakanov, — N.C. App. —, 664 S.E.2d 13, 2008 N.C. App. LEXIS 1466 (Aug. 5, 2008).

Defendant, in his brief, did not contend that defendant filed his income tax returns for two years, nor did defendant assert that defendant filed an accurate return for one year; instead, defendant contended only that defendant's actions were not willful. Therefore, any argument except for willfulness was deemed abandoned under N.C. R. App. P. 28(b)(6), and the appellate court only addressed the question of willfulness. State v. Howell, — N.C. App. —, 662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (July 15, 2008).

Statement of Standard of Review. — N.C. R. App. P. 28(b)(6) required not only that an argument contain a concise statement of the applicable standard(s) of review, but also that the statement of the standards of review contain citations of the authorities upon which an appellant relied. Overcash v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 635 S.E.2d 442, 2006 N.C. App. LEXIS 2168 (2006).

Property owner's appellate brief failed to comply with N.C.R.A.P., Rule 28(b)(6) in that it did not contain a concise statement of the applicable standard(s) of review for each question presented along with citations of the authorities upon which the owner relied; therefore, when viewed in tandem with the owner's other failures to comply with the North Carolina Rules of Appellate Procedure, the nature and significance of the owner's rules violations warranted dismissal of his appeal. Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007).

Even though defendant neither stated the standard of review nor cited any authority supporting any standard of review as required by N.C. R. App. P.28(b)(6), defendant's substantial compliance with other aspects of the North Carolina Rules of Appellate Procedure did not justify dismissal of defendant's appeal. State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008).

Although an appellant did not include the standard of review in the appellant's brief, as required by N.C. R. App. P. 28(b)(6). the rule violation did not merit sanctions because nonjurisdictional appellate rule violations that did not rise to the level of a substantial failure or gross violation did not merit sanctions. Carpenter v. Carpenter, — N.C. App. —, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

Where no statement of the applicable standard of review was presented in the argument section of the appellate brief, either at the beginning of each question presented or at the beginning of the discussion of all questions presented, the appeal was subject to dismissal. Under such circumstances, the appeal failed to comply with N.C. R. App. 28(b)(6). McQuillin v. Perez, — N.C. App. —, 657 S.E.2d 924, 2008 N.C. App. LEXIS 532 (Mar. 18, 2008).

Failure to State Standard of Review. — Defense counsel was chastised with an admonishment to exercise more diligence in stating the standard of review in briefs prepared for the Court of Appeals of North Carolina as an alternative sanction to the dismissal of defendant's appeal. State v. Parker, — N.C. App. —, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

Although the appellant's brief failed to state a standard of review for the first argument in his brief, as was required by N.C. R. App. P. 28(b)(6), the appellate court, pursuant to N.C. R. App. P. 2, chose to decide the appeal based upon the merits because the appellees failed to comply with N.C. R. App. P. 37 as their motion to dismiss the appeal was made in their brief instead of in a separate motion. Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

Incorporation by reference of arguments contained in briefs before the Court of Appeals is not permitted under the present Rules of Appellate Procedure. Fortner v. J.K. Holding Co., 319 N.C. 640, 357 S.E.2d 167 (1987).

Where the denial of a property owner's subdivision application was reversed and the parties appealed the decision to remand for a new hearing, although the property owner did not state the standard of review in its appellate brief, its appeal was not dismissed based on this error. Blue Ridge Co., L.L.C. v. Town of Pineville, — N.C. App. —, 655 S.E.2d 843, 2008 N.C. App. LEXIS 227 (2008).

Failure to File Brief. — Borrower's failure to file a brief with the appellate court violated N.C. R. App. P. 13 and N.C. R. App. P. 28(b), and as a result, the appeal was dismissed. Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

Questions Must Be Presented in Brief. — A question purportedly raised by an assignment of error or exception must be presented and argued in the brief in order to obtain appellate review. In re Envtl. Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

Although defendant made a constitutional objection at trial pertaining to admission of evidence, because he did not provide argument or cite any cases in support of the alleged constitutional violations in his brief, the appellate court did not consider his arguments based on alleged constitutional violations. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Defendant waived the argument that the trial court erred when it failed to provide the jury with a written copy of the jury instructions, as defendant did not object to the alleged error, and although defendant, in an assignment of error, argued pursuant to N.C. R. App. P. 10(c)(4) that the error was plain error, defendant did not argue in defendant's brief that the instructions amounted to plain error pursuant to N.C. R. App. P. 28(a). State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003), appeal dismissed, cert. denied sub nom. State v. Scercy, 357 N.C. 581, 589 S.E.2d 363 (2003).

Assignments of error that are not briefed on appeal are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5). Thus, where defendant's brief contained arguments supporting only three of the original five assignments of error on his appeal from a judgment convicting him of second-degree trespass and possession of firearms by a felon, the two omitted assignments of error were deemed abandoned pursuant to Rule 28(b)(5), and the court limited its review to those assignments of error addressed in defendant's brief. State v. Boston, 165 N.C. App. 214, 598 S.E.2d 163 (2004).

Where defendant failed to argue an assignment of error in the appellate brief, the assignment was deemed abandoned under N.C. R. App. P. 28(b)(6). State v. Price, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

Mother's cursory argument concerning neglect and abandonment was predicated upon not receiving proper notice of the motion to terminate and thus, her assignment of error concerning G.S. 7B-1111 were deemed abandoned under N.C. R. App. P. 28(b)(6). In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Because the purported class of retail employees failed to cite and argue an assignment of error in their appellate briefing, the assignment of error was deemed abandoned under N.C. R. App. P. 28(a). Harrison v. Wal-Mart Stores, Inc., 170 N.C. App. 545, 613 S.E.2d 322, 2005 N.C. App. LEXIS 1082 (2005).

When defendant assigned error to a jury instruction, but in his brief cited no authority and presented no argument pertaining to the alleged error,it was deemed abandoned under N.C. R. App. P. 28(b)(6). State v. Turner, 177 N.C. App. 423, 628 S.E.2d 464, 2006 N.C. App. LEXIS 979 (2006), cert. denied, 361 N.C. 226, 643 S.E.2d 398 (2007).

When a patient in a medical malpractice case cited no authority in support of her contention that certain defendants could be held liable based on apparent agency, as was required by N.C. R. App. P. 28(b)(6), and the record did not support her contention, the court upheld the trial court's grant of summary judgment as to those defendants. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

Because the city failed to include in its brief any argument or legal authority in support of its assignments of error in regard to the workers' compensation case, the assignments of error were deemed abandoned. Rose v. City of Rocky Mount, 180 N.C. App. 392, 637 S.E.2d 251, 2006 N.C. App. LEXIS 2413 (2006).

Although defendant appealed the judgment entered denying his motion to dismiss one of the eight indictments filed against him, because he failed to argue that assignment of error in his brief, the claim was therefore deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007), rev'd, 362 N.C. 169, 655 S.E.2d 831 (2008), State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975).

Trial court did not err by excluding evidence of a sexual assault victim's allegedly delinquent child support payments as not relevant to the sexual assault trial under G.S. 8C-1, N.C. R. Evid. 403; however, defendant had abandoned his argument because he only referenced it in a heading of his brief and did not provide a reason, argument, or authority to support his claim, as required by N.C. R. App. P. 28(b)(6). State v. Harris, — N.C. App. —, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

By including the same argument from a previous brief filed before the appellate court two years ago, the potential property purchaser, in the new brief, did not appropriately preserve an issue for appellate review; thus, the appellate court did not have to address the assignment of error. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, — N.C. App. —, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

Questions raised by assignments of error but not presented in party's brief are deemed abandoned. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Under former Rule 28 (Rules of Practice in Court of Appeals), assignments of error not brought forward and argued in the brief are deemed abandoned. State v. Robinson, 26 N.C. App. 620, 216 S.E.2d 497 (1975).

On appeal, where defendant brings forward in his brief fewer arguments than there are assignments of error, the remaining assignments of error are deemed abandoned. State v. Ledford, 41 N.C. App. 213, 254 S.E.2d 780 (1979).

Where appellant did not bring forth exceptions to certain findings of the trial court in his brief, he was deemed to have abandoned them. Baker v. Log Sys., 75 N.C. App. 347, 330 S.E.2d 632 (1985).

Defendant's assignments of error, which were not argued or supported in his brief, were deemed abandoned under N.C. R. App. P. 28(b)(6). State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

Where defendant's brief contained arguments supporting only five of the original seven assignments of error on appeal, the two omitted assignments of error were deemed abandoned. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Because: (1) an insured presented no authority to support his claim that the express terms of his homeowner's policy provided coverage for his personal property; (2) the insured did not assign error to any of the trial court's findings of fact and conclusions of law; and (3) the court declined to exercise the court's discretion under N.C. R. App. P. 2 to suspend the requirements of N.C. R. App. P. 28, due to improper briefing, the trial court properly found that the insured's personal property was not covered under that policy. Hannah v. Nationwide Mut. Fire Ins. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1018 (May 20, 2008).

Unpreserved Issue Raised in Amicus Brief. — By choosing to assign error only to the trial court's denial of his motion to suppress, the juvenile had not raised on appeal the issue of whether a fatal variance existed between the petition and the evidence; this issue was presented by the appellate defender's N.C. R. App. P. 28(i) amicus curiae brief and, under N.C. R. App. P. 2, the appellate court considered the "fatal variance" issue. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

An Unsupported Assertion of Plain Error Will Fail. — The right and requirement to specifically and distinctly contend that an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's instruction amounted to plain error, as required by subsections (a) and (b)(5) of this rule. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

Defendant's failure to support his contention that the trial court committed plain error by allowing a witness to describe what she saw on a computer precluded appellate review of that assignment of error. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Argument in Brief Did Not Correspond to Assignment of Error. — Where defendant's objection and assignment of error were directed to the witness's purported "unresponsive answer" but the accompanying argument in the brief concerned the leading nature of the question by the prosecutor, the argument in the brief did not correspond to the assignment of error; therefore, that assignment was deemed abandoned under this rule. State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989).

The defendant waived his right to appellate review of the admissibility of hearsay evidence under G.S. 8C-1, Rule 803(3) where he only argued erroneous admission under G.S. 8C-1, Rule 804(b)(5). State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

In the bond forfeiture case, the insurer, pursuant to N.C. R. App. P. 28(b)(6), waived its argument on appeal that the trial court erred when it failed to make a factual finding regarding whether the insurer received notice of the bond forfeiture and requested a remand for a factual finding; the insurer cited no cases in support of this argument and did not argue the point made in the assignment of error. State v. Lopez, 169 N.C. App. 816, 611 S.E.2d 197, 2005 N.C. App. LEXIS 806 (2005).

Arguments Too Vague for Appellate Review. — Contractors' arguments that fees charged by a village were unconstitutional, were inconsistent with both the state and federal constitutions, and infringed on guaranteed liberties were too vague for appellate review. Bald Head Island, Ltd. v. Village of Bald Head Island, 175 N.C. App. 543, 624 S.E.2d 406, 2006 N.C. App. LEXIS 177 (2006).

One assignment of error is enough to raise one question of law under N.C.R.A.P., Rule 10(c) and subsection (b) of this rule, even when it questions the correctness of many rulings of the trial court. Pate v. Thomas, 89 N.C. App. 312, 365 S.E.2d 704, cert. denied, 322 N.C. 482, 370 S.E.2d 227 (1988).

Cross-Assignments of Error. — N.C. R. App. P. 28(c) operates in conjunction with N.C. R. App. P. 10(d) by allowing an appellee, without having taken appeal, to present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Harllee v. Harllee, 151 N.C. App. 40, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

Constitutional arguments presented in the briefs filed in another case not yet decided by the Court of Appeals were not properly before the court, inasmuch as former subsection (d) of this rule, which permitted incorporation of such material, was repealed in 1981, and the material sought to be incorporated was not submitted as part of the record of the case at hand on appeal. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Abandonment of Assignments of Error. — Where defendant failed to attach pertinent portions of the court transcript or to include verbatim reproduction of materials he wanted court to review as required by this rule or to advance any argument or cite any authority to support his assignments of error, he waived these assignments of error. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

In termination of parental rights case, three of four assignments of error on appeal, relating to respondent/father, were deemed abandoned because respondents/parents failed to argue them in their brief or to cite any authority supporting them. In re Leftwich, 135 N.C. App. 67, 518 S.E.2d 799 (1999).

The propriety of directed verdicts with respect to plaintiffs' claims against all defendants for securities fraud and against one defendant for negligent misrepresentation were not briefed as required by this rule and were, thus, deemed abandoned. Jay Group, Ltd. v. Glasgow, 139 N.C. App. 595, 534 S.E.2d 233, 2000 N.C. App. LEXIS 975 (2000), cert. denied, 353 N.C. 265, 546 S.E.2d 100 (2000).

Assignments of error that are not supported by reason or legal argument in the appellant's brief are deemed abandoned. N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002), aff'd, 357 N.C. 502, 586 S.E.2d 89 (2003).

Where defendant failed to put forth an argument in support of several of defendant's assignments of error, the assignments were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Sakobie, 157 N.C. App. 275, 579 S.E.2d 125, 2003 N.C. App. LEXIS 645 (2003).

Injured party abandoned, under N.C. R. App. P. 28(a), her claim that a trial court which adopted an arbitrator's award dismissing her case erred when it denied her motion for relief from judgment under G.S. 1A-1, N.C. R. Civ. P. 60(b)(1) and (6) because she offered no argument or evidence to support her contentions. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

North Carolina Department of Transportation abandoned its argument that a trial court's findings of fact were irrelevant and that the trial court erred in its conclusions of law because it failed to assert legal authority in its brief in support of the claim; furthermore, the Department's assignment of error that the testimony of two witnesses impermissibly stated legal conclusions was overruled because the Department failed to assign error to any specific testimony by either witness on this theory. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

It was not the duty of the appellate court to supplement an appellant's brief with legal authority or arguments not contained therein; therefore, the appellant's assignment of error was deemed abandoned by virtue of N.C. R. App. P. 28(b)(6) when it failed to provide legal authority or argument for an assignment of error. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

Where defendant failed to argue on appeal certain assignments of error, the assignments were abandoned under N.C. R. App. P. 28(b). State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699, 2005 N.C. App. LEXIS 1160 (2005).

Pursuant to N.C. R. App. P. 28(b)(6), omitted assignments of error are deemed abandoned. State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

Mother's cursory argument concerning neglect and abandonment was predicated upon not receiving proper notice of the motion to terminate and thus, her assignment of error concerning G.S. 7B-1111 were deemed abandoned under N.C. R. App. P. 28(b)(6). In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Appellate court deemed that shareholders' abandoned their assignments of error on appeal, pursuant to N.C. R. App. P. 28(b)(6), because the shareholders did not argue them on appeal. Barnes v. Kochhar, 178 N.C. App. 489, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

When respondent, a juvenile, presented arguments for only three of his eight assignments of error, the five assignments of error for which no argument had been presented were deemed abandoned. In re S.R.S., 180 N.C. App. 151, 636 S.E.2d 277, 2006 N.C. App. LEXIS 2233 (2006).

When defendant in a criminal case did not argue his remaining assignments of error, the court deemed them abandoned. State v. Ryals, — N.C. App. —, 635 S.E.2d 470, 2006 N.C. App. LEXIS 2161 (2006).

Citizens who sought to block the building of a modular school abandoned their assignment of error to the trial court's dismissal of their claims based on mootness under N.C.R.A.P., Rule 28(b)(6) because they submitted no authority in support of their contention that the trial court erred in concluding that their claims were moot; nevertheless, pursuant to its discretion under N.C.R.A.P., Rule 2, the appellate court elected to suspend the appellate rules and to reach the merits of the mootness contentions. Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ., 182 N.C. App. 241, 641 S.E.2d 824, 2007 N.C. App. LEXIS 593 (2007).

Because a hospital and its insurance carrier failed to set forth argument pertaining to their remaining assignments of error, an appellate court therefore deemed them abandoned under N.C. R. App. P. 28(b)(6). Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007), cert. denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 273 (2008), Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007).

Defendant failed to argue his remaining assignments of error on appeal; thus, they were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Clemmons, 181 N.C. App. 391, 639 S.E.2d 110, 2007 N.C. App. LEXIS 155 (2007).

Homeowner violated N.C. R. App. P. 10(c)(1) and her appeal was dismissed as she failed to support her assignments of error regarding the exclusion of evidence with any record page reference to the order she purported to appeal; the appeal was therefore abandoned pursuant to N.C. R. App. P. 28(b)(6). Jones v. Harrelson & Smith Contrs., LLC, 180 N.C. App. 478, 638 S.E.2d 222, 2006 N.C. App. LEXIS 2521 (2006), rev'd, 362 N.C. 226, 657 S.E.2d 352 (2008).

Accident victim failed to cite G.S. ch. 75 in his appellate brief or to present any argument showing that the trial court erred in ruling on the victim's chapter 75 claim; his discussion of G.S. ch. 58 was therefore insufficient to satisfy preservation of his G.S. ch. 75 claim pursuant to G.S. 58-63-15(11), and his assignment of error was dismissed. Stott v. Nationwide Mut. Ins. Co., 183 N.C. App. 46, 643 S.E.2d 653, 2007 N.C. App. LEXIS 827 (2007).

Appellant failed to cite any authority supporting argument regarding a motion to compel discovery and restated and incorporated by reference the arguments made before and articulated in appellant's brief; accordingly, assignment of error on the issue was abandoned and dismissed because the appellant failed to cite any legal authority in any section of appellant's brief to support the argument that the trial court erred in denying the appellant's motion to compel discovery. Stott v. Nationwide Mut. Ins. Co., 183 N.C. App. 46, 643 S.E.2d 653, 2007 N.C. App. LEXIS 827 (2007).

Poker club owner's assignment of error was beyond the scope of appellate review because the owner violated N.C.R.A.P. 28(b)(6) as he failed to identify the assignments of error in the pages of the printed record after listing the question presented and he failed to include the applicable standards of review. Joker Club, L.L.C. v. Hardin, 183 N.C. App.

92, 643 S.E.2d 626, 2007 N.C. App. LEXIS 838 (2007).

Attorney abandoned, under N.C. R. App. P. 28(b)(6), his claim that he did not violate N.C. Rev. R. Prof. Conduct 1.16 because his argument was unaccompanied by any references to the assignments of error upon which it was based. In re Key, — N.C. App. —, 643 S.E.2d 452, 2007 N.C. App. LEXIS 799 (2007), cert. denied, 361 N.C. 428, 648 S.E.2d 506 (2007).

Assignment of error was deemed abandoned under N.C. R. App. P. 28(b)(6) as the owner assigned error to the judgment granting a competitor's motion for directed verdict without citing any legal authority in its brief in support of the assignment of error. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Because defendant failed to present argument in his brief with regard to certain assignments of error, those arguments were deemed abandoned under N.C. R. App. P. 28(b)(6). State v. Campbell, — N.C. App. —, 656 S.E.2d 721, 2008 N.C. App. LEXIS 280 (2008).

Because appellants made no further argument regarding an issue on appeal, any additional assignments of error pertaining to the issue were deemed abandoned under N.C. R. App. P. 28(b)(6). Good Hope Health Sys., L.L.C. v. N.C. HHS, — N.C. App. —, 659 S.E.2d 456, 2008 N.C. App. LEXIS 700 (2008).

In a medical negligence action, a patient's assignment of error that related to an order granting a directed verdict was abandoned, under N.C. R. App. P. 28(b)(6), because the patient failed to present any argument in the body of her brief directly related to the trial court's order granting the surgeon's motion for directed verdict. Kerr v. Long, — N.C. App. —, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (Mar. 18, 2008).

Defendant abandoned the challenge defendant made to a videotaped interview between the victim and a clinical social worker by failing to include the videotape as an exhibit to the record on appeal. State v. Davis, — N.C. App. —, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (Aug. 5, 2008).

Because defendant failed to argue assignments of error, the errors were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. McDonald, — N.C. App. —, 663 S.E.2d 462, 2008 N.C. App. LEXIS 1496 (Aug. 5, 2008).

Since questions on appeal were not supported by argument or case law, according to N.C. R. App. P. 28(b)(6) those assignments of error were deemed abandoned. Matthews v. Davis, — N.C. App. —, 664 S.E.2d 16, 2008 N.C. App. LEXIS 1475 (Aug. 5, 2008).

Assignments of error listed in the record but not argued in defendant's brief were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Howell, — N.C. App. —, 662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (July 15, 2008).

After a biological mother failed to cite any authority in support of her challenge to a trial court's application of the "best interest of the child" standard, she had abandoned her assignment of error under N.C. R. App. P. 28(b)(6). Mason v. Dwinnell, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 908 (May 6, 2008).

Appellate court deemed assignments of error abandoned pursuant to N.C. R. App. P. 28(b)(6) because the appellant failed to set forth, or cite authority in support of, the assignments of error. Babb v. Graham, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1024 (May 20, 2008).

Abandonment of Issue. — Where defendant failed to argue in his brief an alleged error made by the trial court, the issue was deemed abandoned. State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984).

In a case involving an appeal from a neglect and dependency finding, a mother abandoned the argument that the findings were unsupported by the evidence; therefore, the appellate court was limited to reviewing whether or not the findings of fact supported the conclusions of law. In re P.M., 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005).

Although defendant assigned error to the sufficiency of evidence to support the court's findings, it was determined that he abandoned the issue on appeal by not presenting argument in his brief. State v. Rhyne, 124 N.C. App. 84, 478 S.E.2d 789 (1996).

Plaintiffs abandoned their appeal from the directed verdict dismissing their claim for negligent infliction of emotional distress by failing to argue it on appeal. Bailey v. Gitt, 135 N.C. App. 119, 518 S.E.2d 794 (1999).

Where defendant contended that trial court erred in excluding evidence concerning his accomplice's conduct, but failed to refer to any specific ruling of the trial court and to provide any citations to the record or transcript, he was deemed to have abandoned his argument. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Defendant's contention that an instruction on voluntary manslaughter should have been given in addition to ones on first-degree murder by poisoning and attempted first-degree murder by poisoning was not raised in any assignment of error and was, therefore, abandoned. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Defendant's failure to assign error to trial court's admission of inculpatory statements by his daughter, which tended to show that the defendant had tried to throw the blame for the poisoning of the family on the mother, resulted in his abandoning it pursuant to this section. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Assignment of error relating to concurring acts of negligence was abandoned where plaintiffs failed to cite any legal authority or make an argument for extension of the law in support of their argument. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53, 1999 N.C. App. LEXIS 1296 (1999).

Employee failed in an appeal of the lower court's approval of an agency decision that the employee's refusal to report to work after the expiration of family and medical leave was a voluntary resignation without notice; the employee did not argue subject matter jurisdiction issues which defeated the claim. Shackleford-Moten v. Lenoir County Dep't of Soc. Servs., 155 N.C. App. 568, 573 S.E.2d 767, 2002 N.C. App. LEXIS 1630 (2002), cert. denied, 357 N.C. 252, 582 S.E.2d 609 (2003).

Where corporation failed to argue the dismissal of its counterclaim or any other assignments of error in its brief, the appellate court deemed the corporation's assignments of error abandoned; however, the appellate court chose to address the corporation's claim to the extent implicated in the creditor's cross-appeal. LexisNexis v. TRaviSHan Corp., 155 N.C. App. 205, 573 S.E.2d 547, 2002 N.C. App. LEXIS 1635 (2002).

In former board members' derivative action suit against a non-profit corporation and current members of its board of directors, the former board members abandoned and failed to preserve for review any issues pertaining to their individual claims as they did not assign error to the trial court's order of summary judgment, nor present any arguments on appeal, pertaining to their individual claims against. Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

Although an employee originally assigned error to several of the North Carolina Industrial Commission's findings as unsupported by the evidence, his brief on appeal contained only arguments pertaining to the Commission's conclusions of law; thus, the employee's assignments of error to the Commission's findings were deemed abandoned pursuant to N.C. R. App. P. 28(a). Bursell v. N.C. Indus. Comm'n I.C. No. 177846, 172 N.C. App. 73, 616 S.E.2d 342, 2005 N.C. App. LEXIS 1427 (2005).

Where a defendant failed to argue assignments of error, they were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Although a mother whose children were placed in protective custody stated in the heading for her first question presented on appeal that the trial court erred in not dismissing the neglect and dependency petition, she failed to adequately argue this point in her brief; appellate court therefore concluded that she abandoned this argument under N.C. R. App. P. 28(b)(6). In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

Although plaintiff property owner asserted on appeal that a trial court erred by granting the motion of defendants, a water company and property owners, for summary judgment with respect to plaintiff's claims for trespass, nuisance, unjust enrichment, and unfair trade practices, plaintiff's brief included argument only as to his trespass claim, and therefore his appeal as to the remaining claims was abandoned pursuant to N.C. R. App. P. 28(a). Woodring v. Swieter, 180 N.C. App. 362, 637 S.E.2d 269, 2006 N.C. App. LEXIS 2387 (2006).

Parties failed to set forth argument pertaining to their assignments of error; accordingly, the appellate court deemed them abandoned pursuant to N.C. R. App. P. 28(b)(6). Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007), petition allowed as to additional issues 361 N.C. 569, 650 S.E.2d 439 (2007).

Although the trial court granted summary judgment for a bank and its subsidiary on the borrowers' claims of unfair and deceptive trade practices (UDTP) and breach of the duty of good faith and fair dealing, the borrowers limited their argument to the summary judgment entered for the bank and the subsidiary on the borrowers' UDTP claims; accordingly, the borrowers, pursuant to N.C. R. App. P. 28(b)(6), abandoned any claim of error as to summary judgment for the bank and its subsidiary on the borrowers' claims for breach of the duty of good faith and fair dealing. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007), petition allowed as to additional issues 361 N.C. 569, 650 S.E.2d 439 (2007).

Where grounds asserted by appellants for dismissal of a petition for certiorari were not argued in their brief, and despite the appellants' statement that they did not waive such grounds, the appellate court deemed them abandoned pursuant to N.C. R. App. P. 28(b)(6). Cook v. Union County Zoning Bd. of Adjustment, 185 N.C. App. 582, 649 S.E.2d 458, 2007 N.C. App. LEXIS 1949 (2007).

Where defendant failed to either set out assignments of error in defendant's appellate brief, or such assignments of error that were set out were not supported by reason, argument, or cited authority, they were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Lloyd, — N.C. App. —, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Where an executor challenged an order denying the probate of a decedent's prior will, the executor abandoned the argument that the trial court erred in denying a stay pending appeal because the executor cited no authority in support of this argument.

Because an employer made no argument in the employer's brief relating to an assignment of error or the findings of the Full Commission of the North Carolina Industrial Commission with respect to an issue, the assignment was taken as abandoned pursuant to N.C. R. App. P. 28(b)(6). Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 657 S.E.2d 34, 2008 N.C. App. LEXIS 213 (2008).

Because defendant's brief failed to address certain assignments of error, pursuant to N.C. R. App. P. 28(b)(6) those were deemed abandoned. State v. Cox, — N.C. App. —, 661 S.E.2d 294, 2008 N.C. App. LEXIS 1097 (2008).

Assignments of errors asserted in the record on appeal, but not argued in an appellant's brief, are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Where defendants made arguments in support of some of defendants' assignments of error but did not make arguments in support of defendants' remaining assignments of error, defendants' remaining assignments of error were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Ly, — N.C. App. —, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (Apr. 1, 2008).

Defendant, in his brief, did not challenge the trial court's finding of the aggravating factor that defendant committed a crime while on pre-trial release; therefore, this assignment of error was deemed abandoned pursuant toN.C. R. App. P. 28(b)(6). State v. Sellars, — N.C. App. —, 664 S.E.2d 45, 2008 N.C. App. LEXIS 1470 (Aug. 5, 2008).

Issues Raised in Defendant's Brief, But Not Supported by Argument or Authority, Are Deemed Abandoned Under N.C. R. App. P. 28(b)(6). — Where a defendant failed to present any argument or authority in support of its four word contention in its brief that the trial court erroneously granted plaintiff's motion for costs, the issue was waived on appeal. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

Defendants' inclusion of "facts" not supported by the record was inappropriate; accordingly, the appellate court gave them no heed. Baxley v. Jackson, 179 N.C. App. 635, 634 S.E.2d 905, 2006 N.C. App. LEXIS 2055 (2006).

No Subject Index. — Although an employee's brief violated N.C. R. App. P. 28(b)(1) as the brief had no subject index, the minor violation did not warrant sanctions pursuant to N.C. R. App. P. 25 and 34. Gillis v. Montgomery County Sheriff's Dep't, — N.C. App. —, 663 S.E.2d 447, 2008 N.C. App. LEXIS 1314 (2008).

Failure to Meet Requirements of Subdivision (b)(5). — Defendant's assignment of error concerning the court's denial of his motion to dismiss for insufficient evidence was considered abandoned where defendant failed to make any supporting argument or give any citation of supporting authority. State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

Husband's appeal was dismissed in part because, although he made a halfhearted attempt in his brief to comply with N.C. R. App. P. 28(b)(5) by providing sporadic record and transcript citations in the first few pages of his statement of the facts, there was no citation to the record or transcripts in either of the last two lengthy paragraphs. Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Property owner's statement of the facts in his appellate brief contravened the requirements of N.C.R.A.P., Rule 28(b)(5) because, despite a large record, the account of the facts was exactly one paragraph with 18 lines; therefore, when viewed in tandem with the owner's other failures to comply with the North Carolina Rules of Appellate Procedure, the nature and significance of the owner's rules violations warranted dismissal of his appeal. Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007).

Failure to Offer Grounds Justifying Appellate Review. — Appellate court dismissed defendants' appeal from the trial court's order denying their motion for reconsideration of its earlier order denying their motion to compel arbitration because defendants failed to offer grounds which justified appellate review. Slaughter v. Swicegood, 162 N.C. App. 457, 591 S.E.2d 577, 2004 N.C. App. LEXIS 190 (2004).

Reply Brief. — A reply brief is intended to be a vehicle for responding to matters raised in the appellees' brief and is not intended to be — and may not serve as — a means for raising entirely new matters. Newsome v. North Carolina State Bd. of Elections, 105 N.C. App. 499, 415 S.E.2d 201 (1992).

Reply brief could not revive assignments of error which plaintiff had previously abandoned where plaintiff's brief in chief failed to state any reason, argument or authority in support of its contention that summary judgment was improperly granted on particular claims. Trull v. Central Carolina Bank & Trust Co., 117 N.C. App. 220, 450 S.E.2d 542 (1994).

The bar may not use a memorandum of additional authority as a reply brief or for additional argument. Whitaker v. Akers, 137 N.C.App. 274, 527 S.E.2d 721, 2000 N.C. App. LEXIS 315 (2000).

Replacement Brief Sufficient. — Plaintiffs' motion to dismiss defendants' appeal and to impose sanctions pursuant to N.C. R. App. P. 34 for failure to comply with the required format and contents of an appellate brief as required by N.C. R. App. P. 28(b) was denied, as defendants filed a replacement brief which sufficiently complied with the North Carolina Rules of Appellate Procedure. Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

Appellant Must Except to Each Finding or Conclusion Separately. — On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, and then state which assignments support which questions in the brief. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Reduction of Appeal to Broadside Attack. — Where defendant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law, and correctly assigned error individually to each excepted finding and conclusion, but then, rather than direct the Court of Appeals to the particular findings he challenged, he instead argued the general denial of his Rule 41(b) motion, he thereby reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Therefore the only question presented was whether the findings of fact supported the conclusions of law and the conclusions supported the judgment. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

The Court of Appeals will not "fish out" an appellant's exceptions which are not referred to by the proper printed page number. — Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252, cert. denied, 297 N.C. 454, 256 S.E.2d 807 (1979); S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

Failure to Identify Page Held Not to Require Dismissal. — Although defendant did not identify the record page on which each exception appeared as required under N.C.R.A.P., Rule 10(c) and subdivision (b)(5) of this rule, these omissions were not so egregious as to invoke dismissal. Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

The State is not required by section (c) to state the facts unless there is some disagreement. — State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Incorporating Material by Reference. — For case construing former subsection (d), repealed in 1981, see State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Citation to Transcript was Not Reason to Dismiss Appeal. — Defendant's citation to the transcript rather than the record for his assignments of error was not a reason to dismiss the appeal because the mistake did not prevent the appellate court or the litigants from a full understanding of the issues at hand, nor did it obstruct the process of the appeal. State v. Burke, 185 N.C. App. 115, 648 S.E.2d 256, 2007 N.C. App. LEXIS 1738 (2007).

Materials Relating to Similar Case. — This rule does not prohibit a party from including in an appendix to a brief copies of a motion, order and portions of a transcript showing the court's reasoning in a similar case. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104 (1991).

Relief as Matter of Appellate Grace. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under G.S. 7A-32(c) or pursuant to N.C.R.A.P., Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Although juvenile's brief appealing order to turn him over to South Carolina authorities did not refer to assignments of error and exceptions pertinent to the question, nor contain a statement of the questions for review, the Court of Appeals would consider the juvenile's appeal and suspend the requirements of subsection (b) of this rule, as authorized by N.C.R.A.P., Rule 2, because it was an important case of first impression in this state and to prevent any injustice to the juvenile. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

By failing to address the interlocutory nature of an order in a brief to the appellate court, the appellants (siblings who were not allowed to intervene in a G.S. 49-14 paternity action) violated N.C. R. App. P. 28(b)(4); however, pursuant to N.C. R. App. P. 2, the appellate court elected, in its discretion, to hear the merits of the appellants' argument. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Although an employee's brief failed to comply with N.C. R. App. P. 28(b)(4) and (6) by failing to include a statement of the grounds for appellate review and a concise statement of the applicable standards of review for each question, the rule violations, while serious, were not so egregious as to warrant dismissal of the appeal because: (1) reaching the merits of the case did not create an appeal for the employee or cause the court to examine issues not raised by the employee; and (2) the employer was given sufficient notice of the issues on appeal as evidenced by the filing of its brief thoroughly responding to the employee's arguments; as a result, the court elected to review the merits of the employee's appeal pursuant to N.C. R. App. P. 2. Hassell v. Onslow County Bd. of Educ., 182 N.C. App. 1, 641 S.E.2d 324, 2007 N.C. App. LEXIS 487 (2007).

Failure to Cite Authority. — Where a boyfriend was sued by a husband for alienation of his wife's affections and criminal conversation, the boyfriend's argument that the trial court did not provide the jury with any standards for the assessment of punitive damages and that the omission violated his rights to due process and equal protection under the United States Constitution and similar rights under the North Carolina Constitution, complied with neither N.C. R. App. P. 28(b)(6) nor N.C. R. App. P. 10(b)(1), and the assignment of error was overruled. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 630 (2003).

Constitutional claims based on the imposition of a special assessment for an inlet's relocation were not reviewed on appeal because an owner failed to cite any authority to support the claim that his constitutional rights were violated; therefore, they were not properly preserved for review. Parker v. New Hanover County, 173 N.C. App. 644, 619 S.E.2d 868, 2005 N.C. App. LEXIS 2227 (2005).

Trial court properly confirmed an arbitration award, as property owners failed to support any of their various theories challenging the award with citation to authority, in violation of N.C. R. App. P. 28(b)(6). Creekside Constr. Co. v. Dowler, 172 N.C. App. 558, 616 S.E.2d 609, 2005 N.C. App. LEXIS 1783 (2005).

When defendant assigned error to a jury instruction, but in his brief cited no authority and presented no argument pertaining to the alleged error,it was deemed abandoned under N.C. R. App. P. 28(b)(6). Diggs v. Novant Health, Inc., 177 N.C. App. 290, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

When plaintiff cited no authority in support of its argument, it had abandoned the assignment of error under N.C. R. App. P. 28(b)(6). James River Equip., Inc. v. Mecklenburg Utils., Inc., 179 N.C. App. 414, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006), cert. denied, appeal dismissed, 361 N.C. 355, 644 S.E.2d 226 (2007).

Although an attorney challenged the propriety of a trial court imposing sanctions against him under G.S. 1A-1-11, he provided no authority, as required under N.C. R. App. P. 28(b)(6), to support his contention that the judge, by expressing personal opinions regarding the case during a hearing, violated N.C. Code Jud. Conduct 5(E) by improperly assuming the role of a mediator, and therefore was stripped of the authority to impose sanctions. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Private citizens argument that the Utilities Commission's approval of a utility's preferred route for a transmission line was arbitrary and capricious was dismissed because the citizens failed to cite any authorities upon which they relied; further, it was not the role of the appellate court to create an appeal for the citizens. State ex rel. Utils. Comm'n v. Wardlaw, 179 N.C. App. 582, 634 S.E.2d 898, 2006 N.C. App. LEXIS 2041 (2006).

When defendant failed to cite any authority for its interlocutory appeals of the denials of its motion to dismiss based on failure to prosecute and of its motion to costs, these assignments of error were dismissed. N.C. DOT v. County of Durham, 181 N.C. App. 346, 638 S.E.2d 577, 2007 N.C. App. LEXIS 78 (2007).

Subcontractor's brief failed to comply with the North Carolina Rules of Appellate Procedure as: (1) it simply made a conclusory statement that it "appealed as a right from a judgment of the lower court" without providing reference to any statute permitting such appellate review as required by N.C. R. App. P. 28(b)(4); (2) it did not define the "abuse of discretion" standard and did not provide citations to legal authority supporting its proposed standard of review as required by N.C. R. App. P. 28(b)(6); and (3) its assignment of error, both in the record on appeal and as presented in the brief, failed to provide specific record and transcript references as required by N.C. R. App. P. 10(c) and N.C. R. App. P. 28(b)(6). McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Defendant's double jeopardy argument contained no citation to supporting authority; therefore, the appellate court declined to address it under N.C.R.A.P. 28(b)(6). State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

Employee's appeal from the denial of her claim under the North Carolina Workers' Compensation Act was dismissed because the court declined to invoke its discretionary authority under N.C.R.A.P. 2 and the employee violated N.C.R.A.P. 28(b)(6) by failing to argue specific findings and conclusions or cite authority in her brief. Ord v. IBM, 184 N.C. App. 543, 646 S.E.2d 656, 2007 N.C. App. LEXIS 1429 (2007).

As an employer and two of its officers violated N.C. R. App. P. 10(c)(1) and 28(b)(6) in their brief by failing to include clear and specific record references in their assignments of error, and in failing to set forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, dismissal of the appeal was warranted; review in the interests of justice under N.C. R. App. P. 2 was declined, as the appeal did not present exceptional circumstances. Capps v. NW Sign Indus. of N.C., Inc., — N.C. App. —, 652 S.E.2d 372, 2007 N.C. App. LEXIS 2268 (2007).

Appellants cited no case law or authority in support of the appellants' argument as directed by N.C. R. App. P. 28(b)(6) and the appellate court thus declined to consider the issue. Crouse v. Mineo, — N.C. App. —, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (Mar. 18, 2008).

Caveator beneficiary (CB) violated N.C. R. App. P. 28(b)(6) as he made general statements concerning the merits of the CB's case, but did not make any substantive argument, nor cite any law, supporting the CB's argument that the trial court abused the court's discretion as to the assessment of costs and attorney's fees. In re Will of Harts, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1491 (Aug. 5, 2008).

Secured creditor's failure to provide authority in support of the creditor's argument, where the creditor's argument consisted of a bare assertion that it followed as a matter of logic from the jury's findings that one or the other of the creditor's motions should have been granted, constituted a gross violation of N.C. R. App. 28(b)(6), and subjected the argument to dismissal. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1546 (Aug. 19, 2008).

Failure to Cite Authority Abandons Argument. — Where the defendant properly included in its brief the assignments of error and exceptions to the findings of fact from the trial court but completely failed to afford the appellate court any citations of authority or the portions of the record upon which it relied to support its argument, its argument was deemed abandoned under subdivision (b)(3) of this rule. S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

Where plaintiff failed to cite authority in support of assignment of error, such assignment would be deemed to be abandoned. Byrne v. Bordeaux, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

Where plaintiff contended that he produced sufficient evidence to establish a prima facie case of defamation in the form of slander and libel but did not state any reason or argument nor cite any authority for support of the contention that there was sufficient evidence of libel, he abandoned his assignment of error with respect to the libel claim. Smith v. Carolina Coach Co., 120 N.C. App. 106, 461 S.E.2d 362 (1995).

Where defendant failed to cite any authority in support of its contention the trial court erroneously instructed the jury, the court declined to consider the issue. Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 481 S.E.2d 349 (1997), cert. denied, 346 N.C. 281, 487 S.E.2d 551 (1997).

Husband's assignments of error regarding the constitutionality of the domestic violence statute were deemed abandoned since he failed to cite any authority to support his arguments. Wilson v. Wilson, 134 N.C. App. 642, 518 S.E.2d 255 (1999).

Defendant's assignment of error was dismissed where he failed to cite any authority in support of his contention that "a plea must be accepted by the State as well as the Court before a judgment can be entered." State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

The court refused to address defendant's argument pursuant to this section where defendant failed to cite authority to support the contention that admittance of testimony of a witness who is offered immunity violates a defendant's constitutional rights. State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518, 2000 N.C. App. LEXIS 1208 (2000).

Plaintiff grading company violated N.C. R. App. P. 28 by failing to present any arguments or authority pertaining to the only order from which it appealed; the appeal was deemed abandoned. Atchley Grading Co. v. W. Cabarrus Church, 148 N.C. App. 211, 557 S.E.2d 188, 2001 N.C. App. LEXIS 1286 (2001).

Appellate court refused to consider defendant's request that the court deviate from prior precedent where defendant offered no argument in the appellate brief to support the plea for a deviation. State v. Shepherd, 156 N.C. App. 69, 575 S.E.2d 776, 2003 N.C. App. LEXIS 31 (2003).

Assignment of error was not preserved for appeal where no authority was cited in support of the argument, which was, therefore, deemed abandoned under N.C. R. App. P. 28(b)(6). Citifinancial Mortg. Co. v. Gray, — N.C. App. —, 652 S.E.2d 321, 2007 N.C. App. LEXIS 2316 (2007).

Failure to cite authority was a violation of N.C. R. App. P. 28(b)(6) and subjected appellant's argument to dismissal. Good Hope Health Sys., L.L.C. v. N.C. HHS, — N.C. App. —, 659 S.E.2d 456, 2008 N.C. App. LEXIS 700 (2008).

Where a plaintiff cites no authority to support a contention, an appellate court treats the argument as abandoned under N.C. R. App. P. 28. Dalenko v. Collier, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1500 (Aug. 5, 2008).

Respondent abandoned his first assignment of error by failing to set forth argument in support thereof as required by N.C. R. App. P. 28(b)(6). In re R.D.L., — N.C. App. —, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (Aug. 5, 2008).

Citing Incorrect Statute Caused Dismissal of Assignment of Error. — By arguing an incorrect statute, defendants failed to present authority in support of their assignment of error and that assignment was dismissed pursuant to N.C. R. App. P. 28(b)(6) Mineola Cmty. Bank, S.S.B. v. Everson, — N.C. App. —, 652 S.E.2d 369, 2007 N.C. App. LEXIS 2306 (2007).

Citation of Authority in Assignments of Error Precluded. — Even though a wife claimed that the husband abandoned the majority of his arguments by failing to cite to supporting authority in his assignments of error to the appellate court, the husband had indeed complied with N.C. R. App. P. 28(b)(6) by presenting arguments to the appellate court which contained citations of the authorities upon which he relied. Morris v. Gray, 181 N.C. App. 552, 640 S.E.2d 737, 2007 N.C. App. LEXIS 258 (2007).

Failure to Relate Cases to Assignment of Error. — Where plaintiff, in his brief, has listed several cases but has made no attempt to relate the cases cited to his one assignment of error or to any argument advanced in support thereof, his brief is clearly not in accordance with this rule. Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979).

Where an argument in the appellant's brief did not deal with the assignment of error, it was deemed abandoned. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

Failure to Discuss Assignment of Error in Brief. — Where plaintiff failed to discuss in its brief the trial court's denial of its motion for a new trial, the question raised by plaintiff's assignment of error on that issue was deemed abandoned. Wachovia Bank & Trust Co. v. Southeast Airmotive, Inc., 91 N.C. App. 417, 371 S.E.2d 768 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230 (1989).

Defendant abandoned four out of five assignments of error on appeal by failing to bring them forward in his brief. State v. Clapp, 135 N.C. App. 52, 519 S.E.2d 90 (1999).

Where defendant failed to assign error to or provide any argument in defendant's appellate brief regarding the trial court's ex parte communication, the appellate court, pursuant to N.C. R. App. P. 28(b)(6), refused to consider the issue. State v. Phillips, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Where defendant's brief contained arguments supporting only one of the eleven original assignments of error on appeal, the omitted assignments of error were deemed abandoned under N.C. R. App. P. 28(b)(6). State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Failure to Assign Error to Findings of Fact. — Although defendant assigned error to the findings that the state had made the reasonable effort to notify defendant of a probation violation required by G.S. 15A-1344(f)(2), including a finding that defendant absconded from supervision, defendant did not bring those assignments forward in defendant's brief, and the findings were binding on appeal under N.C. R. App. P. 28(b)(6). State v. High, 183 N.C. App. 443, 645 S.E.2d 394, 2007 N.C. App. LEXIS 1171 (2007).

In a medical negligence action, an appellate court did not need to evaluate a patient's claims with respect to a witness's knowledge of the applicable standard of care and his competency to serve as an expert witness, under N.C. R. App. P. 10(a), 10(c), 28(a), because (1) even if the trial court erred in excluding the witness's testimony with respect to the applicable standard of care, the trial court's order still included a ruling that the patient failed to meet her burden of proof in establishing proximate cause; and (2) the patient failed to challenge the alternate basis for the trial court's order granting the surgeon's motion for directed verdict. Kerr v. Long, — N.C. App. —, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (Mar. 18, 2008).

Failure to refer to the assignments of error or exceptions following the statement of the questions presented could result in abandonment of all of appellant's questions on appeal and consequently result in dismissal of the appeal. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed and cert. denied, 305 N.C. 306, 290 S.E.2d 707 (1982).

Court would not address the merits of plaintiff's argument regarding alleged fraudulent conveyances where she violated subdivision (b)(5) of this rule in that she failed to reference in her brief the assignment of error supporting the argument. Therefore, this part of plaintiff's appeal would be dismissed. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Dismissal of an appeal was proper, where the appellant failed to double space the text of her brief and failed to set out in her brief references to the assignments of error upon which her presented issues and arguments were based. Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

Failure to Argue Assignment of Error. — Because defendant seller had not argued its assignments of error, they were deemed abandoned. Baker v. Lanier Marine Liquidators, Inc., — N.C. App. —, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

While the record on appeal contained ten assignments of error, in his brief, however, defendant brought forward arguments in support of only two of the assignments of error; therefore, those assignments of error for which defendant failed to present arguments were deemed abandoned. State v. Patterson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 875 (May 6, 2008).

Assigning error to a conclusion of law on the generalized basis of "insufficiency of the evidence" does not preserve the issue of the sufficiency of evidence supporting the findings of fact on which the conclusion was based; a father failed to preserve the issue of whether the evidence supported the trial court's findings in his termination case, where the father did not assign error to any of the trial court's findings of fact, and thus the trial court's findings were presumed to be supported by competent evidence and were binding on appeal. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

Multiple Errors in Brief. — Defendant in murder case did not identify the specific questions or answers which he wanted the Supreme Court to review, did not include the portions of the transcripts containing those questions or answers in the appendix, and did not include a verbatim recitation of those questions or answers in his brief. Therefore, the assignments of error were dismissed. State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993).

When the buyers in a dispute over earnest money appealed the trial court's judgment, but their appellate brief made no reference to the record, the 189 pages of testimony, or any of the 16 exhibits, which included several documents totaling over 100 pages, they did not indicate the assignment of error relevant to each argument, and they did not identify any assignment of error by its number or the page where it appeared in the record, it was difficult, if not impossible, to properly determine their appeal, and, considering their other appellate rules violations and the lack of a significant issue or error requiring waiver of their violations, their appeal was dismissed. Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Guarantor's appealed was dismissed because the guarantor failed to comply with N.C. R. App. P. 10 and N.C. R. App. P. 28 by failing to: (1) separate each question presented within the argument section of the brief; (2) reference each assignment of error with numbers and pages where they appeared in the record on appeal; (3) support the arguments with stated or cited authority; (4) provide a full and complete statement of the facts; and (5) number each assignment of error separately in the record on appeal. Consol. Elec. Distribs., Inc. v. Dorsey, 170 N.C. App. 684, 613 S.E.2d 518, 2005 N.C. App. LEXIS 1078 (2005).

Appellate court refused to use its discretion under N.C. R. App. P. 2 to overlook a company's numerous and egregious appellate rule violations as: (1) the company failed to respond to an LLC's motion to dismiss the company's appeal; (2) none of the company's assignments of error in the original record on appeal or in an addendum to the record on appeal contained any clear and specific record or transcript references; (3) in the argument section of its brief, the company stated the question presented but failed to reference any assignments of error pertinent to the question in violation of N.C. R. App. P. 28(b)(6); (4) the company's failure to state the grounds for appellate review violated Rule 28(b)(4); and (5) the company's failure to state the applicable standard of review for each question presented violated Rule 28(b)(6). Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 183 N.C. App. 389, 645 S.E.2d 212, 2007 N.C. App. LEXIS 1167 (2007), rev'd 362 N.C. 191, 657 S.E.2d 361 (2008), rev'd, 362 N.C. 191, 657 S.E.2d 361 (2008), Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 183 N.C. App. 389, 645 S.E.2d 212, 2007 N.C. App. LEXIS 1167 (2007), rev'd 362 N.C. 191, 657 S.E.2d 361 (2008).

Homeowners' attorney was ordered to pay double the printing costs of an appeal under N.C. R. App. P. 34(b) due to the violation of N.C. R. App. P. 9,11, 12, 28(b)(4), 28(b)(6), and 28(b)(5), which was substantial under N.C. R. App. P. 25, but not so gross as to warrant dismissal against an insurance agent. Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Cuties of Appellant. — It is an appellants' duty to make sure the record contains all evidence relevant to the appellants' appeal, and the appellants' duty to direct the appellate court to that evidence in the appellant's brief pursuant to N.C. R. App. P. 9 and 28(b)(6). Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1546 (Aug. 19, 2008).

Single Error Did Not Warrant Dismissal of Appeal. — Because a potential property purchaser listed only nine assignments of error in the record, appellee businesses and the appellate court could easily ascertain the appeal. Furthermore, since the purchaser violated only one appellate rule, there was no compelling reason to dismiss the issue; thus, the appellate court exercised its discretion to reach the merits regarding the breach of contract issue. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, — N.C. App. —, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

Although appellant failed to identify the various exceptions upon which its assignments of errors were based, as required by subsection (b)(5) of this rule, the court deemed it appropriate, pursuant to N.C.R.A.P., Rule 2, to dispose of the appeal on the merits. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Codefendant Deemed to Have Abandoned Assignment. — Where codefendants object to the introduction of evidence, but the assignment of error based on this exception is brought forward and discussed in the brief of only one of the codefendants, the assignment is deemed abandoned by the other codefendants. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

An exception to the trial judge's signing of the judgment upon verdict of guilty raises nothing for review under this rule. State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

It is the better practice for the appellee's brief to use the same numbering system for the questions presented as the appellant's brief. — State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Question Not Raised at Trial or on Appeal May Not Be Attacked by Collateral Review. — Where the defendant in a prosecution for second-degree murder failed to raise at trial, on direct appeal or in a subsequent petition for post-conviction relief, the question of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. State v. Locklear, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979), decided under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Subdivision (b)(4) serves the same function as N.C.R.A.P., Rule 9(c)(1) serves with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

Subdivision (b)(4) Must Be Followed When Stenographic Transcript Used. — It is imperative that defendants using the stenographic transcript alternative allowed by N.C.R.A.P., Rule 9(c)(1) carefully follow the requirements of subdivision (b)(4) of this rule in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780, 1982 N.C. App. LEXIS 2840 (1982), cert. denied without prejudice, — N.C. —, 342 S.E.2d 907 (1986).

Failure to observe the requirements of subdivision (b)(4) of this rule constitutes a substantial impediment to the capacity of the appellate court to perform its functions. Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982).

Property owner did not include a statement of the grounds for appellate review in his brief in accordance with N.C.R.A.P., Rule 28(b)(4); therefore, when viewed in tandem with the owner's other failures to comply with the North Carolina Rules of Appellate Procedure, the nature and significance of the owner's rules violations warranted dismissal of his appeal. Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007).

Appellants Complied With Subdivision (b)(4). — Where the trial court denied, in part, the motion to stay and compel arbitration filed by defendants salesperson and developer, defendants properly recognized the interlocutory nature of their appeal and argued the grounds for immediate appellate review, pursuant to N.C. R. App. P. 28(b)(4). Brown v. Centex Homes, 171 N.C. App. 741, 615 S.E.2d 86, 2005 N.C. App. LEXIS 1356 (2005).

Only Portions of Transcript Necessary to Determine Question Need Be Set Out. — Subdivision (b)(4) of this rule only requires setting out the verbatim portions of the transcript necessary for an understanding of each question presented. The rule does not require the appellant to include all of the evidence necessary for a determination of the questions presented. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

N.C.R.A.P., Rule 9(c) provides for an alternative to narrating the evidence into the record; that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (N.C.R.A.P., Rule 9 or this rule), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Appendix as Part of Record on Appeal. — In an action regarding the termination of state employment, an appendix to the employee's brief was stricken because it violated N.C. R. App. P. 9 and 28, as it was not part of the record, nor agreed on by the parties to be part of the record, nor submitted pursuant to a motion to amend the record. Woodburn v. N.C. State Univ., 156 N.C. App. 549, 577 S.E.2d 154, 2003 N.C. App. LEXIS 305 (2003), cert. denied, 357 N.C. 470, 584 S.E.2d 296 (2003).

Where defendant's appellate brief, challenging defendant's first-degree murder conviction, did not cite the specific assignment of error that defendant contended supported defendant's one argument that was not waived and defendant did not attach to the brief the pertinent portions of the trial proceedings related to the argument, defendant violated N.C. R. App. P. 28(b)(6), (d)(1); however, the appellate court, rather than deeming the error waived, exercised its discretion under N.C. R. App. P. 2 to examine the merits of defendant's argument. State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

When Appendix Required. — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of this rule is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

This rule only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Improper Documents in Appendix. — It is improper for a party to attach a document not in the record and not permitted under this rule in an appendix to its brief. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, 1996 N.C. App. LEXIS 240 (1996), cert. denied, 472 S.E.2d 8 (1996).

The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where they did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

The inclusion in an appendix of materials from outside the record violated N.C. R. App. P. 28(d) and could have subjected defendants to sanctions; although the appellate court, in its discretion, elected not to impose such sanctions. Woodring v. Swieter, 180 N.C. App. 362, 637 S.E.2d 269, 2006 N.C. App. LEXIS 2387 (2006).

Type Size. — N.C.R.A.P., Rule 26 requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with Rule 26, Rule 26 governs and no brief shall be submitted in less than eleven point type. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. The numbering of the pages, as provided in Appendix B., is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Characters Per Inch. — Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. N.C.R.A.P., Rule 26 does not speak in terms of characters per inch; however, in order to provide a uniform construction of this rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of the Court of Appeals and the Supreme Court and the standard we will apply to the briefs filed with the Court of Appeals. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Prospective Application of Construction of Rule. — Where the point size in defendants' appellate brief did not comply with N.C.R.A.P., Rule 26, but neither the rule nor the Court of Appeals had previously construed Rule 26, the court would consider the arguments presented in defendants' brief. Rule 26, as construed in this case, will be applied by the Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Page Limitation. — Appellate rules governing the size of type and the number of pages to be included in appellate briefs prevent unfair advantage to any litigant and insure a level playing field for all parties on appeal. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

Because the appellee's brief exceeded the page limit under N.C. R. App. P. 28(j), and the appellate court denied the appellee's motion to waive the page limit, the appellate court did not consider that part of the appellee's brief that exceeded the allowable page limit. Watts v. Borg Warner Auto., Inc., 171 N.C. App. 1, 613 S.E.2d 715, 2005 N.C. App. LEXIS 1159 (2005), aff'd, 360 N.C. 169, 622 S.E.2d 492 (2005).

Sanction for Lengthy Brief. — Where an appellant submitted a 75-page brief, in clear violation of the 35-page limit of subsection (j) of this rule, which put forth precisely the same argument as in his previous motion to dismiss and in previous appeals, under N.C.R.A.P., Rule 34 the Court of Appeals was authorized to impose a sanction against that party. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774 (1991), cert. denied, 332 N.C. 484, 421 S.E.2d 349 (1992).

Where appellate brief was 42 pages in length, thereby exceeding the 35 page limit, and counsel proffered minimal justification for the rule violation, the court imposed a fine and reimbursement for copying expenses to be paid by counsel personally. State v. Hudson, 123 N.C. App. 336, 473 S.E.2d 415 (1996), rev'd on other grounds, 345 N.C. 729, 483 S.E.2d 436 (1997).

North Carolina Court of Appeals did not consider that portion of the brief which exceeded the N.C. R. App. P. 28(j) 35-page limit. D'Aquisto v. Mission St. Joseph's Health Sys., 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005), rev'd on other grounds, review improvidently denied, in part, 360 N.C. 567, 633 S.E.2d 89 (2006).

Noncompliance Resulting in Sanctions Against Plaintiff's Attorneys. — Given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with N.C.R.A.P., Rules 9, 28, and 37, the court would impose sanctions against plaintiff's attorneys in the form of costs associated with the appeal. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

Dismissal as Sanction. — Because appellant management company violated N.C. R. App. P. 28(b)(6), by failing to identify an assignment of error by the page where it appeared in the record following the question presented, and violated N.C. R. App. P. 26(g)(1), by submitting a brief that contained an improper index margin, double-spaced captions and headings, and no appendix page reference, and the appellant acknowledged its violations but made no attempt to correct, amend, or substitute its brief, the court declined to apply N.C. R. App. P. 2 and to review the merits of the appeal and instead dismissed it; nothing in the record or briefs demonstrated exceptional circumstances to suspend or vary the rules in order to prevent manifest injustice to a party, or to expedite a decision in the public interest. Selwyn Vill. Homeowners Ass'n v. Cline & Co., — N.C. App. —, 651 S.E.2d 909, 2007 N.C. App. LEXIS 2297 (2007).

Sanctions Other than Dismissal. — Dismissal of an appeal for failure to comply with N.C. R. App. P. 28(b)(4), and 28(b)(6) was reversed and remanded because the intermediate appellate court should have considered whether sanctions other than dismissal would have been appropriate pursuant to N.C. R. App. P. 25(b) or 34. If the court concluded that dismissal was the appropriate sanction, it may then have considered whether the circumstances of the case justified invoking N.C. R. App. P. 2 to reach the merits of the appeal. Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

Costs Attributable to Too Long Brief As-

sessed Against Attorney. — Where former attorney for plaintiffs filed a brief of 80 single-spaced pages of arguments, a gross violation of subsection (j) of this rule, the portion of the costs of the appeal attributable to plaintiff appellant's excessively long brief were assessed against said attorney, with plaintiffs bearing the remainder of the costs of the appeal. North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462, cert. denied, 327 N.C. 484, 397 S.E.2d 215 (1990).

Amicus Brief Accepted Under N.C.R.A.P., Rule 2. — Where in spite of the fact that appellee and estate purported to have settled their differences, and in spite of the fact that appellee was no longer represented by attorneys, such attorneys filed a brief opposing appellant, titled "Appellee's Brief," appellate court would use N.C.R.A.P., Rule 2 to treat this brief as an amicus brief because of the extraordinary procedural posture of the case. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. denied, 331 N.C. 749, 417 S.E.2d 236 (1992).

The scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal, and where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court. Bustle v. Rice, 116 N.C. App. 658, 449 S.E.2d 10 (1994).

Briefs Held to Violate Rule. — An appellate brief in a capital murder case violated this rule, where it set forth several arguments with a cluster of assignments referred to after each such argument, with each such argument also including many subheadings in which separate questions were stated without reference to any assignment of error. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Appellants' appeal was dismissed due to their violation of the requirement of N.C. R. App. P. 28(b)(6) that, in an appellant's brief, immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Anthony v. City of Shelby, 152 N.C. App. 144, 567 S.E.2d 222, 2002 N.C. App. LEXIS 904 (2002).

Appellate court refused to review an interlocutory appeal of the trial court's grant of partial summary judgment, where the appellants failed to comply with N.C. R. App. P. 28(b)(4) by failing to state in their brief the substantial right that would have been lost if the appeal was not heard, as was required under G.S. 1-277(a) and G.S. 7A-27(d)(1). Munden v. Courser, 155 N.C. App. 217, 574 S.E.2d 110, 2002 N.C. App. LEXIS 1582 (2002).

When a trial court's judgment setting aside an execution sale was appealed, the trial court's conclusion that the sales price for the subject property was grossly inadequate was not properly presented for review, under N.C. R. App. P. 28(b)(6), because, while the appealing parties assigned as error the trial court's conclusion that the sales price was grossly inadequate, they did not assign error to the trial court's findings of fact relating to the adequacy of price and their brief did not contain any argument that the trial court erred in concluding that the sales price was grossly inadequate. Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

Neighbor's only assignment of error in record on appeal lacked references to the record or transcript as required by N.C. R. App. P. 10(c)(1); further, the neighbor's brief contained no reference to the lone assignment of error nor the numbers and pages by which it appeared in the record, in violation of N.C. R. App. P. 28(b)(6), and the appeal was dismissed. Walsh v. Town of Wrightsville Beach Bd. of Alderman, 179 N.C. App. 97, 632 S.E.2d 271, 2006 N.C. App. LEXIS 1685 (2006), rev'd and remanded, 361 N.C. 348 (2007), for further consideration in light of State v. Hart, 361 N.C. 309, 644 S.E.2d 201 (2007).

Husband's appeal was dismissed, in part, because the argument in the appellate brief failed to contain a concise statement of the applicable standard(s) of review for each question presented as well as any citation of authorities supporting such a standard of review as required by N.C. R. App. P. 28(b)(6). Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Defendant's counsel was sanctions and was required to personally pay the printing costs of an appeal because he violated N.C. R. App. P. 26(g)(1) by single-spacing the argument section of his brief and because he failed to include a statement of the standard of review as required under N.C. R. App. P. 28(b)(6). State v. Lockhart, 181 N.C. App. 316, 639 S.E.2d 5, 2007 N.C. App. LEXIS 89 (2007).

In a consumer's suit against a manufacturer and a repair company for carbon monoxide poisoning from a home gas heater, where appeal was sought on a ruling granting summary judgment in favor of the manufacturer, but denying summary judgment in favor of the company, and where the company filed a memorandum of additional authorities after oral argument, pursuant to N.C. R. App. P. 28(g), the memorandum was struck because it was used for additional argument and was not limited to citation of additional authorities, as provided by the rule. Edmondson v. Macclesfield L-P Gas Co., 182 N.C. App. 381, 642 S.E.2d 265, 2007 N.C. App. LEXIS 693 (2007).

Single Violation Not Substantial. — Where dominant tract owners were granted a prescriptive easement, the servient tract owner's counsel was ordered to pay the printing costs of the appeal pursuant to N.C. R. App. P. 34(b) because the servient tract owner did not provide an applicable standard of review or citation of authorities supporting such a standard in the appellate brief, and the single violation was not substantial. Caldwell v. Branch, 181 N.C. App. 107, 638 S.E.2d 552, 2007 N.C. App. LEXIS 91 (2007).

Where Record Did Not Reveal Any Request That Trial Court Make Findings of Fact and Conclusions of Law. — Where the record did not reveal any request by former wife that the trial court make findings of fact and conclusions of law, the former wife's assignment of error asserting that the trial court failed to make those findings and conclusions in dismissing her action was overruled. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Appellate court considered plaintiff's interlocutory appeal of a summary judgment order, even though her brief did not contain the statement required by N.C. R. App. P. 28(b)(4)

regarding whether a substantial right would be affected if the appeal were not immediately reviewed, since, during oral arguments, both parties argued that the appeal was interlocutory and gave reasons why the trial court's ruling was immediately appealable. McCutchen v. McCutchen, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

Review of Significant Issues Warranted Under N.C. R. App. P. 2. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), (d)(1)c., and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Appeal Proper Where Substantial Right Affected. — Widow sufficiently established that the order below affected a substantial right and that interlocutory review was therefore appropriate under circumstances in which the trial court had ordered the widow to pay $150,000 which she had withdrawn from a decedent's bank account. Estate of Redden v. Redden, 179 N.C. App. 113, 632 S.E.2d 794, 2006 N.C. App. LEXIS 1638 (2006).

Consideration of Appeal Despite Failure to Comply with Rule. — Although the appellants' brief did not conform completely to the mandates of the North Carolina Rules of Appellate Procedure, thereby subjecting their appeal to dismissal, the appellate court nevertheless elected to reach the merits of their appeal; the court found that it was proper not to dismiss the appeal because, inter alia, the court did not believe that the appellees were substantially prejudiced as the appellants' assignments of error were specific enough to put the appellees on notice of the contested issues and upon what basis the court might rule, and maintaining the integrity of the laws through proper interpretation and application outweighed the importance of dismissal in a case in which the rules violations had little to no impact. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

Although counsel's statement of facts was neither full, complete, nor non-argumentative, as required by N.C. R. App. P. 28, the appellate court considered the appeal because it would have been unjust to penalize defendant; however, pursuant to N.C. R. App. P. 25 and N.C. R. App. P. 34, defendant's counsel was ordered to personally pay costs. State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007).

Appellate court agreed to hear defendant's appeal of defendant's conviction of habitual impaired driving despite the fact that it could have dismissed the appeal because defendant violated the state rules of appellate procedure by failing to identify assignments of errors by the pages at which they appear in the printed record on appeal; however, it also deemed abandoned defendant's assignment of errors not argued in defendant's brief. State v. Bradley, 181 N.C. App. 557, 640 S.E.2d 432, 2007 N.C. App. LEXIS 251 (2007).

Dismissal Not Appropriate Remedy. — Subcontractor's violations of N.C. R. App. 28(b)(4) and (b)(6) and 10(c) were not so egregious as to require dismissal of the appeal, and the subcontractor was ordered to pay the costs of printing the appeal under N.C. R. App. P. 34(b), as N.C. R. App. P. 2 had to be applied cautiously; therefore, its application inherently was limited, State v. Hart, 644 S.E.2d 201 (2007), suggested no similar limitation on the application of N.C. R. App. P. 25 and N.C. R. App. P. 34, and there was no reason to engraft any limitation beyond the language contained within the rules. McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Court Had Discretion to Determine Whether Dismissal was Warranted. — Even assuming for the sake of argument that the husband's appellate brief did not strictly comply with the North Carolina Rules of Appellate Procedure, it was within the appellate court's discretion as to whether dismissal was warranted as a sanction; since the husband's alleged violations were not sufficiently egregious to warrant dismissal, the appellate court declined to dismiss the husband's appeal and would review the husband's remaining assignment of error. Cotter v. Cotter, 185 N.C. App. 511, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Under N.C. R. App. P. 28, a trial court's findings of fact are binding upon an appellate court where plaintiff fails to assign error to specific findings of fact by the trial court and instead resorts to a broadside attack on the order that its findings were not supported by pleadings, submissions, evidence of record and arguments of the parties and did not support its conclusions. Further, plaintiff's brief merely argues, without citation of case authority, that her complaint is not frivolous as contemplated by G.S. 1A-1,N.C. R. Civ. P. 11. Dalenko v. Collier, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1500 (Aug. 5, 2008).

Appeal Not Treated as Petition for Certiorari. — Notice of appeal was ineffective as to an insurer, and was not treated as a petition for a writ of certiorari under N.C. R. App. P. 21(a)(1), in part, due to the homeowners' violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5). Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Applied in State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Duncan, 290 N.C. 741, 228 S.E.2d 237 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976); In re Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977); State v. Witherspoon, 293 N.C. 321, 237 S.E.2d 822 (1977); State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977); State v. Alston, 293

N.C. 553, 238 S.E.2d 505 (1977); State v. Lockett, 33 N.C. App. 401, 235 S.E.2d 73 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977); State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978); State v. Martin, 294 N.C. 253, 240 S.E.2d 415 (1978); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); State v. Warren, 35 N.C. App. 468, 241 S.E.2d 854 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Smith v. State, 36 N.C. App. 307, 244 S.E.2d 161 (1978); State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Bailey, 36 N.C. App. 728, 245 S.E.2d 97 (1978); Siedlecki v. Powell, 36 N.C. App. 690, 245 S.E.2d 417 (1978); State v. Davis, 37 N.C. App. 173, 245 S.E.2d 583 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152 (1978); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979); State v. Henley, 296 N.C. 547, 251 S.E.2d 463 (1979); State v. Hopkins, 296 N.C. 673, 252 S.E.2d 755 (1979); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223 (1979); State v. Hunt, 297 N.C. 258, 254 S.E.2d 591 (1979); Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980); State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); Hanes v. Kennon, 46 N.C. App. 597, 265 S.E.2d 488 (1980); Southern Nat'l Bank v. B & E Constr. Co., 46 N.C. App. 736, 266 S.E.2d 1 (1980); Lloyd v. Carnation Co., 47 N.C. App. 203, 266 S.E.2d 722 (1980); Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980); Rose v. Herring Tractor & Truck Co., 47 N.C. App. 643, 267 S.E.2d 717 (1980); State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980); State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981); McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981); Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981); Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982); State v. Thompson, 306 N.C. 526, 294 S.E.2d 314 (1982); State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880 (1982); Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); State v. Joseph, 59 N.C. App. 436, 297 S.E.2d 173 (1982); State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983); Edwards v. Latham, 60 N.C. App. 759, 299 S.E.2d 819 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Gonzalez, 62 N.C. App. 146, 302 S.E.2d 463 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983); State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983); State v. Collins, 64 N.C. App. 656, 308 S.E.2d 353 (1983); Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362 (1984); Chrysler Credit Corp. v. Rebhan, 66 N.C. App. 255, 311 S.E.2d 606 (1984); Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); Smith-Douglass v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Miller v. Henderson, 71 N.C. App. 366, 322 S.E.2d 594 (1984); In re Will of Leonard, 71 N.C. App. 714, 323 S.E.2d 377 (1984); Goforth Properties, Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984); Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984); Pittman v. First Protection Life Ins. Co., 72 N.C. App. 428, 325 S.E.2d 287 (1985); Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985); State v. Castleberry, 73 N.C. App. 420, 326 S.E.2d 312 (1985); Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985); Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985); Lattimore v. Fisher's Food Shoppe, Inc., 313 N.C. 467, 329 S.E.2d 346 (1985); Watts v. Cumberland County Hosp. Sys., 74 N.C. App. 769, 330 S.E.2d 256 (1985); Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985); State ex rel. Utils. Comm'n v. Nantahala Power &

Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985); L. Harvey & Son Co. v. Jarman, 76 N.C. App. 191, 333 S.E.2d 47 (1985); State v. Parker, 76 N.C. App. 465, 333 S.E.2d 515 (1985); State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985); In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985); Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 77 N.C. App. 475, 335 S.E.2d 335 (1985); State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985); Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985); Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E.2d 639 (1985); Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985); Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986); Holthusen v. Holthusen, 79 N.C. App. 618, 339 S.E.2d 823 (1986); Cobb v. Cobb, 79 N.C. App. 592, 339 S.E.2d 825 (1986); Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986); Graham v. Mid-State Oil Co., 79 N.C. App. 716, 340 S.E.2d 521 (1986); State v. Brewington, 80 N.C. App. 42, 341 S.E.2d 82 (1986); Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90 (1986); Pee Dee Oil Co. v. Quality Oil Co., 80 N.C. App. 219, 341 S.E.2d 113 (1986); Hardaway Constructors, Inc. v. North Carolina DOT, 80 N.C. App. 264, 342 S.E.2d 52 (1986); Boyd v. Watts, 316 N.C. 622, 342 S.E.2d 840 (1986); State v. Gilliam, 317 N.C. 293, 344 S.E.2d 783 (1986); State v. Harper, 82 N.C. App. 398, 346 S.E.2d 223 (1986); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986); Vuncannon v. Vuncannon, 82 N.C. App. 255, 346 S.E.2d 274 (1986); Cavenaugh v. Cavenaugh, 317 N.C. 652, 347 S.E.2d 19 (1986); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); Harris v. Duke Power Co., 83 N.C. App. 195, 349 S.E.2d 394 (1986); Facet Enters., Inc. v. Deloatch, 83 N.C. App. 495, 350 S.E.2d 906 (1986); Hill v. Hill, 83 N.C. App. 661, 351 S.E.2d 108 (1986); State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987); Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 84 N.C. App. 27, 351 S.E.2d 786 (1987); Harvey v. Harvey, 84 N.C. App. 145, 351 S.E.2d 842 (1987); State v. Williams, 319 N.C. 73, 352 S.E.2d 428 (1987); Wagner v. R, J & S Assocs., 84 N.C. App. 555, 353 S.E.2d 234 (1987); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239 (1987); Melkonian v. Board of Adjustment, 85 N.C. App. 531, 355 S.E.2d 503 (1987); Burton v. NCNB Nat'l Bank, 85 N.C. App. 702, 355 S.E.2d 800 (1987); Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis, 86 N.C. App. 51, 356 S.E.2d 372 (1987); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917 (1987); State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987); Taylor v. North Carolina DOT, 86 N.C. App. 299, 357 S.E.2d 439 (1987); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); McKnight v. Simpson's Beauty Supply, Inc., 86 N.C. App. 451, 358 S.E.2d 107 (1987); State v. Bright, 320 N.C. 491, 358 S.E.2d 498 (1987); Whitehurst v. Crisp R.V. Ctr., Inc., 86 N.C. App. 521, 358 S.E.2d 542 (1987); McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987); Barbecue Inn, Inc. v. Carolina Power & Light Co., 88 N.C. App. 355, 363 S.E.2d 362 (1988); In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988); South Carolina Ins. Co. v. Hallmark Enters., Inc., 88 N.C. App. 642, 364 S.E.2d 678 (1988); Bryant v. Eagan, 88 N.C. App. 741, 364 S.E.2d 704 (1988); Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988); Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14 (1988); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988); State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988); State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654 (1988); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988); Walter v. Vance County, 90 N.C. App. 636, 369 S.E.2d 631 (1988); Russell v. Town of Morehead City, 90 N.C. App. 675, 370 S.E.2d 56 (1988); Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988); In re Medical Ctr., 91 N.C. App. 107, 370 S.E.2d 597 (1988); McDonald v. Scarboro, 91 N.C. App. 13, 370 S.E.2d 680 (1988); Matthews v. Prince, 90 N.C. App. 541, 369 S.E.2d 116 (1988); Gentile v. Town of Kure Beach, 91 N.C. App. 236, 371 S.E.2d 302 (1988); State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988); Brandt v. Brandt, 92 N.C. App. 438, 374 S.E.2d 663 (1988); Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989); State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989); Edwards v. Advo Sys., 93 N.C. App. 154, 376 S.E.2d 765 (1989); State v. Agee, 93 N.C. App. 346, 378 S.E.2d 533 (1989); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); Lincoln v. Grinstead, 94 N.C. App. 122, 379 S.E.2d 671 (1989); Peace v. J.P. Stevens Co., 95 N.C. App. 129, 381 S.E.2d 798 (1989); Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue, 95 N.C. App. 151, 381 S.E.2d 815 (1989); State v. Sanders, 95 N.C. App. 56, 381 S.E.2d 827 (1989); Star Auto. Co. v. Jaguar Cars Inc., 95 N.C. App. 103, 382 S.E.2d 226 (1989); State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989); Tindall v. Willis, 95 N.C. App. 374, 382 S.E.2d 778 (1989); Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989); State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989); State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989); Privette v. University of N.C., 96 N.C. App. 124, 385 S.E.2d 185 (1989); State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989); Kwan-Sa You v. Roe, 97 N.C. App. 1, 387 S.E.2d 188 (1990); Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990); Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 97 N.C. App. 511, 389 S.E.2d 576 (1990); Cheek v. Poole, 98 N.C. App. 158, 390 S.E.2d 455 (1990); In re Consol. Appeals of Certain Timber Cos., 98 N.C. App. 412, 391 S.E.2d 503 (1990); In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990); Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990); Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); Liberty Fin. Co. v. North Augusta Computer Store, Inc., 100 N.C. App. 279, 395 S.E.2d 709 (1990); Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990); Christensen v. Christensen, 101 N.C. App. 47, 398 S.E.2d 634 (1990); Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990); State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991); J.M. Owen Bldg. Contractors, Inc. v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991); State v. Cotton, 102 N.C. App. 93, 401 S.E.2d 376 (1991); Thomas v. Thomas, 102 N.C. App. 124, 401 S.E.2d 396 (1991); State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991); Williams v. Abernethy, 102 N.C. App. 462, 402 S.E.2d 438 (1991); State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991); State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991); Correll v. Division of Social Servs., 103 N.C. App. 562, 406 S.E.2d 633 (1991); Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991); State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991); State v. Stone, 104 N.C. App. 448, 409 S.E.2d 719 (1991); Williams v. New Hanover County Bd. of Educ., 104 N.C. App. 425, 409 S.E.2d 753 (1991); State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991); State v. Maye, 104 N.C. App. 437, 410 S.E.2d 8 (1991); In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); Lumsden v. Lawing, 107 N.C. App. 493, 421 S.E.2d 594 (1992); Fowler v. Valencourt, 108 N.C. App. 106, 423 S.E.2d 785 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440 (1993); Keith v. Polier, 109 N.C. App. 94, 425 S.E.2d 723 (1993); Albritton v. Albritton, 109 N.C. App. 36, 426 S.E.2d 80 (1993); Thompson v. Hank's of Carolina, Inc., 109 N.C. App. 89, 426 S.E.2d 278 (1993); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Tuggle, 109 N.C. App. 235, 426 S.E.2d 724 (1993); State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376 (1993); Jefferson-Pilot Life Ins. Co. v. Spencer, 110 N.C. App. 194, 429 S.E.2d 583 (1993); State v. Jones, 110 N.C. App. 169, 429 S.E.2d 597 (1993); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604 (1993); State v. McRae, 110 N.C. App. 643, 430 S.E.2d 434 (1993); State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (1993); State v. Moore, 111 N.C. App. 649, 432 S.E.2d 887 (1993); Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798 (1993); State v. Ramseur, 112 N.C. App. 429, 435 S.E.2d 837 (1993); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); Northwood Homeowners Ass'n v. Town of Chapel Hill, 112 N.C. App. 630, 436 S.E.2d 282 (1993); In re Sullivan, 112 N.C. App. 795, 436 S.E.2d 862 (1993); Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993); Varner v. Bryan, 113 N.C. App. 697, 440 S.E.2d 295 (1994); Lavelle v. Guilford County Area Mental Illness, Mental Retardation & Substance Abuse Auth., 115 N.C. App. 75, 443 S.E.2d 761 (1994); Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 444 S.E.2d 252 (1994); State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (1994); Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994); State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994); McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994); Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); NationsBank v. Baines, 116 N.C. App. 263, 447 S.E.2d 812 (1994); State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995); Outen v. Mical, 118 N.C. App. 263, 454 S.E.2d 883 (1995); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); State v. Taylor, 340 N.C. 52, 455 S.E.2d 859 (1995); Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 856 (1995); State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995); Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995); State v. McLean, 120 N.C. App. 838, 463 S.E.2d 826 (1995); Gibson v. Mutual Life Ins. Co., 121 N.C. App. 284, 465 S.E.2d 56 (1996); State v. Locklear, 121 N.C. App. 355, 465 S.E.2d 61 (1996); Graham v. Hardee's Food Sys., 121 N.C. App. 382, 465 S.E.2d 558 (1996); State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995); Carteret County v. United Contractors of Kinston, 120 N.C. App. 336, 462 S.E.2d 816 (1995); State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996); State v. Watson, 122 N.C. App. 596, 472 S.E.2d 28 (1996); State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 123 N.C. App. 43, 472 S.E.2d 193 (1996); Setzer v. Boise Cascade Corp., 123 N.C. App. 441, 473 S.E.2d 431 (1996); King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996); Computer Decisions, Inc. v. Rouse Office Mgt. of N.C., Inc., 124 N.C. App. 383, 477 S.E.2d 262 (1996); Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997); Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997); Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998); State v. Goode, 350 N.C. 247, 512 S.E.2d 414 (1999); State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000); Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999); Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479, 1999 N.C. App. LEXIS 1176 (1999); Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739, 1999 N.C. App. LEXIS 1186 (1999); State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999); Matthews v. Food Lion, Inc., 135 N.C. App. 784, 522 S.E.2d 587, 1999 N.C. App. LEXIS 1229 (1999); State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000); McCullough v. Branch Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000); State v. Cabe, 136 N.C. App. 510, 524 S.E.2d 828, 2000 N.C. App. LEXIS 53 (2000), cert. denied, 351 N.C. 475, 543 S.E.2d 496 (2000); Thomas v. Washington, 136 N.C. App. 750, 525 S.E.2d 839, 2000 N.C. App. LEXIS 154 (2000); In re Wright, 137 N.C. App. 104, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000); State v. Jackson, 137 N.C. App. 570, 529 S.E.2d 253 (N.C. Ct. App. 2000); Sidden v. Mailman, 137 N.C. App. 669, 529 S.E.2d 266, 2000 N.C. App. LEXIS 493 (2000); Patterson ex rel. Jordan v. Patterson, 137 N.C. App. 653, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000); State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2000); Bahl v. Talford, 138 N.C. App. 119, 530 S.E.2d 347, 2000 N.C. App. LEXIS 537 (2000); Price v. Breedlove, 138 N.C. App. 149, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000); State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000); State v. Lucas, 138 N.C. App. 226, 530 S.E.2d 602, 2000 N.C. App. LEXIS 596 (2000); State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000); Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000); State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000), cert. denied, 352 N.C. 678, 545 S.E.2d 434 (2000), cert. denied, 531 U.S. 1177, 121 S. Ct. 1153, 148 L. Ed. 2d 1015 (2001); Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532

S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000); State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569, 2000 N.C. App. LEXIS 800 (2000); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 (2001); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000); Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000); State v. Young, 140 N.C. App. 1, 535 S.E.2d 380, 2000 N.C. App. LEXIS 1042 (2000), cert. denied, 353 N.C. 397, 547 S.E.2d 429 (2001), appeal dismissed, 353 N.C. 397, 547 S.E.2d 429 (2001); State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000); Connelly v. Family Inns of Am., 141 N.C. App. 583, 540 S.E.2d 38, 2000 N.C. App. LEXIS 1408 (2000); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001); State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516, 2001 N.C. App. LEXIS 727 (2001); Carolina Place Joint Venture v. Flamers Charburgers, Inc., 145 N.C. App. 691, 552 S.E.2d 647, 2001 N.C. App. LEXIS 731 (2001); State v. Galloway, 145 N.C. App. 555, 551 S.E.2d 525, 2001 N.C. App. LEXIS 744 (2001), appeal dismissed, 356 N.C. 307, 570 S.E.2d 885 (2002); Lassiter v. Bank of N.C., 146 N.C. App. 264, 551 S.E.2d 920, 2001 N.C. App. LEXIS 867 (2001); State v. Streeter, 146 N.C. App. 594, 553 S.E.2d 240, 2001 N.C. App. LEXIS 989 (2001), cert. denied, 356 N.C. 312, 571 S.E.2d 211 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1319, 154 L. Ed. 2d 1071 (2003); Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002); Crawford v. Commercial Union Midwest Ins. Co., 147 N.C. App. 455, 556 S.E.2d 30, 2001 N.C. App. LEXIS 1183 (2001), cert. denied, 356 N.C. 160, 568 S.E.2d 190 (2002); State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002), cert. denied, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002); Rice v. Rice, 147 N.C. App. 505, 555 S.E.2d 924, 2001 N.C. App. LEXIS 1190 (2001); State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138, 2001 N.C. App. LEXIS 1246 (2001), cert. denied, 355 N.C. 219, 560 S.E.2d 152 (2002).; Lewis v. Orkand Corp., 147 N.C. App. 742, 556 S.E.2d 685, 2001 N.C. App. LEXIS 1250 (2001); State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001); In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002); Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002); State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003); Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002), cert. dismissed, 356 N.C. 678, 577 S.E.2d 887 (2003), cert. denied, 356 N.C. 678, 577 S.E.2d 888 (2003); Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002); Edwards v. Cerro, 150 N.C. App. 551, 564 S.E.2d 277, 2002 N.C. App. LEXIS 581 (2002); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002); BNT Co. v. Baker Precythe Dev. Co., 151 N.C. App. 52, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002); Singleton v. Haywood Elec. Membership Corp., 151 N.C. App. 197, 565 S.E.2d 234, 2002 N.C. App. LEXIS 715 (2002); State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); State v. Maney, 151 N.C. App. 486, 565 S.E.2d 743, 2002 N.C. App. LEXIS 754 (2002); Wolf v. Wolf, 151 N.C. App. 523, 566 S.E.2d 516, 2002 N.C. App. LEXIS 781 (2002); State v. Quick, 152 N.C. App. 220, 566 S.E.2d 735, 2002 N.C. App. LEXIS 878 (2002); State v. Williams, 153 N.C. App. 192, 568 S.E.2d 890, 2002 N.C. App. LEXIS 1081 (2002); State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657, 2002 N.C. App. LEXIS 1126 (2002); State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262, 2002 N.C. App. LEXIS 1170 (2002); State v. McKinney, 153 N.C. App. 369, 570 S.E.2d 238, 2002 N.C. App. LEXIS 1184 (2002); Rackley v. Coastal Painting, 153 N.C. App. 469, 570 S.E.2d 121, 2002 N.C. App. LEXIS 1186 (2002); Structural Components Int. Inc. v. City of Charlotte, 154 N.C. App. 119, 573 S.E.2d 166, 2002 N.C. App. LEXIS 1418 (2002); Alford v. Lowery, 154 N.C. App. 486, 573 S.E.2d 543, 2002 N.C. App. LEXIS 1459 (2002); State v. Boyd, 154 N.C. App. 302, 572 S.E.2d 192 (2002); Overton v. Camden County, 155 N.C. App. 100, 574 S.E.2d 150, 2002 N.C. App. LEXIS 1573 (2002); Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 574 S.E.2d 490, 2002 N.C. App. LEXIS 1615 (2002); State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002); Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002); Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003); Swain v. Preston Falls E., L.L.C., 156 N.C. App. 357, 576 S.E.2d 699, 2003 N.C. App. LEXIS 106 (2003); In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003); Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003); State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003); State v. Barlowe, 157 N.C. App. 249, 578 S.E.2d 660, 2003 N.C. App. LEXIS 536 (2003); State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003); State v. Nance, 157 N.C. App. 434, 579 S.E.2d 456, 2003 N.C. App. LEXIS 750 (2003); Piedmont Inst. of Pain Mgmt. v. Staton Found. , 157 N.C. App. 577, 581 S.E.2d 68, 2003 N.C. App. LEXIS 934 (2003); State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003); State v. Jones, 158 N.C. App. 465, 581 S.E.2d 107 (2003); Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003); State v. Frink, 158 N.C. App. 581, 582 S.E.2d 617, 2003 N.C. App. LEXIS 1280 (2003); State v. Riley, 159 N.C. App. 546, 583 S.E.2d 379, 2003 N.C. App. LEXIS 1521 (2003); McClure Lumber Co. v. Helmsman Constr., Inc., 160 N.C. App. 190, 585 S.E.2d 234, 2003 N.C. App. LEXIS 1733 (2003); Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003); Hooker v. Stokes-Reynolds

Hospital/North Carolina Baptist Hosp. Inc., 161 N.C. App. 111, 587 S.E.2d 440, 2003 N.C. App. LEXIS 1975 (2003); State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003); State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003); State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003); State v. Doyle, 161 N.C. App. 247, 587 S.E.2d 917, 2003 N.C. App. LEXIS 2059 (2003); State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003); Dial v. Cozy Corner Rest., Inc., 161 N.C. App. 694, 589 S.E.2d 146, 2003 N.C. App. LEXIS 2261 (2003); State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003); Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003); Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1, 2004 N.C. App. LEXIS 18 (2004); State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004); State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004); Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004); Moose v. Hexcel-Schwebel, 163 N.C. App. 177, 592 S.E.2d 615, 2004 N.C. App. LEXIS 309 (2004); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004); In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004); Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004); State v. Pope, 163 N.C. App. 486, 593 S.E.2d 813, 2004 N.C. App. LEXIS 423 (2004); State v. Distance, 163 N.C. App. 711, 594 S.E.2d 221, 2004 N.C. App. LEXIS 576 (2004); State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004); Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); Moses H. Cone Mem'l Health Servs. Corp. v. Triplett, 167 N.C. App. 267, 605 S.E.2d 492 (2004); State v. Allen, 164 N.C. App. 665, 596 S.E.2d 261, 2004 N.C. App. LEXIS 1018 (2004); State v. Bruton, 165 N.C. App. 801, 600 S.E.2d 49, 2004 N.C. App. LEXIS 1508 (2004); State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004); Wallace v. M, M & R, Inc., 165 N.C. App. 827, 600 S.E.2d 514, 2004 N.C. App. LEXIS 1510 (2004); Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004); State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004); State v. Taylor, 165 N.C. App. 750, 600 S.E.2d 483, 2004 N.C. App. LEXIS 1519 (2004); Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004); Jenkins v. Easco Aluminum, 165 N.C. App. 86, 598 S.E.2d 252, 2004 N.C. App. LEXIS 1158 (2004); Lange v. Lange, 167 N.C. App. 426, 605 S.E.2d 732, 2004 N.C. App. LEXIS 2334 (2004); Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004); Lewis v. N.C. Dep't of Corr., 167 N.C. App. 560, 606 S.E.2d 199, 2004 N.C. App. LEXIS 2385 (2004); State v. Davis, 167 N.C. App. 770, 607 S.E.2d 5, 2005 N.C. App. LEXIS 14 (2005); Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005); State v. Craig, 167 N.C. App. 793, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005); Lowery v. Duke Univ., 167 N.C. App. 714, 609 S.E.2d 780, 2005 N.C. App. LEXIS 7 (2005); Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005); Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005); State v. Snipes, 168 N.C. App. 525, 608 S.E.2d 381, 2005 N.C. App. LEXIS 334 (2005); Johnson v. Lucas, 168 N.C. App. 515, 608 S.E.2d 336, 2005 N.C. App. LEXIS 350 (2005); State v. Snider, 168 N.C. App. 701, 609 S.E.2d 231, 2005 N.C. App. LEXIS 395 (2005); State v. Hightower, 168 N.C. App. 661, 609 S.E.2d 235, 2005 N.C. App. LEXIS 454 (2005); Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005); State v. McMillian, 169 N.C. App. 160, 609 S.E.2d 265, 2005 N.C. App. LEXIS 544 (2005); Schenk v. HNA Holdings, Inc., 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005), cert. denied, — N.C. —, 626 S.E.2d 649 (2005); State v. McNeill, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005); In re T.K., 171 N.C. App. 35, 613 S.E.2d 739, 2005 N.C. App. LEXIS 1191 (2005); State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005); State v. Harrison, 169 N.C. App. 257, 610 S.E.2d 407, 2005 N.C. App. LEXIS 608 (2005), aff'd, — N.C. —, 627 S.E.2d 461 (2006); Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005); State v. Millsaps, 169 N.C. App. 340, 610 S.E.2d 437, 2005 N.C. App. LEXIS 617 (2005); State v. Belton, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005); State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005); State v. Howell, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005); State v. Torres, 171 N.C. App. 419, 615 S.E.2d 36, 2005 N.C. App. LEXIS 1200 (2005); Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005); State v. Ledwell, 171 N.C. App. 328, 614 S.E.2d 412, 2005 N.C. App. LEXIS 1259 (2005); In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005); State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); Smith v. Richardson Sports Ltd., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005); In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005); Welch Contr., Inc. v. N.C. DOT, 175 N.C. App. 45, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005); In re D.W., 171 N.C. App. 496, 615 S.E.2d 90, 2005 N.C. App. LEXIS 1358 (2005); Alexander v. Cumberland County Bd. of Educ., 171 N.C. App. 649, 615 S.E.2d 408, 2005 N.C. App. LEXIS 1366 (2005); Morton Bldgs., Inc. v. Tolson, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005); State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005); In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005); State v. Watts, 172 N.C. App. 58, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005); In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005); Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005); State v. Bellamy, 172 N.C.

App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005); Helsius v. Robertson, 174 N.C. App. 507, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005); Mayfield v. Parker Hannifin, 174 N.C. App. 386, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005); State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005); State v. Cummings, 174 N.C. App. 772, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005); State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006); Broadbent v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006); State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006); In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006); State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006); State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006); Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006); State v. Henderson, 179 N.C. App. 191, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006); State v. Sink, 178 N.C. App. 217, 631 S.E.2d 16, 2006 N.C. App. LEXIS 1312 (2006); In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006); Shelton v. Duke Univ. Health Sys., 179 N.C. App. 120, 633 S.E.2d 113, 2006 N.C. App. LEXIS 1628 (2006); State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006); King v. Windsor Capital Group, Inc., 178 N.C. App. 669, 632 S.E.2d 557, 2006 N.C. App. LEXIS 1643 (2006); Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006); James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006); State v. Teate, 180 N.C. App. 601, 638 S.E.2d 29, 2006 N.C. App. LEXIS 2515 (2006); State v. Holt, 181 N.C. App. 328, 639 S.E.2d 65, 2007 N.C. App. LEXIS 22 (2007); In re L.B., 181 N.C. App. 174, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); In re A.S., 182 N.C. App. 139, 641 S.E.2d 400, 2007 N.C. App. LEXIS 484 (2007); State v. Erickson, 181 N.C. App. 479, 640 S.E.2d 761, 2007 N.C. App. LEXIS 262 (2007); State v. Anderson, 181 N.C. App. 655, 640 S.E.2d 797, 2007 N.C. App. LEXIS 410 (2007); State v. Sares, — N.C. App. —, 643 S.E.2d 49, 2007 N.C. App. LEXIS 746 (2007); State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637, 2007 N.C. App. LEXIS 834 (2007); In re K.S, 183 N.C. App. 315, 646 S.E.2d 541, 2007 N.C. App. LEXIS 1164 (2007); State v. McLean, 183 N.C. App. 429, 645 S.E.2d 162, 2007 N.C. App. LEXIS 1097 (2007); Turik v. Town of Surf City, 182 N.C. App. 427, 642 S.E.2d 251, 2007 N.C. App. LEXIS 686 (2007); State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007); In re C.M., 183 N.C. App. 398, 644 S.E.2d 630, 2007 N.C. App. LEXIS 1152 (2007); In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007); In re H.L.A.D., 184 N.C. App. 381, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007); State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007); Stocum v. Oakley, 185 N.C. App. 56, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007); State v. Wiggins, 185 N.C. App. 376, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007); Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382, 2007 N.C. LEXIS 813 (2007); In re L.B., 184 N.C. App. 442, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007); City of Winston-Salem v. Slate, 185 N.C. App. 33, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007); State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876, 2007 N.C. App. LEXIS 1805 (2007); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007); Losing v. Food Lion, L.L.C., 185 N.C. App. 278, 648 S.E.2d 261, 2007 N.C. App. LEXIS 1704 (2007); State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007); Pulte Home Corp. v. Am. S. Ins. Co., 185 N.C. App. 162, 647 S.E.2d 614, 2007 N.C. App. LEXIS 1703 (2007); Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007); State v. Sellers, 185 N.C. App. 726, 649 S.E.2d 656, 2007 N.C. App. LEXIS 1939 (2007); Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007); State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007); State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917, 2007 N.C. App. LEXIS 1957 (2007); Weber, Hodges & Godwin Commer. Real Estate Servs., LLC v. Cook, — N.C. App. —, 650 S.E.2d 834, 2007 N.C. App. LEXIS 2082 (2007); In re A.R.H.B., — N.C. App. —, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007); Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 2112 (Oct. 2, 2007); State v. Brower, — N.C. App. —, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007); State v. Young, — N.C. App. —, 651 S.E.2d 576, 2007 N.C. App. LEXIS 2197 (2007); Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007); State v. Goldsmith, — N.C. App. —, 652 S.E.2d 336, 2007 N.C. App. LEXIS 2310 (2007); State v. Cobb, — N.C. App. —, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007); State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007); Piles v. Allstate Ins. Co., — N.C. App. —, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007); Crawford v. Mintz, — N.C. App. —, 653 S.E.2d 222, 2007 N.C. App. LEXIS 2455 (2007); In re D.D.F., — N.C. App. —, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007); Meadows v. Iredell County, — N.C. App. —, 653 S.E.2d 925, 2007 N.C. App. LEXIS 2564 (2007); State v. McCallum, — N.C. App. —, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007); In re M.G., — N.C. App. —, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007); State v. Moncree, — N.C. App. —, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008); State v. Smith, — N.C. App. —, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (Jan. 15, 2008); N.C. State Bar v. Key, — N.C. App. —, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008); State v. Hagans, — N.C. App. —, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008); State v. Crowe, — N.C. App. —, 656 S.E.2d 688, 2008 N.C. App. LEXIS 261 (2008); N.C. State Bar v. Ethridge, — N.C. App. —, 657 S.E.2d 378, 2008 N.C. App. LEXIS 283 (2008); Hill v. West, — N.C. App. —, 657 S.E.2d 698, 2008 N.C. App. LEXIS 384 (2008); Lineberger v. N.C. Dep't of Corr., — N.C. App. —, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008); Austin v. Bald II, L.L.C., — N.C. App. —, 658 S.E.2d 1, 2008 N.C. App. LEXIS 543 (Mar. 18, 2008); Raper v. Mansfield Sys., — N.C. App. —, 657 S.E.2d 899, 2008 N.C. App. LEXIS 540 (Mar. 18, 2008); State v. Jenkins, — N.C. App. —, 658 S.E.2d 309, 2008 N.C. App. LEXIS 605 (Apr. 1, 2008); Estroff v. Chatterjee, — N.C. App. —, 660 S.E.2d 73, 2008 N.C. App. LEXIS 905 (2008); State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008); In re E.X.J., — N.C. App. —, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (June 17, 2008); Azar v. Presbyterian Hosp., — N.C. App. —, 663 S.E.2d 450, 2008 N.C. App. LEXIS 1313 (2008); State v. Simmons, — N.C. App. —, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (July 1, 2008); Starr v. County Bd. of Educ., — N.C. App. —, 663 S.E.2d 322, 2008 N.C. App. LEXIS 1311 (2008); S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1537 (Aug. 19, 2008); State v. Washington, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1625 (Sept. 2, 2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1555 (Aug. 19, 2008).; Gregory v. W.A. Brown & Sons, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1543 (Aug. 19, 2008); Pope v. Rollins (in re Estate of Pope), — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1626 (Sept. 2, 2008); City of Asheville v. State, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1556 (Aug. 19, 2008); State v. Murrell, — N.C. —, — S.E.2d —, 2008 N.C. LEXIS 688 (Aug. 27, 2008).

Quoted in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981); Akzona, Inc. v. Southern Ry., 314 N.C. 488, 334 S.E.2d 759 (1985); Clark v. Asheville Contracting Co., 316 N.C. 475, 342 S.E.2d 832 (1986); Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986); Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987); Assaad v. Thomas, 87 N.C. App. 276, 360 S.E.2d 503 (1987); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988); State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993); Sharp v. Gailor, 132 N.C. App. 213, 510 S.E.2d 702 (1999); Poe v. Atlas-Soundelier/American Trading & Prod. Corp., 132 N.C. App. 472, 512 S.E.2d 760 (1999); Talley v. Talley, 133 N.C. App. 87, 513 S.E.2d 838, 1999 N.C. App. LEXIS 340 (1999), cert. denied, 350 N.C. 599, 537 S.E.2d 495 (1999); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999); Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999), rev'd on other grounds, 351 N.C. 166, 522 S.E.2d 73 (1999); South Mecklenburg Painting Contractors v. Cunnane Group, Inc., 134 N.C. App. 307, 517 S.E.2d 167 (1999); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000); Lynn v. Burnette, 138 N.C. App. 435, 531 S.E.2d 275, 2000 N.C. App. LEXIS 618 (2000); McKillop v. Onslow County, 139 N.C. App. 53, 532 S.E.2d 594, 2000 N.C. App. LEXIS 808 (2000); Burchette v. Lynch, 139 N.C. App. 756, 535 S.E.2d 77, 2000 N.C. App. LEXIS 1025 (2000); State v. Jones, 140 N.C. App. 691, 538 S.E.2d 228, 2000 N.C. App. LEXIS 1257 (2000); State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889, 2004 N.C. App. LEXIS 1136 (2004); State v. Henderson, 182 N.C. App. 406, 642 S.E.2d 509, 2007 N.C. App. LEXIS 671 (2007).

Stated in Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980); State v. Oliver, 52 N.C. App. 483, 279 S.E.2d 19 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981); State v. Jacobs, 57 N.C. App. 537, 291 S.E.2d 804 (1982); State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983); State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Bryant v. Nationwide Mut. Fire Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803 (1984); Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670 (1984); Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988); Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684, 1999 N.C. App. LEXIS 1311 (1999); State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000); Sugg v. Field, 139 N.C. App. 160, 532 S.E.2d 843, 2000 N.C. App. LEXIS 817 (2000); State v. Harris, 139 N.C. App. 153, 532 S.E.2d 850, 2000 N.C. App. LEXIS 809 (2000); Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001)

Cited in State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976); State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282 (1977); State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977); State v. Greene, 34 N.C. App. 149, 237 S.E.2d 325 (1977); State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977); Murphy v. Murphy, 34 N.C. App. 677, 239 S.E.2d 597 (1977); State v. Thomas, 35 N.C. App. 198, 241 S.E.2d 128 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); North Carolina Auto. Rate Admin. Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978); Lineberry v. Wilson, 36 N.C. App. 649, 244 S.E.2d 702 (1978); Bank of N.C. v. Cranfill, 37 N.C. App. 182, 245 S.E.2d 538 (1978); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); Reliance Ins. Co. v. North Carolina Nat'l Bank, 39 N.C. App. 420, 250 S.E.2d 699 (1979); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979); State v. Sealey, 41 N.C. App. 175, 254 S.E.2d 238 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); Wright v. Wright, 47 N.C. App. 367, 267 S.E.2d 61 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270

S.E.2d 515 (1980); State v. Jones, 50 N.C. App. 560, 274 S.E.2d 401 (1981); State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981); State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766 (1981); State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981); State v. Luckey, 54 N.C. App. 178, 282 S.E.2d 490 (1981); State v. Locklear, 54 N.C. App. 235, 282 S.E.2d 485 (1981); Coleman v. City of Winston-Salem, 57 N.C. App. 137, 291 S.E.2d 155 (1982); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982); State v. Woodrup, 60 N.C. App. 205, 298 S.E.2d 439 (1983); In re Webb, 60 N.C. App. 410, 299 S.E.2d 240 (1983); McManus v. Gambill, 60 N.C. App. 600, 299 S.E.2d 479 (1983); Carter v. Parsons, 61 N.C. App. 412, 301 S.E.2d 405 (1983); Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411 (1983); State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); Curl ex rel. Curl v. Key, 64 N.C. App. 139, 306 S.E.2d 818 (1983); Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983); State v. Kelley, 65 N.C. App. 159, 308 S.E.2d 720 (1983); Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); Warren v. Joseph Harris Co., 67 N.C. App. 686, 313 S.E.2d 901 (1984); In re Barefoot, 67 N.C. App. 712, 313 S.E.2d 924 (1984); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Foy v. Foy, 69 N.C. App. 213, 316 S.E.2d 315 (1984); State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984); Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984); Square D. Co. v. C.J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984); State v. Beam, 70 N.C. App. 181, 319 S.E.2d 616 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984); Stanley v. Nationwide Mut. Ins. Co., 71 N.C. App. 266, 321 S.E.2d 920 (1984); Warmack v. Cooke, 71 N.C. App. 548, 322 S.E.2d 804 (1984); Yassoo Enters., Inc. v. North Carolina Joint Underwriting Ass'n, 73 N.C. App. 52, 325 S.E.2d 677 (1985); Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985); North Carolina Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985); Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809 (1986); Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986); Aetna Cas. & Sur. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 316 N.C. 368, 341 S.E.2d 548 (1986); State v. Artis, 316 N.C. 507, 342 S.E.2d 847 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); State v. First Resort Properties, 81 N.C. App. 499, 344 S.E.2d 354 (1986); Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986); State v. Sanders, 81 N.C. App. 438, 344 S.E.2d 592 (1986); Griffin v. Griffin, 81 N.C. App. 665, 344 S.E.2d 828 (1986); State v. Oliver, 82 N.C. App. 135, 345 S.E.2d 697 (1986); State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986); State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986); Laumann v. Plakakis, 84 N.C. App. 131, 351 S.E.2d 765 (1987); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); Gibson v. Lambeth, 86 N.C. App. 264, 357 S.E.2d 404 (1987); McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987); Crosby v. Bowers, 87 N.C. App. 338, 361 S.E.2d 97 (1987); State v. McKnight, 87 N.C. App. 458, 361 S.E.2d 429 (1987); Travis v. Knob Creek, Inc., 321 N.C. 279, 362 S.E.2d 277 (1987); In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987); State v. Powell, 321 N.C. 364, 364 S.E.2d 332 (1988); Southwood Ass'n v. Wallace, 89 N.C. App. 327, 365 S.E.2d 700 (1988); Stern v. Stern, 89 N.C. App. 689, 367 S.E.2d 7 (1988); Fox v. Barrett, 90 N.C. App. 135, 367 S.E.2d 412 (1988); Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Reed, 93 N.C. App. 119, 377 S.E.2d 84 (1989); Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273 (1989); Strickland v. Central Serv. Motor Co., 94 N.C. App. 79, 379 S.E.2d 645 (1989); Tate v. Action Moving & Storage, Inc., 95 N.C. App. 541, 383 S.E.2d 229 (1989); State v. Green, 95 N.C. App. 558, 383 S.E.2d 419 (1989); State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989); Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989); Carolina Mills Lumber Co. v. Huffman, 96 N.C. App. 616, 386 S.E.2d 437 (1989); White v. Hugh Chatham Mem. Hosp., 97 N.C. App. 130, 387 S.E.2d 80 (1990); Lynn v. Overlook Dev., 98 N.C. App. 75, 389 S.E.2d 609 (1990); Wall v. North Carolina Dep't of Human Resources, 99 N.C. App. 330, 393 S.E.2d 109 (1990); State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990); McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990); Swilling v. Swilling, 99 N.C. App. 551, 393 S.E.2d 303 (1990); State v. Sherrill, 99 N.C. App. 540, 393 S.E.2d 352 (1990); Shaw v. Stringer, 101 N.C. App. 513, 400 S.E.2d 101 (1991); Metric Constructors, Inc. v. Industrial Risk Insurers, 102 N.C. App. 59, 401 S.E.2d 126 (1991); Edelstein v. Pinnacle Inn & Country Club Condominium Owners' Ass'n, 103 N.C. App. 86, 403 S.E.2d 927 (1991); State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991); State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991); Fine v. Fine, 103 N.C. App. 642, 406 S.E.2d 631 (1991); State v. Angel, 330 N.C. 85, 408 S.E.2d 724 (1991); Lowder v. All Star Mills, Inc., 104 N.C. App. 305, 409 S.E.2d 94 (1991); State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991); State v. Lundberg, 104 N.C. App. 543, 410 S.E.2d 216 (1991); State v. Vines, 105 N.C. App. 147, 412 S.E.2d 156 (1992); Perkins v. CCH Computax, Inc., 106 N.C. App. 210, 415 S.E.2d 755 (1992); State v. Hucks, 332 N.C. 650, 422 S.E.2d 711 (1992); Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992); Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 423 S.E.2d 324 (1992); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); Aetna Cas. & Sur. Co. v. Continental Ins. Co., 110 N.C. App. 278, 429 S.E.2d 406 (1993); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994); Surrette v. Surrette, 114 N.C. App. 368, 442 S.E.2d 123 (1994); Williams v. Paley, 114 N.C. App. 571, 442 S.E.2d 558 (1994); State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994); Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39 (1994); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994); State v. Lilly, 117 N.C. App. 192, 450 S.E.2d 546 (1994); Maryland Cas. Co. v. Smith, 117 N.C. App. 593, 452 S.E.2d 318 (1995); Associated Mechanical Contractors v. Payne, 118 N.C. App. 54, 453 S.E.2d 545 (1995); Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995); State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870 (1995); State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996); In re Mount Shepherd Methodist Camp, 120 N.C. App. 388, 462 S.E.2d 229 (1995); Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995); State v. Brewton, 342 N.C. 875, 467 S.E.2d 395 (1996); Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996); Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350 (1996); Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997); Adams v. Kelly Springfield Tire Co., 123 N.C. App. 681, 474 S.E.2d 793 (1996); State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996), cert. denied, 520 U.S. 1106, 117 S. Ct. 1111, 137 L. Ed. 2d 312 (1997); State v. Stroud, 345 N.C. 106, 478 S.E.2d 476 (1996), cert. denied, 522 U.S. 826, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997); State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996); Poole v. Copland, Inc., 125 N.C. App. 235, 481 S.E.2d 88 (1997); Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E.2d 358 (1997); Russell v. Adams, 125 N.C. App. 637, 482 S.E.2d 30 (1997); Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997), cert. denied, 346 N.C. 279, 487 S.E.2d 548 (1997); Edwards v. Hardy, 126 N.C. App. 69, 483 S.E.2d 724 (1997); Farmah v. Farmah, 126 N.C. App. 210, 484 S.E.2d 96 (1997); Yates Constr. Co. v. Commissioner of Labor, 126 N.C. App. 147, 484 S.E.2d 430 (1997); In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997); Crescent Elec. Membership Corp. v. Duke Power Co., 126 N.C. App. 344, 485 S.E.2d 312 (1997), cert. denied, 346 N.C. 545, 488 S.E.2d 798 (1997); State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998); State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997); State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997); Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (1997); Barrett v. Hyldburg, 127 N.C. App. 95, 487 S.E.2d 803 (1997); State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997); Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), cert. denied, 347 N.C. 409, 496 S.E.2d 394 (1997); In re Hunt, 127 N.C. App. 370, 489 S.E.2d 428 (1997); Smith v. Sealed Air Corp., 127 N.C. App. 359, 489 S.E.2d 445 (1997); Wicker v. Holland, 128 N.C. App. 524, 495 S.E.2d 398 (1998); State v. Shope, 128 N.C. App. 611, 495 S.E.2d 409 (1998); State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998); Paschal v. Myers, 129 N.C. App. 23, 497 S.E.2d 311 (1998); State v. Wilkins, 131 N.C. App. 220, 506 S.E.2d 274 (1998); Watson v. Dixon, 130 N.C. App. 47, 502 S.E.2d 15 (1998); Cooke v. P.H. Glatfelter/Ecusta, 130 N.C. App. 220, 502 S.E.2d 419 (1998); State v. Roope, 130 N.C. App. 356, 503 S.E.2d 118 (1998), cert., 349 N.C. 374, 525 S.E.2d 189 (1998); In re Will of Buck, 130 N.C. App. 408, 503 S.E.2d 126 (1998); Scott v. United Carolina Bank, 130 N.C. App. 426, 503 S.E.2d 149 (1998); Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401 (1998), cert. dismissed, 351 N.C. 41, 519 S.E.2d 314 (1999); Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998); State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); Darryl Burke Chevrolet, Inc. v. Aikens, 131 N.C. App. 31, 505 S.E.2d 581 (1998), aff'd, 350 N.C. 83, 511 S.E.2d 639 (1999); Integon Indem. Corp. v. Universal Underwriters Ins. Co., 131 N.C. App. 267, 507 S.E.2d 66 (1998); Kephart v. Pendergraph, 131 N.C. App. 559, 507 S.E.2d 915 (1998); Terrell v. Lawyers Mut. Liab. Ins., 131 N.C. App. 655, 507 S.E.2d 923 (1998); State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1998); Cox v. Dine-A-Mate, Inc., 131 N.C. App. 542, 508 S.E.2d 6 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); North Carolina Trust Co. v. Taylor, 131 N.C. App. 690, 508 S.E.2d 809 (1998); Conway v. Conway, 131 N.C. App. 609, 508 S.E.2d 812 (1998); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999); Parkwood Ass'n v. Capital Health Care Investors, 133 N.C. App. 158, 514 S.E.2d 542 (1999); Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999); North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000); State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000), cert. denied, 352 N.C. 596, 545 S.E.2d 218 (2000); Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815, 2000 N.C. App. LEXIS 812 (2000); State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258, 2000 N.C. App. LEXIS 811 (2000); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000); Bason v. Kraft Food Serv., Inc., 140 N.C. App. 124, 535 S.E.2d 606, 2000 N.C. App. LEXIS 1099 (2000); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).; State v. Kimble, 141 N.C. App. 144, 539 S.E.2d 342, 2000 N.C. App. LEXIS 1277 (2000); State v. Wall, 141 N.C. App. 529, 539 S.E.2d 692, 2000 N.C. App. LEXIS 1412 (2000), cert. denied, — N.C. —, 566 S.E.2d 480 (2002); State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000); Disciplinary Hearing Comm'n v. Frazier, 141 N.C. App. 514, 540 S.E.2d 758, 2000 N.C. App. LEXIS 1393 (2000), cert. granted sub nom. North Carolina State Bar v. Frazier, 353 N.C. 378, 547 S.E.2d 434 (2001); State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000); State v. Thompson, 141 N.C. App. 698, 543 S.E.2d

160, 2001 N.C. App. LEXIS 20 (2001), cert. denied, 353 N.C. 396, 548 S.E.2d 157 (2001); State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792, 2001 N.C. App. LEXIS 35 (2001), cert. dismissed, 353 N.C. 392, 548 S.E.2d 151 (2001), cert. denied and appeal dismissed, 353 N.C. 392, 548 S.E.2d 152 (2001); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 142 N.C. App. 127, 542 S.E.2d 247, 2001 N.C. App. LEXIS 39 (2001); Martishius v. Carolco Studios, Inc., 142 N.C. App. 216, 542 S.E.2d 303, 2001 N.C. App. LEXIS 79 (2001), aff'd, 355 N.C. 465, 562 S.E.2d 887 (2002); Lagies v. Myers, 142 N.C. App. 267, 542 S.E.2d 336, 2001 N.C. App. LEXIS 90 (2001); Terrell v. Terminix Servs., 142 N.C. App. 305, 542 S.E.2d 332, 2001 N.C. App. LEXIS 91 (2001); Howard, Stallings, From & Hutson, P.A. v. Douglas, 143 N.C. App. 122, 545 S.E.2d 470, 2001 N.C. App. LEXIS 234 (2001); Walker v. Walker, 143 N.C. App. 414, 546 S.E.2d 625, 2001 N.C. App. LEXIS 295 (2001); Dean v. Manus Homes, Inc., 143 N.C. App. 549, 546 S.E.2d 160, 2001 N.C. App. LEXIS 310 (2001); Chapel Hill Cinemas, Inc. v. Robbins, 143 N.C. App. 571, 547 S.E.2d 462, 2001 N.C. App. LEXIS 341 (2001); North Carolina Farm Bur. Mut. Ins. Co. v. Allen, 146 N.C. App. 539, 553 S.E.2d 420, 2001 N.C. App. LEXIS 988 (2001); Graham v. Martin, 149 N.C. App. 831, 561 S.E.2d 583, 2002 N.C. App. LEXIS 298 (2002); State v. Martinez, 150 N.C. App. 364, 562 S.E.2d 914, appeal dismissed, cert. denied, 356 N.C. 172, 568 S.E.2d 859 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); State v. Gay, 151 N.C. App. 530, 566 S.E.2d 121, 2002 N.C. App. LEXIS 774 (2002), cert. denied, 356 N.C. 685, 578 S.E.2d 315 (2003); Futrell v. Resinall Corp., 151 N.C. App. 456, 566 S.E.2d 181, 2002 N.C. App. LEXIS 779 (2002), aff'd, 357 N.C. 158, 579 S.E.2d 269 (2003); Johnson v. S. Tire Sales & Serv., 152 N.C. App. 323, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002), cert. denied, 356 N.C. 437, 572 S.E.2d 784 (2002); Miller v. B.H.B. Enters., Inc., 152 N.C. App. 532, 568 S.E.2d 219, 2002 N.C. App. LEXIS 960 (2002); In re Lane Company-Hickory Chair Div., 153 N.C. App. 119, 571 S.E.2d 224, 2002 N.C. App. LEXIS 1083 (2002); State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745, 2002 N.C. App. LEXIS 1179 (2002), cert. denied, 357 N.C. 253, 583 S.E.2d 41 (2003); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002), cert. denied, 356 N.C. 691, 578 S.E.2d 597 (2003); In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002); Myers v. Mutton, 155 N.C. App. 213, 574 S.E.2d 73, 2002 N.C. App. LEXIS 1576 (2002); State v. Glover, 156 N.C. App. 139, 575 S.E.2d 835, 2003 N.C. App. LEXIS 78 (2003); Whittington v. Hendren (In re Hendren), 156 N.C. App. 364, 576 S.E.2d 372, 2003 N.C. App. LEXIS 132 (2003); Ayers v. Patz, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2093 (Aug. 20, 2002); State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003); State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003), cert. denied, 357 N.C. 464, 586 S.E.2d 274 (2003), aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004); Rice v. Rice, 159 N.C. App. 487, 584 S.E.2d 317, 2003 N.C. App. LEXIS 1496 (2003); In re Morales, 159 N.C. App. 429, 583 S.E.2d 692, 2003 N.C. App. LEXIS 1518 (2003); State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745, 2002 N.C. App. LEXIS 1179 (2002), cert. denied, 357 N.C. 253, 583 S.E.2d 41 (2003); State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003); Fox v. Green, 161 N.C. App. 460, 588 S.E.2d 899, 2003 N.C. App. LEXIS 2193 (2003); In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004); Harris v. Harris, 162 N.C. App. 511, 591 S.E.2d 560, 2004 N.C. App. LEXIS 183 (2004); State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004); White v. Davis, 163 N.C. App. 21, 592 S.E.2d 265, 2004 N.C. App. LEXIS 256 (2004); State v. Everett, 163 N.C. App. 95, 592 S.E.2d 582, 2004 N.C. App. LEXIS 291 (2004); N.C. Farm P'ship v. Pig Improvement Co., 163 N.C. App. 318, 593 S.E.2d 126, 2004 N.C. App. LEXIS 374 (2004), cert. denied, 358 N.C. 544, 599 S.E.2d 401 (2004); Keel v. Private Bus., Inc., 163 N.C. App. 703, 594 S.E.2d 796, 2004 N.C. App. LEXIS 571 (2004), cert. dismissed sub nom. Keel v. Private Bus., 358 N.C. 732, 601 S.E.2d 535 (2004); State v. Cook, 164 N.C. App. 139, 594 S.E.2d 819, 2004 N.C. App. LEXIS 741 (2004); Enoch v. Alamance County Dep't of Soc. Servs., 164 N.C. App. 233, 595 S.E.2d 744, 2004 N.C. App. LEXIS 810 (2004); Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004); State v. Quinn, 166 N.C. App. 733, 603 S.E.2d 886, 2004 N.C. App. LEXIS 2025 (2004); State v. Oakley, 167 N.C. App. 318, 605 S.E.2d 215, 2004 N.C. App. LEXIS 2185 (2004), cert. denied, — N.C. —, 610 S.E.2d 386 (2005); In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004); State v. Moore, 167 N.C. App. 495, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004); State v. Batchelor, 167 N.C. App. 797, 606 S.E.2d 422, 2005 N.C. App. LEXIS 9 (2005); Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005); Hatcher v. Harrah's NC Casino Co., LLC, 169 N.C. App. 151, 610 S.E.2d 210, 2005 N.C. App. LEXIS 512 (2005); Hemric v. Groce, 169 N.C. App. 69, 609 S.E.2d 276, 2005 N.C. App. LEXIS 530 (2005); State v. Sutton, 169 N.C. App. 90, 609 S.E.2d 270, 2005 N.C. App. LEXIS 534 (2005); Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439, 2005 N.C. App. LEXIS 540 (2005); N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005); State v. Nettles, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005); State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005); Davis v. Columbus County Schs., 175 N.C. App. 95, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005); In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005); State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005); Gorsuch v. Dees, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005); State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005), cert. dismissed, — N.C. —, 630 S.E.2d 447 (2006), cert. denied, — N.C. —, 630 S.E.2d 447 (2006); Property Rights Advocacy Group v. Town of Long Beach, 173 N.C. App. 180, 617 S.E.2d 715, 2005 N.C. App. LEXIS 1924 (2005), aff'd, — N.C. —, 628 S.E.2d 768 (2006); State v.

Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); N.C. Dep't of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 616 S.E.2d 594, 2005 N.C. App. LEXIS 1805 (2005); State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005); State v. Stephens, 175 N.C. App. 328, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006); Am. Gen. Fin. Servs. v. Barnes, 175 N.C. App. 406, 623 S.E.2d 617, 2006 N.C. App. LEXIS 54 (2006); State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006), cert. denied, — N.C. —, 631 S.E.2d 141 (2006); State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006); Duke Energy Corp. v. Malcolm, 178 N.C. App. 62, 630 S.E.2d 693, 2006 N.C. App. LEXIS 1300 (2006); Wooten v. Newcon Transp., Inc., 178 N.C. App. 698, 632 S.E.2d 525, 2006 N.C. App. LEXIS 1670 (2006); Bobbitt v. N.C. State Univ., — N.C. App. —, 635 S.E.2d 463, 2006 N.C. App. LEXIS 2164 (2006); State v. Locklear, 180 N.C. App. 115, 636 S.E.2d 284, 2006 N.C. App. LEXIS 2248 (2006); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18, 2006 N.C. App. LEXIS 2504 (2006); State v. Gillespie, 180 N.C. App. 514, 638 S.E.2d 481, 2006 N.C. App. LEXIS 2512 (2006); In re T.M., 180 N.C. App. 539, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006); State v. Andujar, 180 N.C. App. 305, 636 S.E.2d 584, 2006 N.C. App. LEXIS 2292 (2006); State v. Teel, 180 N.C. App. 446, 637 S.E.2d 288, 2006 N.C. App. LEXIS 2380 (2006); In re J.M.W., — N.C. App. —, 635 S.E.2d 916, 2006 N.C. App. LEXIS 2116 (2006); In re Will of McFayden, 179 N.C. App. 595, 635 S.E.2d 65, 2006 N.C. App. LEXIS 2053 (2006); State v. Pointer, 181 N.C. App. 93, 638 S.E.2d 909, 2007 N.C. App. LEXIS 93 (2007); In re D.S.A., 181 N.C. App. 715, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007); State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007); State v. Hayes, — N.C. App. —, 644 S.E.2d 655, 2007 N.C. App. LEXIS 1160 (2007); Hung Nguyen v. Burgerbusters, Inc., 182 N.C. App. 447, 642 S.E.2d 502, 2007 N.C. App. LEXIS 670 (2007); Brown v. Am. Partners Fed. Credit Union, — N.C. App. —, 645 S.E.2d 117, 2007 N.C. App. LEXIS 1180 (2007); State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288, 2007 N.C. App. LEXIS 1673 (2007); Cotter v. Cotter, 185 N.C. App. 511, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007); Spaulding v. Honeywell Int'l, Inc., 184 N.C. App. 317, 646 S.E.2d 645, 2007 N.C. App. LEXIS 1477 (2007); Reidy v. Whitehart Ass'n, 185 N.C. App. 76, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007); State v. Carter, — N.C. App. —, 650 S.E.2d 650, 2007 N.C. App. LEXIS 2089 (2007); State v. Hall, — N.C. App. —, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007); In re I.J., — N.C. App. —, 650 S.E.2d 671, 2007 N.C. App. LEXIS 2081 (2007); Richardson v. Maxim Healthcare/Allegis Group, — N.C. App. —, 652 S.E.2d 3, 2007 N.C. App. LEXIS 2319 (2007); State v. Tate, — N.C. App. —, 653 S.E.2d 892, 2007 N.C. App. LEXIS 2553 (2007); State v. Spencer, — N.C. App. —, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007); Billings v. Gen. Parts, Inc., — N.C. App. —, 654 S.E.2d 254, 2007 N.C. App. LEXIS 2560 (2007); Strezinski v. City of Greensboro, — N.C. App. —, 654 S.E.2d 263, 2007 N.C. App. LEXIS 2562 (2007); N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007); State v. Stephens, — N.C. App. —, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008); State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, — N.C. App. —, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008); State v. Coltrane, — N.C. App. —, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008); Patrick v. Wake County Dep't of Human Servs., — N.C. App. —, 655 S.E.2d 920, 2008 N.C. App. LEXIS 197 (Feb. 5, 2008); State v. Daniels, — N.C. App. —, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008); Frey v. Best, — N.C. App. —, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008); State v. Applewhite, — N.C. App. —, 660 S.E.2d 240, 2008 N.C. App. LEXIS 822 (2008);

Cited in Durham Hous. Auth. v. Partee, — N.C. App. —, 658 S.E.2d 69, 2008 N.C. App. LEXIS 535 (Mar. 18, 2008); Carter v. West Am. Ins. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1021 (May 20, 2008); Shepard v. Bonita Vista Props., L.P., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1489 (Aug. 5, 2008).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — *The cases cited below were decided under former Rules 27 and 28, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina.*

Rules Mandatory. — The rules of practice of the Supreme Court are mandatory. Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

A failure to comply with this rule results in a failure to present for review the questions sought to be presented. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Brief Not in Accordance with Rules. — An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court. Bradshaw v. Stansberry, 164 N.C. 356, 79 S.E. 302 (1913).

Failure to File in Time. — Where appellant fails to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss will be granted. Rosemond v. McPherson, 156 N.C. 593, 72 S.E. 570 (1911); In re Bailey, 180 N.C. 300, 103 S.E. 896 (1920).

Where an appellant knows that his brief must be prepared, printed, and filed by noon of a certain day, and he takes no steps to this end, a motion to dismiss the appeal will be granted. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

Late filing of appellant's brief works an abandonment of the assignments of error, except those appearing on the face of the record, which are cognizable ex mero motu. State v. Lynn, 251 N.C. 703, 111 S.E.2d 866 (1960).

When Cause Docketed Too Late for Hearing. — Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to file printed briefs must be denied. Gupton v. Sledge, 161 N.C. 213, 76 S.E. 527 (1912); Bumgarner v. Thornton Light & Power Co., 76 S.E. 528 (1912); McLean v. McDonald, 175 N.C. 418, 95 S.E. 769 (1918).

When No Brief Filed. — Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the records proper no error appears. Rowe v. Campbell, 76 S.E. 474 (1912); Cumberland County v. R.S. Dickson & Co., 190 N.C. 330, 129 S.E. 726 (1925).

Where an appellant failed to file a brief in the Supreme Court, as required by this rule, upon motion of the Attorney General the appeal of the appellant was held properly dismissed. State v. Kinyon, 210 N.C. 294, 186 S.E. 368 (1936); State v. Pelley, 222 N.C. 684, 24 S.E.2d 635 (1943).

The failure to file a brief as required by this rule works an abandonment of the assignments of error, except those appearing upon the face of the record, which are cognizable ex mero motu. Dillard v. Brown, 233 N.C. 551, 64 S.E.2d 843 (1951); Land v. Land, 4 N.C. App. 115, 165 S.E.2d 692 (1969).

Where appellant does not file a brief, his appeal will be dismissed. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).

Appellant's exceptions and assignments of error are deemed abandoned where appellant fails to file a brief as required by this rule. In re Maxwell, 7 N.C. App. 59, 171 S.E.2d 20 (1969).

An appeal is subject to dismissal for failure of claimants to file their brief within the time allowed by the rules of the Court of Appeals. Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

In Capital Felony Cases. — An appeal will be dismissed upon motion of the Attorney General for failure of defendant to file a brief, but when defendant has been convicted of a capital felony, this will be done only after a careful examination of the record fails to disclose material defect. State v. Peele, 220 N.C. 83, 16 S.E.2d 449 (1941); State v. Sturdivant, 220 N.C. 535, 17 S.E.2d 661 (1941).

Although exceptions, in support of which no reason or argument is stated or authority cited, will be taken as abandoned in accordance with the provisions of this rule, nevertheless in the case of a capital felony, the Supreme Court will examine the matters to which those exceptions relate in its search for prejudicial error. State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952).

Briefs which merely state with reference to the exceptions taken of record, "Exceptions No. 1. This question and answer are incompetent," etc., afford no assistance to the court. They are merely pass briefs, and do not conform to the rules. Jones v. Southern Ry., 164 N.C. 392, 80 S.E. 408 (1913); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

Exceptions Not Discussed Deemed Abandoned. — It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the court, for otherwise they are taken as abandoned. Gray v. Cartwright, 174 N.C. 49, 93 S.E. 432 (1917); State v. Barnhill, 186 N.C. 446, 119 S.E. 894 (1923); Austin v. Crisp, 186 N.C. 616, 120 S.E. 199 (1923); In re Will of Fuller, 189 N.C. 509, 127 S.E. 549 (1925); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927); Ludford v. Combs, 195 N.C. 851, 141 S.E. 541 (1928); Grant v. Tallassee Power Co., 196 N.C. 617, 146 S.E. 531 (1929); Andrews Music Store v. Boone, 197 N.C. 174, 148 S.E. 39 (1929); State v. Wells, 209 N.C. 358, 183 S.E. 282 (1936); Stephenson v. Honeycutt, 209 N.C. 701, 184 S.E. 482 (1936); Sparks v. Holland, 209 N.C. 705, 184 S.E. 552 (1936); Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936); Taylor v. Rierson, 210 N.C. 185, 185 S.E. 627 (1936); Texas Co. v. City of Elizabeth City, 210 N.C. 454, 187 S.E. 551 (1936); State v. Tate, 210 N.C. 613, 188 S.E. 91 (1936); Wilson v. Williams, 215 N.C. 407, 2 S.E.2d 19 (1939); In re Escoffery, 216 N.C. 19, 3 S.E.2d 425 (1939); State v. Cox, 217 N.C. 177, 7 S.E.2d 473 (1940); Rose v. Bank of Wadesboro, 217 N.C. 600, 9 S.E.2d 2 (1940); State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941); Bank of Pilot Mt. v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942); Brown v. Ward, 221 N.C. 344, 20 S.E.2d 324 (1942); Moyle v. Hopkins, 222 N.C. 33, 21 S.E.2d 826 (1942); Amick v. Coble, 222 N.C. 484, 23 S.E.2d 854 (1943); Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943); State v. Hunt, 223 N.C. 173, 25 S.E.2d 598 (1943); State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943); Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943); State v. Epps, 223 N.C. 741, 28 S.E.2d 219 (1943); Hopkins v. Colonial Stores, Inc., 224 N.C. 137, 29 S.E.2d 455 (1944); Merchant v. Lassiter, 224 N.C. 343, 30 S.E.2d 217 (1944); State v. Thompson, 224 N.C. 661, 32 S.E.2d 24 (1944); State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945); State v. Britt, 225 N.C. 364, 34 S.E.2d 408 (1945); Troitino v. Goodman, 225 N.C. 406, 35 S.E.2d 277 (1945); State v. Hightower, 226 N.C. 62, 36 S.E.2d 649 (1946); State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946); State v. Hart, 226 N.C. 200, 37 S.E.2d 487 (1946); Clark v. Cagle, 226 N.C. 230, 37 S.E.2d 672 (1946); State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946); State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946); State v. Cogdale, 227 N.C. 59, 40 S.E.2d 467 (1946); State v. Jones, 227 N.C. 94, 40 S.E.2d 700 (1946); State v. Fairley, 227 N.C. 134, 41 S.E.2d 88 (1947); Bell v. Brown, 227 N.C. 319, 42 S.E.2d 92 (1947); Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947); State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947); State v. Frye, 229 N.C. 581, 50 S.E.2d 895 (1948); State v. Muse, 230 N.C. 495, 53 S.E.2d 529 (1949); State v. Reid, 230 N.C. 561, 53 S.E.2d 849, cert. denied, 338 U.S. 876, 70 S. Ct. 138, 94 L. Ed. 539 (1949); Williams v. Williams, 231 N.C. 33, 56 S.E.2d 20 (1949); State v. Wiggins, 232 N.C. 619, 61 S.E.2d 611 (1950); Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950); State v. Brown, 233 N.C. 202, 63 S.E.2d 99 (1951); State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); Edgewood Knoll Apts. v. Braswell, 239 N.C. 560, 80 S.E.2d 653, rehearing denied and appeal dismissed, 240 N.C. 760, 83 S.E.2d 797 (1954); Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955); State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); State v. Faulkner, 241 N.C. 609, 86 S.E.2d 81 (1955); Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955); Ammons v. Layton, 242 N.C. 122, 86 S.E.2d 915 (1955); Rhodes v. Raxter, 242 N.C. 206, 87 S.E.2d 265 (1955); State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955); Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955); Ford v. Blythe Bros. Co., 242 N.C. 347, 87 S.E.2d 879 (1955); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955); Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956); Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); J.A. Jones Constr. Co. v. Local 755, 246 N.C. 481, 98 S.E.2d 852 (1957); In re Will of Knight, 250 N.C. 634, 109 S.E.2d 470 (1959); State v. Newton, 251 N.C. 151, 110 S.E.2d 810 (1959); Henderson Cotton Mills v. Local 584, 251 N.C. 234, 111 S.E.2d 476 (1959); Henderson Cotton Mills v. Local 584, 251 N.C. 240, 111 S.E.2d 471 (1959); State v. Rose, 251 N.C. 281, 111 S.E.2d 311 (1959); Evans v. Queen City Coach Co., 251 N.C. 324, 111 S.E.2d 187 (1959); Friday v. Adams, 251 N.C. 540, 111 S.E.2d 893 (1960); State v. Coleman, 253 N.C. 799, 117 S.E.2d 742 (1961); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); State v. Williams, 255 N.C. 82, 120 S.E.2d 442 (1961); State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961); Little v. Power Brake Co., 255 N.C. 451, 121 S.E.2d 889 (1961); State v. Hart, 256 N.C. 645, 124 S.E.2d 816 (1962); State v. Pearson, 258 N.C. 188, 128 S.E.2d 251 (1962); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963); White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964); State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964); State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Young v. Lowie, 265 N.C. 456, 144 S.E.2d 204 (1965); Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966); Moore v. New York Life Ins. Co., 266 N.C. 440, 146 S.E.2d 492 (1966); State v. Stafford, 267 N.C. 201, 147 S.E.2d 925 (1966); Long v. Thompson, 267 N.C. 310, 148 S.E.2d 127 (1966); Mathis v. Siskin, 268 N.C. 119, 150 S.E.2d 24 (1966); State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966); McDonald v. Moore Sheet Metal & Heating Co., 268 N.C. 496, 151 S.E.2d 27 (1966); Pendergrass v. Massengill, 269 N.C. 364, 152 S.E.2d 657 (1967); Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967); State v. Withers, 271 N.C. 364, 156 S.E.2d 733 (1967); State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967); King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968), cert. denied, 393 U.S. 1042, 89 S. Ct. 669, 21 L. Ed. 2d 590 (1969); Freeman v. City of Charlotte, 273 N.C. 113, 159 S.E.2d 327 (1968); Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969); State v. Pulley, 5 N.C. App. 285, 168 S.E.2d 62 (1969); State v. Johnson, 5 N.C. App. 469, 168 S.E.2d 709 (1969); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970); State v. Kirby, 7 N.C. App. 366, 172 S.E.2d 93 (1970); State v. Brown, 7 N.C. App. 372, 172 S.E.2d 99 (1970); State v. Gaiten, 8 N.C. App. 66, 173 S.E.2d 646, aff'd, 277 N.C. 236, 176 S.E.2d 778 (1970); In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Norman, 8 N.C. App. 239, 174 S.E.2d 41, aff'd, 9 N.C. App. 706, 177 S.E.2d 449 (1970).

In the absence of a showing, by statement of reason or argument or citation of authority, that the statute of limitations pleaded is relevant as a defense, error in striking this defense did not appear. Dunn v. Dunn, 242 N.C. 234, 87 S.E.2d 308 (1955).

Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with this rule. Ingle v. Southern Ry., 167 N.C. 636, 83 S.E. 744 (1914).

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965); State v. Covington, 267 N.C. 292, 148 S.E.2d 138 (1966); Branch v. State, 269 N.C. 642, 153 S.E.2d 343 (1967); State v. Battle, 271 N.C. 594, 157 S.E.2d 14 (1967); State v. Wyatt, 271 N.C. 596, 157 S.E.2d 96 (1967); State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967); State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Davis, 272 N.C. 469, 158 S.E.2d 630 (1968); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968); State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); Goldston v. Lynch, 2 N.C. App. 291, 163 S.E.2d 26 (1968); State v. Bass, 5 N.C. App. 429, 168 S.E.2d 424 (1969); Brantley v. Sawyer, 5 N.C. App. 557, 169 S.E.2d 55 (1969); State v. Paschal, 6 N.C. App. 334, 170 S.E.2d 95 (1969); State v. Clontz, 6 N.C. App. 587, 170 S.E.2d 624 (1969); State v. Corn, 6 N.C. App. 613, 170 S.E.2d 544 (1969); Atkins v. Parker, 7 N.C. App. 446, 173 S.E.2d 38 (1970); Moody v. Lundy Packing Co., 7 N.C. App. 463, 172 S.E.2d 905 (1970); Tickle v. Standard Insulating Co., 8 N.C. App. 5, 173 S.E.2d 491 (1970); State v. Tipton, 8 N.C. App. 53, 173 S.E.2d 527 (1970); State v. Chisholm, 8 N.C. App. 80, 173 S.E.2d 635 (1970); State v. Jordan, 8 N.C. App. 203, 174 S.E.2d 112, aff'd, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Eaton, 8 N.C. App. 321, 174 S.E.2d 24 (1970).

Exceptions set out in the record, and not preserved as required by this rule, are to be considered as abandoned. Higgins v. Higgins, 223 N.C. 453, 27 S.E.2d 128 (1943).

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within this rule, and they will not be considered; the requirements being that there must be some reason or argument in their support set out in the brief. Watkins v. Lawson, 166 N.C. 216, 81 S.E. 623 (1914).

Assignments of Error. — The purported assignments of error will not be considered by the court where they do not throw the slightest light on the questions the court is asked to pass upon and do not comply with this rule. Tillis v. Calvine Cotton Mills, Inc., 244 N.C. 587, 94 S.E.2d 600 (1956).

Where the record and brief contain no assignments of error as required by this rule, only the face of the record proper is presented for review. Bumgarner & Bowman Bldg., Inc. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

An appeal is subject to dismissal where both the record on appeal and the appellant's brief contain no assignments of error but list or refer only to the exceptions. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Where briefs do not contain the exceptions and assignments of error, properly numbered, with references to the printed record, they do not conform to the rules. It is impossible to determine just what exceptions or assignments of error are referred to. State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934).

Defendant's brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).

Effect of Failure to Set Forth Exceptions and Assignments of Error. — The exceptions and assignments of error were not set forth in defendant appellant's brief. This is tantamount to the admission that the evidence was sufficient to be submitted to the jury. State v. Walls, 211 N.C. 487, 191 S.E. 232, appeal dismissed and cert. denied, 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494 (1937).

A broadside reference to the errors assigned by counsel does not conform with this rule. Seibold v. Mutual Benefit Health & Accident Ass'n, 8 N.C. App. 277, 174 S.E.2d 25 (1970).

Exception Too General. — An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944).

Question Discussed in Oral Argument. — A question on oral argument, but not embraced in the assignments of error referred to in the brief, will not be considered. Mitchem v. Mitchem, 169 N.C. 48, 85 S.E. 146 (1915).

Statement of Case. — A fair and succinct statement of the case should be made at the beginning of the brief, so that the Supreme Court may understand the issues and more expeditiously hear the argument and decide the case. Balfour Quarry Co. v. West Constr. Co., 151 N.C. 345, 66 S.E. 217 (1909).

Strict Numerical Order Not Essential. — It is not essential that the assignments of error be argued in the brief in strict numerical order, but certainly counsel should indicate which assignment of error he proposes that the argument supports. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

Citation of Cases. — The grouping of cases cited in a brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950).

Failure to Furnish Appellee with Copy of Brief. — The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the appellant to furnish him a copy of his briefs when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. Turnage v. Dunn, 196 N.C. 105, 144 S.E. 521 (1928).

When Appellant Must Discuss Appellees' Exceptions. — On an appeal from an order of a trial judge setting aside a verdict of the jury in favor of the plaintiff because of error committed against the defendant, the brief of appellant must refer to exceptions taken by defendant. Powers v. City of Wilmington, 177 N.C. 361, 99 S.E. 102 (1919).

Rule 29. Sessions of courts; Calendar of hearings.

(a) *Sessions of court.*

(1) *Supreme Court.* The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) *Court of Appeals.* Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) *Calendaring of cases for hearing.* Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. (Adopted June 13, 1975; Amended March 3, 1982 — 29(a)(1); Amended September 3, 1987 — 29(a)(1); Amended July 26, 1990 — 29(b) — effective October 1, 1990.)

Editor's note. — *The cases cited below were decided under former Rule 13, Rules of Practice in the Supreme Court of North Carolina.*

Title to Public Office. — Where an action involving title to public office is begun after the term of the Supreme Court, and on appeal has come to such term of the Supreme Court after the call of the district to which the cause belongs, the court can, under this rule, set the same down for argument, though it was not entitled to be heard as of right.

Caldwell v. Wilson, 121 N.C. 423, 28 S.E. 363 (1897).

Enjoining Issue of County Bonds. — An injunction suit to restrain a county from issuing bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money. Black v. Commissioners of Buncombe County, 129 N.C. 121, 39 S.E. 818 (1901).

Rule 30. Oral argument and unpublished opinions.

(a) *Order and content of argument.*

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) To the extent practicable, counsel shall refrain from using a juvenile's name in oral argument and, instead, refer to the juvenile consistent with the provisions of Rule 3(b).

(b) *Time allowed for argument.*

(1) *In general.* Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) *Numerous counsel.* Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-appearance of parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on written briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) *Unpublished opinions.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion on every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the Administrative Office of the Court's North Carolina Court System Internet web site and reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to requirements of Rule 28(g) ("Additional Authorities"). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and *pro se* parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1), and serving a copy of the

motion upon all other counsel and *pro se* parties of record. The motion shall be filed and served within 10 days of the filing of the opinion. Any objection to the requested publication, by the counsel or *pro se* parties of record, must be filed within 5 days after service of the motion requesting publication. The panel which heard the case shall determine whether to allow or deny such motion.

(f) *Pre-argument review; Decision of appeal without oral argument.*

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument. (Adopted June 13, 1975; Amended December 18, 1975 — 30(e); Amended May 3, 1976 — 30(f); Amended February 5, 1979 — 30(e); Amended June 10, 1981 — 30(f) — effective July 1, 1981; Amended October 18, 2001 — 30(e)(2), (4) — effective January 1, 2002; Amended October 3, 2002 — 30(e)(3) — effective October 7, 2002; Amended May 6, 2004 — 30(a) — effective May 12, 2004; Amended August 23, 2005 — 30(e) — effective September 1, 2005.)

Legal Periodicals. — For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

Unpublished Decisions Not Controlling Authority. — Unpublished decisions were not controlling authority, and an insurance company's reliance on an unpublished opinion was unavailing to its argument regarding whether a written rejection of underinsured motorist coverage was valid. Erie Ins. Exch. v. Miller, 160 N.C. App. 217, 584 S.E.2d 857, 2003 N.C. App. LEXIS 1728 (2003).

This section prohibits the citation of unpublished opinions and use thereof as precedent. State v. Taylor, 141 N.C. App. 321, 541 S.E.2d 199, 2000 N.C. App. LEXIS 1438 (2000), cert. denied, 355 N.C. 499, 564 S.E.2d 231 (2002).

Applied in United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); City of Winston-Salem v. Slate, 185 N.C. App. 33, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007); In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008). .

CASE NOTES

Quoted in Harris v. Duke Power Co., 83 N.C. App. 195, 349 S.E.2d 394 (1986); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000).

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980); State v. McGraw, 306 N.C. 372, 293 S.E.2d 161 (1982); State v. Bates, 313 N.C. 591, 330 S.E.2d 204 (1985); State v. Allison, 319 N.C. 92, 352 S.E.2d 420 (1987); State v. Weathers, 322 N.C. 97, 366 S.E.2d 471 (1988); State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988); North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989); State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991); State v. Rainey, 331 N.C. 259, 415 S.E.2d 337 (1992); United Servs. Auto. Ass'n v. Simpson, 126 N.C. App. 393, 485 S.E.2d 337 (1997); Jones v. Davis, 163 N.C. App. 628, 594 S.E.2d 235, 2004 N.C. App. LEXIS 577 (2004); Holroyd v. Montgomery County, 167 N.C. App. 539, 606 S.E.2d 353, 2004 N.C. App. LEXIS 2379 (2004), cert. denied, — N.C. —, 613 S.E.2d 690 (2005); State v. Weaver, 359 N.C. 246, 607 S.E.2d 599, 2005 N.C. LEXIS 30 (2005); Smythe v. Waffle House, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005); Pope v. Rollins (in re Estate of Pope), — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1626 (Sept. 2, 2008).

Rule 31. Petition for rehearing.

(a) *Time for filing; Content.* A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) *How addressed; Filed.* A petition for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered.

(c) *How determined.* Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) *Procedure when granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 30 days after the case is certified for rehearing, and the opposing party's brief, within 30 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) *Stay of execution.* When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) *Waiver by appeal from court of appeals.* The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) *No petition in criminal cases.* The courts will not entertain petitions for rehearing in criminal actions. (Adopted June 13, 1975; Amended November 27, 1984 — 31(a) — effective February 1, 1985; Amended September 3, 1987 — 31(d); Amended December 8, 1988 — 31(b), (d) — effective January 1, 1989; Amended October 18, 2001 — 31(b) — effective October 31, 2001.)

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

No Rehearing in Criminal Matters. — Petitions for rehearing were not available in criminal proceedings; because no rehearing was available, there was no period following the denial of certiorari during which the inmate could have sought rehearing, and as such, the inmate's untimely habeas petition could not have been statutorily tolled. Rouse v. Lee, 339 F.3d 238, 2003 U.S. App. LEXIS 16417 (4th Cir. 2003), cert. denied, 541 U.S. 905, 124 S. Ct. 1605, 158 L. Ed. 2d 248 (2004).

Petitioner inmate's habeas petition was untimely under 28 U.S.C.S. § 2244(d)(1) because N.C. R. App. P. 32's 20-day period did not apply to the order of the highest state court denying certiorari and that order ended the state post-conviction process and the tolling provisions of 28 U.S.C.S. § 2244(d)(2); further, N.C. R. App. 31(a) did not apply to criminal proceedings and, under G.S. 15A-1411(b), a post-conviction motion was a motion in the original cause and not a new proceeding, thus, N.C. R. App. P. 31(g) applied and the inmate had no right to file a motion for rehearing in the state court. Rouse v. Lee, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 25353 (M.D.N.C. Jan. 17, 2001).

Underinsured Motorist Benefit Dispute. — During a N.C. R. App. P. 31 motion for rehearing, the appellate court determined that a remand to the trial court was necessary to determine the amount due to plaintiff from an insurance company on an underinsured motorist claim pursuant to G.S. 20-279.21, as the stipulation of the parties was not sufficient to determine the amount due since the stipulation did not specify the total loss incurred by plaintiff. Austin v. Midgett, 166 N.C. App. 740, 603 S.E.2d 855, 2004 N.C. App. LEXIS 2020 (2004).

Applied in Siders v. Gibbs, 31 N.C. App. 481, 229 S.E.2d 811 (1976); Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985); Dodson v. Dodson, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 899 (May 6, 2008).

Stated in Smith v. Nationwide Mut. Ins. Co., 72 N.C. App. 400, 324 S.E.2d 868 (1985)

Cited in State v. Fayetteville St. Christian

School, 299 N.C. 731, 265 S.E.2d 387 (1980); Housing Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982); Penuel v. Hiatt, 100 N.C. App. 268, 396 S.E.2d 85 (1990); Wilson v. Sutton, 124 N.C. App. 170, 476 S.E.2d 467 (1996).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. *— The cases cited below were decided under former Rules 31 and 44, Rules of Practice in the Supreme Court of North Carolina.*

Rule Mandatory. — The requirement that a petition for a rehearing be filed within so many days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

This rule prescribes the procedure for the correction of errors by the Supreme Court. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

Time of Filing Affidavit in Support of Petition. — Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and per contra, the court will not thereafter allow a motion retaining the case on its docket for the purpose of correcting the amount of the judgment. Moore v. Tidwell, 194 N.C. 186, 138 S.E. 541 (1927).

When Time Begins to Run. — The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that court. McGeorge v. Nicola, 173 N.C. 733, 92 S.E. 610 (1917).

Distinction Between Filing and Docketing. — The petition is said to be filed when it is received by the clerk, and this must be done within the requisite days after the filing of the opinion; it is docketed when the clerk enters it upon the records at the order of the justice, who grants the rehearing. Bird v. Gilliam, 123 N.C. 63, 31 S.E. 267 (1898).

Rehearing a Matter of Discretion. — Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

Presumption in Favor of Judgment. — Rehearings of decisions of cases of the Supreme Court are granted only in exceptional cases, and, when granted, every presumption is in favor of the judgment already rendered. Weisel v. Cobb, 122 N.C. 67, 30 S.E. 312 (1898).

Rehearing by Means of Second Appeal Not Allowed. — A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being by a petition to rehear. Gainesville & Alachua County Hosp. Ass'n v. Atlantic Coast Line R.R., 157 N.C. 460, 73 S.E. 242 (1911); LaRoque v. Kennedy, 161 N.C. 459, 77 S.E. 695 (1913).

Same Facts Will Not Warrant Second Appeal. — A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decision having become the law of the case. Strunks v. Southern Ry., 188 N.C. 567, 125 S.E. 182 (1924).

No Rehearing on Motion to Modify. — A rehearing will not be granted upon a summary motion to modify a final judgment of this court. Ruffin v. Harrison, 91 N.C. 398 (1884).

When Rehearing Allowed. — No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the court. Haywood v. Daves, 81 N.C. 8 (1879); Mullen v. Norfolk & N.C. Canal Co., 115 N.C. 15, 20 S.E. 167 (1894).

The petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this court, and no new fact has been called to the attention of the court, or new case or authority cited, or new position assumed, the petition is dismissed. Weston v. John L. Roper Lumber Co., 168 N.C. 98, 83 S.E. 693 (1914).

Only Points Certified as Erroneous Considered. — Upon a rehearing, the Supreme Court will not consider any point not certified as erroneous by counsel making the certificate. Kerr v. Hicks, 133 N.C. 175, 45 S.E. 529 (1903).

When Conclusion Assigned as Error. — It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the court in its opinion is erroneous." Bunn v. Braswell, 142 N.C. 113, 55 S.E. 85 (1906).

When Petitioner Guilty of Laches. — A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him. Battle v. Mercer, 188 N.C. 116, 123 S.E. 258 (1924).

Immaterial Assumption. — It is no ground for the rehearing of a case that the defendant was assumed to be a citizen of North Carolina, whereas, in fact, he was not, when the place of his residence is immaterial. Blackwell v. Wright, 74 N.C. 733 (1876).

When Everything Considered on First Hearing. — Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed. Weisel v. Cobb, 122 N.C. 67, 30 S.E. 312 (1898).

New Trial for Newly Discovered Evidence. — A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the justices of the court, under the rule, put the case in the Supreme Court. Smith v. Moore, 150 N.C. 158, 63 S.E. 735 (1909).

Contents of Supporting Affidavit. — It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear by affidavit that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail. Johnson v. Seaboard Air Line R.R., 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598 (1913).

When Petitioner Erroneously Deprived of Property. — Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. State ex rel. Lee v. Martin, 188 N.C. 119, 123 S.E. 631 (1924).

Court May Order Reargument. — It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been — especially where the record is voluminous and assignments of error indefinite — the court will require it to be reargued. Lenoir v. Valley River Mining Co., 104 N.C. 490, 10 S.E. 525 (1889).

Without New Petition Being Filed. — Where a new trial is granted without passing upon certain exceptions, and, upon a rehearing of the exceptions upon which new trial was granted, is reversed, the Supreme Court may order a reargument of the exceptions not passed upon, without a petition for the same being filed. Fleming v. Southern Ry., 132 N.C. 714, 44 S.E. 551 (1903).

Omission of Questions Not Discussed in Brief. — A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief and he has not appealed from the judgment. Greene v. Lyles, 187 N.C. 598, 122 S.E. 297 (1924).

When No Error Assigned. — Where no exception is taken in trial court to a ruling, and no error is assigned upon rehearing, the Supreme Court will not review the ruling. Faison v. Grandy, 128 N.C. 438, 38 S.E. 897 (1901).

Section Petition to Rehear. — Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the court in reaching the same conclusion. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

Costs When New Trial Granted. — Where, upon a rehearing, the court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. Waldo v. Wilson, 174 N.C. 767, 94 S.E. 715 (1917).

Reasons for Denying Petition Not Usually Set Out. — The reasons of denying a petition to rehear in the Supreme Court are not usually set out. Crowell v. Crowell, 181 N.C. 66, 106 S.E. 149 (1921).

When Petition Will Be Dismissed. — Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. Montgomery v. Blades, 223 N.C. 331, 26 S.E.2d 567 (1943).

Rule 32. Mandates of the courts.

(a) *In general.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk. (Adopted June 13, 1975; Amended November 27, 1984 — 32(b) — effective February 1, 1985.)

CASE NOTES

Time of Issuance. — Federal habeas petitioner claimed that petitioner's habeas application was timely based on issuance of the state appellate court's "mandate" 20 days after denial of petitioner's state post-conviction relief request was affirmed; however, there was no such "mandate" in the record, and the habeas petition was untimely based on the date of affirmance. Morrow v. Harkleroad, 247 F. Supp. 2d 805, 2003 U.S. Dist. LEXIS 2771 (W.D.N.C. 2003).

N.C. R. App. P. 32(b) mandates generally did not issue after summary denials of certiorari and the inmate submitted no evidence that any mandate ever issued in the inmate's case; as such, N.C. R. App. P. 32(b) clearly did not apply to toll the inmate's untimely habeas petition. Rouse v. Lee, 339 F.3d 238, 2003 U.S. App. LEXIS 16417 (4th Cir. 2003), cert. denied, 541 U.S. 905, 124 S. Ct. 1605, 158 L. Ed. 2d 248 (2004).

Petitioner inmate's habeas petition was untimely under 28 U.S.C.S. § 2244(d)(1) because N.C. R. App. P. 32's 20-day period did not apply to the order of the highest state court denying certiorari and that order ended the state post-conviction process and the tolling provisions of 28 U.S.C.S. § 2244(d)(2); further, N.C. R. App. 31(a) did not apply to criminal proceedings and, under G.S. 15A-1411(b), a post-conviction motion was a motion in the original cause and not a new proceeding, thus, N.C. R. App. P. 31(g) applied and the inmate had no right to file a motion for rehearing in the state court. Rouse v. Lee, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 25353 (M.D.N.C. Jan. 17, 2001).

Applied in State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003); Hodge v. N.C. DOT , 161 N.C. App. 726, 589 S.E.2d 737, 2003 N.C. App. LEXIS 2276 (2003), cert. denied, 358 N.C. 234, 595 S.E.2d 151 (2004); Squire v. Pol, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37246 (W.D.N.C. Sept. 13, 2005); State v. Howell, 184 N.C.

App. 369, 646 S.E.2d 622, 2007 N.C. App. LEXIS 1432 (2007); Integon Nat'l Ins. Co. v. Ward, 184 N.C. App. 532, 646 S.E.2d 395, 2007 N.C. App. LEXIS 1463 (2007); Estate of Gainey v. S. Flooring & Acoustical Co., 184 N.C. App. 497, 646 S.E.2d 604, 2007 N.C. App. LEXIS 1468 (2007); State v. Brown, 184 N.C. App. 539, 646 S.E.2d 590, 2007 N.C. App. LEXIS 1469 (2007); Brown v. Ellis, 184 N.C. App. 547, 646 S.E.2d 408, 2007 N.C. App. LEXIS 1470 (2007); Ingersoll v. Smith, 184 N.C. App. 753, 647 S.E.2d 141, 2007 N.C. App. LEXIS 1597 (2007); Greene v. Royster, — N.C. App. —, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); Watson v. Watson, — N.C. App. —, 652 S.E.2d 310, 2007 N.C. App. LEXIS 2317 (2007); Citifinancial Mortg. Co. v. Gray, — N.C. App. —, 652 S.E.2d 321, 2007 N.C. App. LEXIS 2316 (2007); Lancaster v. N.C. Dep't of Env't & Natural Res., Div. of Waste Mgmt., — N.C. App. —, 652 S.E.2d 359, 2007 N.C. App. LEXIS 2304 (2007); Cameron v. Merisel Props., — N.C. App. —, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Quoted in West v. G.D. Reddick, Inc., 302 N.C. 201, 274 S.E.2d 221 (1981); State v. Hennis, 184 N.C. App. 536, 646 S.E.2d 398, 2007 N.C. App. LEXIS 1457 (2007).

Cited in State v. Wright, 151 N.C. App. 493, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002); State v. Gay, 151 N.C. App. 530, 566 S.E.2d 121, 2002 N.C. App. LEXIS 774 (2002), cert. denied, 356 N.C. 685, 578 S.E.2d 315 (2003); Baker v. Showalter, 151 N.C. App. 546, 566 S.E.2d 172, 2002 N.C. App. LEXIS 776 (2002); Watson v. Beck, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 16831 (M.D.N.C. Sept. 15, 2003); Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003); Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004); State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357, 2007 N.C. App. LEXIS 472 (2007).

Rule 33. Attorneys.

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Signatures on electronically filed documents.* If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document from his or her computer to (1) list his or her name first on the document, and (2) place on the document under his or her signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it."

(c) *Agreements.* Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court. (Adopted June 13, 1975; Amended October 18, 2001 — 33(a)-(c) — effective October 31, 2001.)

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Subsection (a) of this rule is not applicable in criminal cases involving court-appointed counsel. — State v. Carter, 66 N.C. App. 21, 311 S.E.2d 5, cert. denied, 310 N.C. 745, 315 S.E.2d 705 (1984).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. — *The cases cited below were decided under former Rule 32, Rules of Practice in the Supreme Court of North Carolina.*

Verbal Agreements Not Considered When Denied. — The Supreme Court will not consider appellant's alleged verbal agreement between the parties when such is denied. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911); Brewer v. Mineola Mfg. Co., 161 N.C. 211, 76 S.E. 237 (1912); McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917).

When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911); State v. Black, 162 N.C. 637, 78 S.E. 210 (1913).

Rule 33A. Secure leave periods for attorneys.

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Appellate Division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the Appellate Division during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the Appellate Division in which the attorney has entered an appearance.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in the Supreme Court, in the office of the Clerk of the Supreme Court;

(2) if the attorney has entered an appearance in the Court of Appeals, in the office of the Clerk of Court of Appeals.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period. (Adopted May 6, 1999, effective January 1, 2000 for all actions and proceedings pending in the appellate division on and after that date.)

Editor's note. — The order adopting this Rule provides that the Rule applies to all actions and proceedings pending in the Appellate Division on and after January 1, 2000.

Rule 34. Frivolous appeals; Sanctions.

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division. (Adopted June 13, 1975; Amended December 8, 1988 — effective July 1, 1989; Amended April 14, 1999 — 34(d).)

CASE NOTES

The appellate division possesses sufficient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so under this rule on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision (N.C.R.A.P., Rule 37). Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Motions to dismiss appeals from being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Where plaintiff had appealed nearly every order entered by the trial court, the appeal at hand being the thirteenth appeal to the appellate division in the case and related cases, not including requests for extraordinary writs, and for the most part plaintiff had merely reasserted issues previously ruled upon by the appellate division, the appeal would be dismissed, with costs to be taxed to plaintiff individually. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

Where an appellant submitted a 75-page brief, in clear violation of the 35-page limit of N.C.R.A.P., Rule 28(j), in which he put forth precisely the same argument as in his previous motion to dismiss and in previous appeals, under this rule the Court of Appeals is authorized to impose a sanction against that party. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774 (1991), cert. denied, 332 N.C. 484, 421 S.E.2d 349 (1992).

Upon review of the more than twenty appeals brought to the Court of Appeals in one case, the court concluded that a hearing pursuant to this rule would be in order and would give notice to appellant pursuant to this rule, that, following receipt of briefs and an oral hearing, it would consider the imposition of one or more of the sanctions enumerated under subdivision (b). Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774 (1991), cert. denied, 332 N.C. 484, 421 S.E.2d 349 (1992).

The court imposed sanctions against plaintiff and awarded damages to the estate for plaintiff's frivolous appeal disputing the value of a stock certificate. Long v. Long, 119 N.C. App. 500, 459 S.E.2d 58 (1995).

Sanctions Not Imposed for Failure to Provide Index with Brief. — Although an employee's brief violated N.C. R. App. P. 28(b)(1) as the brief had no subject index, the minor violation did not warrant sanctions pursuant to N.C. R. App. P. 25 and 34. Gillis v. Montgomery County Sheriff's Dep't, — N.C. App. —, 663 S.E.2d 447, 2008 N.C. App. LEXIS 1314 (2008).

Double Costs Assessed. — Where all appellate briefs contained in excess of 91 characters per line in violation of Appellate Rule 26(g), double costs would be assessed, with the first set to be shared equally among all parties, and the second to be paid in equal share by counsel for the parties. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

Husband's interlocutory appeal was dismissed and double costs were assessed as a sanction under N.C. R. App. P. 34(a)(2) where husband filed a second premature appeal in the same case. Steadman v. Steadman, 148 N.C. App. 713, 559 S.E.2d 291, 2002 N.C. App. LEXIS 55 (2002).

Homeowners' attorney was ordered to pay double the printing costs of an appeal under N.C. R. App. P. 34(b) due to the violation of N.C. R. App. P. 9, 11, 12, 28(b)(4), 28(b)(6), and 28(b)(5), which was substantial under N.C. R. App. P. 25, but not so gross as to warrant dismissal against an insurance agent. Luther v. Seawell, — N.C. App. —, 662 S.E.2d 1, 2008 N.C. App. LEXIS 1148 (June 17, 2008).

Real Estate Broker's Appeal Was Frivolous. — A real estate broker's appeal was frivolous, where the broker appealed a grant of summary judgment in its suit seeking brokers' commissions and introductory fees, because the case presented the same issues between the same parties or their privies as were decided in a prior case. McGowan v. Argo Travel, Inc., 131 N.C. App. 694, 507 S.E.2d 601 (1998).

Materials Outside the Record. — The costs of an appeal were taxed to defense counsel, where counsel successfully challenged a non-statutory aggravating factor imposed by the sentencing judge, but counsel's appellate brief contained materials outside the record and gratuitous comments about the trial judge. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

Dismissal of Appeal. — Plaintiff's appeal, which stated three separate errors in one assignment, failed to state the statutory authority exceeded, the procedure violated and the error of law committed, and failed to provide "clear and specific record or transcript references" relating to each alleged error, violated the Rules of Appellate Procedure, and would be dismissed. Bowen v. North Carolina Dep't of Health & Human Servs., 135 N.C. App. 122, 519 S.E.2d 60 (1999).

Sanctions Other than Dismissal. — Dismissal of an appeal for failure to comply with N.C. R. App. P. 10(c)(1), 28(b)(4), and 28(b)(6) was reversed and remanded because the intermediate appellate court should have considered whether sanctions other than dismissal would have been appropriate pursuant to N.C. R. App. P. 25(b) or 34. If the court concluded that dismissal was the appropriate sanction, it may then have considered whether the circumstances of the case justified invoking N.C. R. App. P. 2 to reach the merits of the appeal. Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

Dismissal of Appeal Not Warranted. — Plaintiffs' motion to dismiss defendants' appeal and to impose sanctions pursuant to N.C. R. App. P. 34 for failure to comply with the required format and contents of an appellate brief as required by N.C. R. App. P. 28(b) was denied, as defendants filed a replacement brief which sufficiently complied with the North Carolina Rules of Appellate Procedure. Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

Subcontractor's violations of N.C. R. App. 28(b)(4) and (b)(6) and 10(c) were not so egregious as to require dismissal of the appeal, and the subcontractor was ordered to pay the costs of printing the appeal under N.C. R. App. P. 34(b), as N.C. R. App. P. 2 had to be applied cautiously; therefore, its application inherently was limited, State v. Hart, 644 S.E.2d 201 (2007), suggested no similar limitation on the application of N.C. R. App. P. 25 and N.C. R. App. P. 34, and there was no reason to engraft any limitation beyond the language contained within the rules. McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Even assuming for the sake of argument that the husband's appellate brief did not strictly comply with the North Carolina Rules of Appellate Procedure, it was within the appellate court's discretion as to whether dismissal was warranted as a sanction; since the husband's alleged violations were not sufficiently egregious to warrant dismissal, the appellate court declined to dismiss the husband's appeal and would review the husband's remaining assignment of error. Cotter v. Cotter, 185 N.C. App. 511, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Failure to provide legal bases for assignments of error, and merely reciting that the decision on appeal was erroneous, constituted gross and substantial violations of N.C. R. App. P. 10(c)(1), and dismissal was traditionally appropriate for such violations, but monetary sanctions were warranted based on remand from the North Carolina Supreme Court for reconsideration of a prior order dismissing the assignments of error. Odom v. Clark, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1554 (Aug. 19, 2008).

Sanctions Imposed. — Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Where defendants made an unwarranted attack on the integrity of plaintiff's counsel to conceal their own deficient pleadings, and made spurious allegations concerning the integrity of the trial court, their grossly improper conduct subjected them to sanctions under N.C. R. App. P. 34(a)(3); they were ordered to pay double costs. Mineola Cmty. Bank, S.S.B. v. Everson, — N.C. App. —, 652 S.E.2d 369, 2007 N.C. App. LEXIS 2306 (2007).

Plaintiff's counsel violated N.C. R. App. P. Rule 9(a)(1)(e) and 9(c)(3)(b) by failing to provide a transcript of the summary judgment hearing with the record on appeal, and also violated Rule 9(a)(1)(c) and 9(b)(3), N.C.R. App. P. 10(c)(1), and N.C. R. App. P. 28(b)(3), (5), and (6). Due to the number and nature of the rules violations, the appellate court considered them "gross" or "substantial" and taxed costs to plaintiff's attorney under N.C.R. App. P. 25 and 34. Azar v. Presbyterian Hosp., — N.C. App. —, 663 S.E.2d 450, 2008 N.C. App. LEXIS 1313 (2008).

Sanctions Imposed on Counsel. — Pursuant to N.C. R. App. P. 25 and N.C. R. App. P. 34, defendant's counsel was ordered to personally pay the costs of defendant's appeal because counsel's statement of facts was neither full, complete, nor non-argumentative, as required by N.C. R. App. P. 28. State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007).

Where dominant tract owners were granted a prescriptive easement, the servient tract owner's counsel was ordered to pay the printing costs of the appeal pursuant to N.C. R. App. P. 34(b) because the servient tract owner did not provide an applicable standard of review or citation of authorities supporting such a standard in the appellate brief, and the single violation was not substantial. Caldwell v. Branch, 181 N.C. App. 107, 638 S.E.2d 552, 2007 N.C. App. LEXIS 91 (2007).

Because an argument advanced by a construction company on appeal had already been considered and rejected in the case, the construction company's assertion of the same argument on appeal violated N.C. R. App. P. 34, and sanctions against the construction company's attorney were warranted. Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co., — N.C. App. —, — S.E.2d —, 2007 N.C. App. LEXIS 1172 (June 5, 2007).

Attorney's Fees Not Imposed. — Injured employee did not pursue a frivolous appeal from North Carolina Industrial Commission decision as he made good faith arguments concerning whether he was entitled to attorney's fees and reimbursement for out-of-pocket medical expenses pursuant to Workers' Comp. R. N.C. Indus. Comm'n 502(2)(b) (2000); therefore, his employer was not entitled to attorney's fees. Stevenson v. Noel Williams Masonry, Inc., 148 N.C. App. 90, 557 S.E.2d 554, 2001 N.C. App. LEXIS 1268 (2001).

Applied in K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989); Lowder v. All Star Mills, Inc., 100 N.C. App. 322, 396 S.E.2d 95 (1990); State v. Bennett, 102 N.C. App. 797, 404 S.E.2d 4 (1991); Lowder v. Lowder, 107 N.C. App. 115, 418 S.E.2d 713 (1992); State v. Burke, 185 N.C. App. 115, 648 S.E.2d 256, 2007 N.C. App. LEXIS 1738 (2007); Meadows v. Iredell County, — N.C. App. —, 653 S.E.2d 925, 2007 N.C. App. LEXIS 2564 (2007); State v. Labinski, — N.C. App. —, 654 S.E.2d 740, 2008 N.C. App. LEXIS 90 (2008); Yorke v. Novant Health, Inc., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1620 (Sept. 2, 2008); Odell v. Legal Bucks, LLC, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1619 (Sept. 2, 2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1555 (Aug. 19, 2008).

Quoted in Howerton v. Grace Hosp., 124 N.C. App. 199, 476 S.E.2d 440 (1996); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999).

Cited in Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); State v. Dayberry, 131 N.C. App. 406, 507 S.E.2d 587 (1998); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000); Anthony v. City of Shelby, 152 N.C. App. 144, 567 S.E.2d 222, 2002 N.C. App. LEXIS 904 (2002); In re T.M., 180 N.C. App. 539, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006); State v. Hart, 361 N.C. 309, 644 S.E.2d 201, 2007 N.C. LEXIS 410 (2007); Selwyn Vill. Homeowners Ass'n v. Cline & Co., — N.C. App. —, 651 S.E.2d 909, 2007 N.C. App. LEXIS 2297 (2007); Capps v. NW Sign Indus. of N.C., Inc., — N.C. App. —, 652 S.E.2d 372, 2007 N.C. App. LEXIS 2268 (2007).

Rule 35. Costs.

(a) *To whom allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to costs in mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) *Costs of appeal taxable in trial tribunals.* Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) *Execution to collect costs in appellate courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return. (Adopted June 13, 1975.)

CASE NOTES

Where plaintiff had appealed nearly every order entered by the trial court, the appeal at hand being the thirteenth appeal to the appellate division in the case and related cases, not including requests for extraordinary writs, and for the most part plaintiff had merely reasserted issues previously ruled upon by the appellate division, the appeal would be dismissed, with costs to be taxed to plaintiff individually. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

Costs Attributable to Excessively Long Brief Assessed Against Attorney. — Where former attorney for plaintiffs filed a brief of 80 single-spaced pages of arguments, a gross violation of N.C.R.A.P., Rule 28(j), the portion of the costs of the appeal attributable to plaintiff appellant's excessively long brief were assessed against said attorney, with plaintiffs bearing the remainder of the costs of the appeal. North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462, appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990).

Costs Assessed on Attorney. — Because Rule 7 of the Rules of Appellate Procedure was violated, in that a timely written request for the transcript was not made, the cost of appeal was assessed on upon plaintiffs' attorney personally, pursuant to this rule. Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995).

Where all appellate briefs contained in excess of 91 characters per line in violation of Appellate Rule 26(g), double costs would be assessed, with the first set to be shared equally among all parties, and the second to be paid in equal share by counsel for the parties. Barnard v. Rowland, 132 N.C. App.

416, 512 S.E.2d 458 (1999).

The costs of an appeal were taxed to defense counsel, where counsel successfully challenged a non-statutory aggravating factor imposed by the sentencing judge, but counsel's appellate brief contained materials outside the record and gratuitous comments about the trial judge. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

Applied in City of Wilmington v. Camera's Eye, Inc., 43 N.C. App. 558, 259 S.E.2d 589 (1979); State v. Bennett, 102 N.C. App. 797, 404 S.E.2d 4 (1991); Lowder v. Lowder, 107 N.C. App. 115, 418 S.E.2d 713 (1992); Fox v. Fox, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

Cited in Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998); McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007).

Rule 36. Trial judges authorized to enter orders under these rules.

(a) *When particular judge not specified by rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. 7A-192.

(b) *Upon death, incapacity, or absence of particular judge authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties. (Adopted June 13, 1975.)

CASE NOTES

Quoted in von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988).

Cited in McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007).

Rule 37. Motions in appellate courts.

(a) *Time; Content of motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) *Termination of Parental Rights and Juvenile Matters.* Any motion or response to a motion filed in the appellate courts shall not include the name of a juvenile, in compliance with Rule 3(b).

(d) *Withdrawal of Appeal in Criminal Cases.* Withdrawal of appeal in criminal cases shall be in accordance with G.S. 15A-1450. In addition to the requirements of G.S. 15A-1450, after the record on appeal ina criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) *Withdrawal of Appeal in Civil Cases.*

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) *Effect of Withdrawal of Appeal.* The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal. (Adopted June 13, 1975; Amended May 6, 2004 — (3)(c) — effective May 12, 2004; January 25, 2007 — added 37(d)-(f) — effective March 1, 2007 and applicable to all cases appealed on or after that date.)

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

The appellate division possesses sufficient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so under N.C.R.A.P., Rule 34 on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision (this rule). Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Discretion to Review the Record. — Appellate court denied a motion to dismiss by the county agency and the guardian ad litem under N.C.R.A.P. 37, and invoked its discretion pursuant to N.C.R.A.P. 2 to review the record to determine whether the evidence supported a trial court's findings of fact and conclusions of law in terminating a father's parental rights; the court concluded that the affirmance of the trial court's order was proper because: (1) the trial court's findings regarding the father were properly supported by clear, cogent, and convincing evidence; (2) the trial court's findings supported its conclusions; and (3) there was no merit in any of the assignments of error noted in the record. In re N.B., 183 N.C. App. 114, 644 S.E.2d 22, 2007 N.C. App. LEXIS 831 (2007).

Motions to dismiss appeals as being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Defendant's motion to dismiss plaintiff's appeal should have been filed in accordance with this rule, not raised for the first time in his brief. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Motions to an appellate court may not be made in a brief, but must be made in accordance with this rule. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, 1996 N.C. App. LEXIS 240 (1996), cert. denied, 472 S.E.2d 8 (1996).

Where two companies appealed the trial court's order allowing intervention by two businessmen in an action to recover broker's compensation following the sale of commercial real estate, the businessmens' brief was erroneous in asking the appellate court to dismiss the appeal because such motions could not be made in a brief. Bruggeman v. Meditrust Co., L.L.C., 165 N.C. App. 790, 600 S.E.2d 507, 2004 N.C. App. LEXIS 1514 (2004).

Although the appellant's brief failed to state a standard of review for the first argument in his brief, as was required by N.C. R. App. P. 28(b)(6), the appellate court, pursuant to N.C. R. App. P. 2, chose to decide the appeal based upon the merits because the appellees failed to comply with N.C. R. App. P. 37 as their motion to dismiss the appeal was made in their brief instead of in a separate motion. Vaden v. Dombrowski, — N.C. App. —, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

Insurance company and insurance agent's request that the insured's appeal be dismissed for violations of appellate procedure rules could not be addressed because the request was raised in their appellate brief. The proper procedure was not to raise the request in an appellate brief, but, instead, to make the request in accordance with N.C. R. App. P. 37. Carter v. West Am. Ins. Co., — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1021 (May 20, 2008).

Where the record on appeal contained no motion to dismiss filed in accordance with this rule, the Court of Appeals would not address the motion as presented in defendant's brief. Morris v.

Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

Appellate court refused to dismiss as moot a parent's appeal from temporary orders placing children in foster care upon finding them neglected and dependent, even though the social services department argued that the issue had been mooted by a subsequent order terminating parental rights; during pendency of the earlier appeal, the trial court's authority was limited to entry of temporary orders in a child's best interest. In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004).

Motion Untimely. — Defendant's amended motion for appropriate relief did not amend the original motion for appropriate relief and alleged new grounds for relief based on ineffective assistance of counsel; the amended motion was untimely and was dismissed without prejudice to defendant to file a new motion for appropriate relief in the trial court. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Noncompliance Resulting in Sanctions Against Plaintiff's Attorneys. — Given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with N.C.R.A.P., Rules 9, 28, and 37, the court would impose sanctions against plaintiff's attorneys in the form of costs associated with the appeal. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

Motion for Attorney's Fees. — When, in an appeal of a personal injury case, the injured party moved, pursuant to N.C. R. App. P. 37(a), for attorney's fees on appeal, it was appropriate to remand the matter to the trial court for findings of fact and an award consistent with those findings. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Applied in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983); Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003); Comm'r of Labor v. Weekley Homes, L.P., 169 N.C. App. 17, 609 S.E.2d 407 (2005); Haley v. ABB, Inc., 174 N.C. App. 469, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005); Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Cited in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990); Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994); Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999); In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999); Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); Freeman v. J.L. Rothrock, — N.C. App. —, 657 S.E.2d 389, 2008 N.C. App. LEXIS 430 (2008).

II. DECISIONS UNDER PRIOR LAW.

***Editor's note.** — The cases cited below were decided under former Rule 36, Rules of Practice in the Supreme Court of North Carolina.*

Only Motions in Writing Entertained. — The Supreme Court will not entertain any motion, unless reduced to writing. McCoy v. Lassiter, 94 N.C. 131 (1886); Hoyle v. Bagby, 253 N.C. 778, 117 S.E.2d 760 (1961).

Rule 38. Substitution of parties.

(a) *Death of a party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for other causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) *Public officers; Death or separation from office.* When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party. (Adopted June 13, 1975.)

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Appeal Where Plaintiff Died Before Entitled to Appeal. — The court used N.C.A.P., Rule 2 to vary the requirements of this rule so as to allow an appeal by the decedent's attorney where the plaintiff died before she was entitled to an appeal. Brown v. Brown, 353 N.C. 220, 539 S.E.2d 621, 2000 N.C. LEXIS 904 (2000).

Sister's petition to declare her brother incompetent was nugatory after the death of the brother and did not survive the death of the brother; thus, the appeal abated and became moot upon the brother's death, and was dismissed. In re Higgins, 160 N.C. App. 704, 587 S.E.2d 77, 2003 N.C. App. LEXIS 1908 (2003).

Applied in Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003).

Cited in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984); Smith v. State, 349 N.C. 332, 507 S.E.2d 28 (1998).

II. DECISIONS UNDER PRIOR LAW.

Editor's note. *— The cases cited below were decided under former Rule 37, Rules of Practice in the Supreme Court of North Carolina.*

Death of Party Pending Appeal. — Where a party dies pending appeal, his personal representative will be made a party by order of the court. First & Citizens Nat'l Bank v. Toxey, 210 N.C. 470, 187 S.E. 553 (1936).

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. Peterson v. McLamb, 221 N.C. 538, 19 S.E.2d 488 (1942).

Rule 39. Duties of clerks; When offices open.

(a) *General provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to be kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court, on paper, microform, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court. (Adopted June 13, 1975; Amended December 8, 1988 — 39(b) — effective January 1, 1989.)

Rule 40. Consolidation of actions on appeal.

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by N.C. R. App. P. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court. (Adopted June 13, 1975; Amended October 18, 2001 — effective October 31, 2001.)

CASE NOTES

Identical Questions of Law. — Where the civil appeals brought by workers exposed to asbestos presented identical questions of law, the court consolidated the appeals pursuant to N.C. R. Civ. P. 40. Schenk v. HNA Holdings, Inc., 167 N.C. App. 47, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004).

Applied in King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d

300 (1986); Sam Stockton Grading Co. v. Hall, 111 N.C. App. 630, 433 S.E.2d 7 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002); In re J.B., 164 N.C. App. 394, 595 S.E.2d 794, 2004 N.C. App. LEXIS 820 (2004).

Quoted in Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

Stated in Richmond County v. North Carolina Low-level Radioactive Waste Mgt. Auth., 108 N.C. App. 700, 425 S.E.2d 468 (1993)

Cited in State v. Garren, 117 N.C. App. 393, 451 S.E.2d 315 (1994); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997); Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999); Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000), aff'd, 352 N.C. 662, 535 S.E.2d 356 (2000).

Rule 41. Appeal information statement.

(a) The Court of Appeals has adopted an APPEAL INFORMATION STATEMENT which will be revised from time to time. The purpose of the APPEAL INFORMATION STATEMENT is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file and serve the APPEAL INFORMATION STATEMENT as set out in this Rule.

(1) The Clerk of the Court of Appeals shall furnish an APPEAL INFORMATION STATEMENT form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. For cases arising out of termination of parental rights and juvenile matters, the name of the juvenile shall not be included in the APPEAL INFORMATION STATEMENT, in compliance with Rule 3(b).

(3) If any party to the appeal concludes that the APPEAL INFORMATION STATEMENT is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within 7 days of the service of the APPEAL INFORMATION STATEMENT and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. (Adopted March 3, 1994, effective March 15, 1994; Amended May 6, 2004 — (b)(2) — effective May 12, 2004.)

CASE NOTES

Review of significant issues warranted under N.C. R. App. P. 2. — Since a plaintiff's violations of N.C. R. App. P. 26(g), 28(b)(5)-(6), 28(d)(1)(c), and 41(b)(2) were not so egregious as to invoke dismissal, the appeals court elected to review the significant issues of the employee's appeal of a summary judgment dismissing her wrongful termination/discrimination claims pursuant to N.C. R. App. P. 2. Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Cited in Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997); Patrick v. Wake County Dep't of Human Servs., — N.C. App. —, 655 S.E.2d 920, 2008 N.C. App. LEXIS 197 (Feb. 5, 2008).

Rule 42. Title.

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "N.C. R. App. P.....," is also appropriate. (Adopted June 13, 1975; Renumbered effective March 15, 1994; Amended October 18, 2001 — effective October 31, 2001.)

CASE NOTES

Cited in Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (1986); Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

APPENDIXES

Editor's note. — These Appendixes were adopted Dec. 7, 1982, and amended Jan. 1, 1983. Appendixes A and F were further amended Oct. 7, 1985. Appendix A was further revised to reflect June 30, 1988, amendments to Rule 13(a). Appendixes A to F were further amended effective July 1, 1989. Appendixes A to F were further amended effective October 18, 2001.

Appendix A. Timetables for appeals.

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	14	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil, agency)	14	filing notice of appeal	7(a)(1) 18(b)(3)
Ordering Transcript (criminal indigent)	14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript (civil, non-capital criminal) (capital criminal)	 60 120	service of order for transcript	7(b)(1)
Serving proposed record on appeal (civil, non-captial criminal)	35 35	notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b) 18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal (civil, non-capital criminal) (capital criminal) (agency)	 30 35 30	service of proposed record service of proposed record	11(c) 18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

Timetable of Appeals to the Supreme Court from the Court of Appeals Under Article III of The Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a), 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief in the Supreme Court (or mailing brief under Rule 26(a))	30 30	Filing notice of appeal certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." Rule 21(c). (Amended October 1, 1990; Amended March 6, 1997; Amended October 31, 2001; Amended May 1, 2003; Amended September 1, 2005.)

Appendix B. Format and style.

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12 point type so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, non-script font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½″, 1″, 1½″, 2″, 4¼″ (center), and 5″.

Captions of Documents

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties except as provided by Rule 3(b) to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. ____

(Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA)
or)
(Name of Plaintiff)) From (Name) County
) No. ____________
v)
)
)
(Name of Defendant))

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by Rule 3(b)) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the court of appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

Indexes

A brief or petition which is 10 pages or more in length and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾″ from each margin, providing a 5-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

Organization of the Court	1
Complaint of Tri-Cities Mfg. Co.	1

***

* PLAINTIFF'S EVIDENCE:	
John Smith	17
Tom Jones	23
Defendant's Motion for Nonsuit	84
* DEFENDANT'S EVIDENCE:	
John Q. Public	86
Mary J. Public	92
Request for Jury Instructions	101
Charge to the Jury	101
Jury Verdict	102
Order or Judgment	108
Appeal Entries	109
Order Extending Time	111
Assignments of Error	113
Certificate of Service	114
Stipulation of Counsel	115
Names and Addresses of Counsel	116

Use of the Transcript of Evidence with Record on Appeal

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page #), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

In termination of parental rights and juvenile matters, the entire verbatim transcript must be sealed pursuant to Rule 9(c); if individual transcript pages are inserted in the record on appeal, the pages must be modified to comply with Rule 3(b).

Table of Cases and Authorities

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of A Uniform System of Citation. Citations shall include parallel citations to official state reporters.

Format of Body of Document

The body of the document of records on appeal should be single-spaced with double-spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R pp. 38-40) References to the transcript, if used, should be made in similar manner. (T p. 558, line 21)

Topical Headings

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

Numbering Pages

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

Signature and Address

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) ATTORNEY, COUNSELOR, LAWYER & HOWE
By: ______________________________
John Q. Howe
By: ______________________________
M. R. N. Associate
Attorneys for Plaintiff Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

(Appointed) ____

John Q. Howe
Attorney for Defendant Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

(Amended October 31, 2001; Amended August 15, 2002; Amended October 7, 2002; Amended May 12, 2004; Amended September 1, 2005.)

CASE NOTES

Type Size. — N.C.R.A.P., Rule 26 requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with Rule 26, Rule 26 governs and no brief shall be submitted in less than eleven point type Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. The numbering of the pages, as provided in Appendix B., is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Characters Per Inch. — Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. N.C.R.A.P., Rule 26 does not speak in terms of characters per inch; however, in order to provide a uniform construction of this rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of the Court of Appeals and the Supreme Court and the standard we will apply to the briefs filed with the Court of Appeals. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Prospective Application of Construction of Rule. — Where the point size in defendants' appellate brief did not comply with N.C.R.A.P., Rule 26, but neither the rule nor the Court of Appeals had previously construed Rule 26, the court would consider the arguments presented in defendants' brief. Rule 26, as construed in this case, will be applied by the Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Cited in Staton v. Brame, 136 N.C. App. 170, 523 S.E.2d 424, 1999 N.C. App. LEXIS 1303 (1999).

Appendix C. Arrangement of record on appeal.

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

TABLE 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items required by Rule 9(a)(1)i
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, telephone numbers, and e-mail address of counsel for all parties to appeal

TABLE 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)g
11. Entries showing settlement of record on appeal, extension of time, etc.
12. Assignments of error, per Rule 9(a)(2)h
13. Names, office addresses, telephone numbers, and e-mail address of counsel for all parties to appeal

TABLE 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a

3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors

*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f, 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 9(a)(3)j
23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal.

TABLE 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).
   R., p. 4.
2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.
   R., p. 7.
3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.
   T., vol. 1, p. 137, lines 17-20.
4. The court's denial of defendant's motion for summary judgment, on the ground that there was not [no] genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.
   R., p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.
   T., vol. 1, p. 295, line 5, through p. 297, line 12.
   T., vol. 1, p. 299, lines 1-8.
2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.
   R., p. 45.
3. The court's instructions to the jury, R., pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

4. The court's instructions to the jury, R., pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.
5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.
   R., p. 80; T., Vol. 3, p. 764, lines 8-23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.
   R., p. 20.
2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.
   R., p. 25.
3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.
   R., p. 27. (Amended October 1, 1990; Amended October 31, 2001.)

Editor's note. — A former Table 4, relating to exceptions set out in the record on appeal, was deleted by the amendment of Appendix C, effective July 1, 1989.

Appendix D. Forms.

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. Notices of Appeal

a. *to Court of Appeals from Trial Division*
Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:
(Plaintiff) (Defendant) (Name of Party) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) entered on (date) in the (District) (Superior) Court of (name) County, (describing it).

Respectfully submitted this ____ day of ___________ 2______.
s/____________________________
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

b. *to Supreme Court from a Judgment of the Superior Court Including a Sentence of Death*

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:
(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this ____ day of ___________ 2______.
s/____________________________
Attorney for Defendant-Appellant
(Address and Telephone)

c. *to the Supreme Court from a Judgment of the Court of Appeals*
Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a clear copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:
(Plaintiff) (Defendant) (name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment …

(*Constitutional question* — G.S. 7A-30(1)) … directly involves substantial questions arising under the Constitution(s) (of the United States) (and) (or) (of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

> "Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp. 7 through 10). This constitutional issue was determined erroneously by the Court of Appeals.")

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in his brief for review:

> (Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(*dissent* — G.S. 7A-30(2)) ... was entered with a dissent by Judge (name), based on the following issue(s):

> (Here state the issue or issues which are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues as with the constitutional question appeal, above. Any additional issues desired to be raised in the Supreme Court where the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this ____ day of ________ 2______.

s/________________________________
Attorney for (Plaintiff) (Defendant)-Appellant
(Address and Telephone)

2. Appeal Entries

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(a) showing appeal duly taken by oral notice under App. Rule 3(b) or 4(a) and
2) the entry required by App. Rule 9(a) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals) (Supreme Court). (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed 21 days thereafter within which to serve objections or a proposed alternative record on appeal.

This ____ day of ________ 2______.

s/________________________
Judge Presiding

3. Petition for Discretionary Review Under G.S. 7A-31

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme

Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff) (Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of [the] case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded [to] take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to Be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this ____ day of __________ 2________.

s/______________________________
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in [the] case.

4. Petition for Writ of Certiorari

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT) (COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment) (order) (decree) of the [Honorable (name), Judge Presiding, (name) County Superior (District) Court] [North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment) (order) (decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.)

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [Superior Court of (name) County] [North Carolina Court of Appeals] to permit review of the (judgment) (order) (decree) above specified, upon errors [(to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure] [stated as follows: (here list the errors, as issues, in the manner provided for the petition for discretionary review)]; and that the petitioner have, such other relief as to the Court may seem proper.

Respectfully submitted, this the ____ day of ________, 2________.

s/______________________________
Attorney for Petitioner
(Address and Telephone)
(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc., which is the subject of the petition and other attachments as described in petition.)

5. Petition for Writ of Supersedeas Under Rule 23 and Motion for Temporary Stay

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment) (order) (decree) of the [Honorable ______, Judge Presiding, (Superior) (District) Court of ______ County] [North Carolina Court of Appeals] dated ______, pending review by this Court of said (judgment) (order) (decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. Section ________ inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment) (order) (decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior) (District) Court of ________ County)] [(North Carolina Court of Appeals)] staying (execution) (enforcement) of its (judgment) (order) (decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal) (discretionary review) (review by extraordinary writ) (now pending) (the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the ____ day of __________, 2________.

s/________________________________
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff) (Defendant) respectfully applies to the Court for an order temporarily staying (execution) (enforcement) of the (judgment) (order) (decree) which is the subject of (this) (the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened of [if] petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution [of] death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable ________, Judge Presiding, Superior Court of ________ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted, this the ____ day of __________, 2______.

s/________________________________
Attorney for Defendant
(Address and Telephone)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison) (Amended March 6, 1997; Amended October 31, 2001; Amended effective March 1, 2007 and applicable to all cases appealed on or after that date.)

Appendix E. Content of briefs.

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

TABLE OF CASES AND AUTHORITIES ii
QUESTIONS PRESENTED 1
STATEMENT OF THE CASE 2
STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 2
STATEMENT OF THE FACTS 2
ARGUMENT:
I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION 6

***

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE FRUITS OF A WARRANTLESS SEARCH OF HIS APARTMENT BECAUSE THE CONSENT GIVEN WAS THE PRODUCT OF POLICE COERCION 18
CONCLUSION 22
CERTIFICATE OF SERVICE 23
APPENDIX:
VOIR DIRE DIRECT EXAMINATION OF JOHN Q. PUBLIC .... App. 1-7
VOIR DIRE CROSS-EXAMINATION OF JOHN Q. PUBLIC .... App. 8-11
VOIR DIRE DIRECT EXAMINATION OF OFFICER LAW N. ORDER .... App. 12-17
VOIR DIRE CROSS-EXAMINATION OF OFFICER LAW N. ORDER .... App. 18-20

*****

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the Index. Page references should be made to each citation of authority.

TABLE OF CASES AND AUTHORITIES

Dunaway v. New York, 442 U.S. 200, 99 S.Ct 2248, 60 L.Ed.2d 824 (1979) 11
State v. Perry, 298 N.C 502, 259 S.E.2d 496 (1979) 14
State v. Reynolds, 298 N.C 380, 259 S.E.2d 843 (1979) 12
United States v. Mendenhall, 446 U.S. 544, 100 S.Ct 1870, 64 L.Ed.2d 497 (1980) 14

4th Amendment, U.S. Constitution 28
14th Amendment, U.S. Constitution 28
GS 15A-221 29
GS 15A-222 28
GS 15A-223 29

*****

QUESTIONS PRESENTED

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

***

STATEMENT OF THE CASE

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1988, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1988, the transcript was ordered on October 15, 1988, and was delivered to parties on December 10, 1988.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 12, 1989. The record was filed and docketed in the Supreme Court on February 25, 1989.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under G.S. 7A-27(b). If the appeal is based on N.C.R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2
(T p. 45, lines 20-23)

The standard of review for each question presented shall be set out in accordance with Appellate Rule 28(b)(6).

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Appellate Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the center of the page.

The Certificate of Service is then shown with centered, upper case heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should *not* compile the entire transcript into an appendix to support issues involving directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The appendix should include a table of contents, showing the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix.
For example:

CONTENTS OF APPENDIX

VOIR DIRE DIRECT EXAMINATION OF JOHN Q. PUBLIC 27
(or T pp. 38-45)
VOIR DIRE CROSS-EXAMINATION OF JOHN Q. PUBLIC 35
(or T pp 46-49)
VOIR DIRE DIRECT EXAMINATION OF OFFICER
LAW N. ORDER 39
(or T pp. 68-73)
VOIR DIRE CROSS-EXAMINATION OF OFFICER
LAW N. ORDER 45
(or T pp. 74-76)

*****

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

(Amended October 31, 2001; Amended August 15, 2002; Amended September 1, 2005.)

Appendix F. Fees and costs.

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas — docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rule 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $1.75 per printed page. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28 (b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter. (Amended October 31, 2001.)

Appendix G.

A Style Manual for the North Carolina Rules of Appellate Procedure

Prepared and Distributed by:

The Appellate Rules Committee of
The North Carolina Bar Association

© 1999, 2003, 2008 North Carolina Bar Association. All rights reserved.

Latest Revision Date: August 2008

Table of Contents

Statement of Purpose 3

I. **The Record on Appeal**
Typical Record on Appeal, with comments 5

II. **The Briefs**
Typical Appellant's Brief, with comments 18
Typical Appellee's Brief 34
Typical Memorandum of Additional Authority 41

III. **Motions and Extraordinary Pleadings**
Typical Petition for Discretionary Review 44
Typical Petition for Writ of Certiorari 52

Statement of Purpose

The Appellate Rules Committee of the North Carolina Bar Association prepared this style manual to assist North Carolina lawyers when they appear in the state appellate courts.

This manual does not substitute for the North Carolina Rules of Appellate Procedure (the "Rules"). The Appellate Rules Committee has attempted to avoid interpretation of the Rules in this manual. To the extent that the manual appears to interpret a Rule, any interpretation has no precedential value. Practitioners are strongly advised to consult the Rules of Appellate Procedure at each stage of the appeal, to acquaint themselves with the process, and to read appellate opinions that interpret the Rules. The Rules are generally organized around the sequence and elements of an appeal (Notice of Appeal, Record on Appeal, Briefs, etc.). In addition to the Rules themselves, the appendixes to the Rules can be helpful in summarizing the contents of the Rules.

This style manual is an effort to synthesize the Rules and the Appendixes into a series of practical examples. The Record on Appeal in the style manual, for example, contains each of the elements of a typical civil-case record, with a few commentaries by the committee on important points. The practitioner with a criminal appeal, a juvenile case or administrative appeal will need to adjust the content, if not the style, of that example. The Rules vary slightly for civil and criminal appeals. Additionally, juvenile appeals involving termination of parental rights and the neglect, abuse and dependency of juveniles are subject to unique rules, especially regarding deadlines. This manual does not address juvenile appeals, and does not attempt to cover every nuance of the Appellate Rules.

The committee would be remiss if it did not point practitioners to another source of examples of appellate pleadings: www.ncappellatecourts.org contains copies of the records on appeal and briefs of cases filed in the Court of Appeals and Supreme Court in recent years. Beware: There are no annotations to those documents. Some of them are wonderful and some are not.

The committee appreciates the advice and comments of those who use the manual. Please send your suggestions to the Appellate Rules Committee, NC Bar Association, P.O. Box 3688, Cary NC 27519.

This manual was first published on 13 May 1999. The latest revision date is shown on the cover page. The latest edition of the manual may also be viewed and downloaded from www.aoc.state.nc.us/www/public/html/rules.htm and from www.ncbar.org/about/committees/appellate.aspx.

A Typical Record on Appeal

A note on typefaces or fonts: The examples that follow are printed on either 12-point Courier typeface or 14-point Time New Roman type face. Rule 26(g) of the Rules of Appellate Procedure requires print to be in at least 12-point type. The Rules distinguish between "proportional" and "nonproportional" type. Appendix B to the Rules defines nonproportional type as "10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character." Appendix B defines proportional type as "any non-italic, non-script font, other than nonproportional type, that is 14-point or larger." Although the Rules do not require a particular type of font and appear to allow the use of 12-point nonproportional type in the Record (but not the briefs!), it is the safer practice to use only 12-point Courier, 12-Point Courier New, or 14-Point Times New Roman in all appellate documents.

Do not make the mistake of filing a brief in 12-point nonproportional type. Under Rule 28(j)(1)(B), all briefs must use either 12-point proportional type or 14-point nonproportional type. Under Rule 26(g)(1), each page of all documents filed with the Appellate Courts may not exceed 27 lines of double-spaced type, even if proportional type is used. Please see Rule 28(j) for a discussion of additional requirements for briefs in proportional type (e.g., Times New Roman).

No. ______ TWENTY-FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

Plaintiff's Name as in)
Final Judgment,)
Plaintiff)
) From Avery County
v.) No. 06 CVS 2345
)
Defendant's Name as in)
Final Judgment,)
Defendant)

****

RECORD ON APPEAL

****

INDEX

Statement of Organization of Trial Court . . . 1
Statement of Jurisdiction 1
Complaint 2
Answer 4
Statement of Transcript Option 7
Verdict 8
Judgment 9
Notice of Appeal with Certificate of Service. .10
Stipulation Settling Record on Appeal 12
Assignments of Error 14
Identification of Counsel for the Appeal. . . .14
Certificate of Service to Proposed Record on Appeal 15
Objections to Record by Appellee [if any] . . .16
Statement of Settlement of Record on Appeal . .17
Supplement Index [if required by Rule 11(c)]. .18
Certificate of Service 19

Note: Index entries are indented ¾ inch from both standard 1" margins (or, put another way, the index line has margins of 1.75" from each side, yielding a 5" line in the middle). The "No." of the case at the top left hand corner is left blank. The Clerk's office will assign a number when the record is filed and it will appear in the printed record on appeal.

Page numbers are centered and flanked by dashes at the top of each page of the record on appeal. The page numbers can appear within the one-inch margin, as long as the first substantive line is at least one inch from the top edge of the paper. The statement of the organization of the court is the first page. No inside caption is required for the record on appeal.

STATEMENT OF ORGANIZATION OF TRIAL COURT

From the 1 May 2008 Civil Session of Superior Court of Avery County, the Honorable [Name of Judge], Judge presiding. From the 15 May 2008 jury verdict and judgment dismissing the plaintiff's claim, the plaintiff filed and served written notice of appeal on 21 May 2008.

The record on appeal was filed in the Court of Appeals on ____________, 2008 and was docketed on ____________, 2008.

By convention, spaces are provided for the Clerk's office to insert by hand the dates of filing and docketing. The "regular" margins for the pages in the record on appeal are 1" all around. Typed material is single-spaced in the record on appeal.

STATEMENT OF JURISDICTION

This action was commenced by the filing of a complaint and issuance of summons on 1 April 2006. The parties acknowledge that the trial court had personal and subject-matter jurisdiction.

In a civil case, if jurisdiction is not at issue, the parties can insert this statement. Nevertheless, it is advisable to include the summons and return of service, particularly in cases involving termination of parental rights. *See, e.g., In re K.A.D.*, 653 S.E.2d 427, 429 (N.C. Ct. App. 2007) (trial court lacks subject matter jurisdiction over petition to terminate parental rights if summons not served on juvenile); *see also Conner Bros. Mach. Co. v. Rogers*, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006) (in the absence of issuance of a summons, the action is "deemed never to have commenced" and the court lacks subject matter jurisdiction). In a criminal case, there is no "Statement of Jurisdiction," since a copy of the warrant or similar process usually follows the "Statement of Organization" page. An example of a jurisdictional statement in an administrative appeal is set out below.

STATEMENT OF JURISDICTION

This action was commenced by the filing of a petition for contested case hearing with the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 150B-23 on 8 July 2008. The Administrative Law Judge issued a Decision on 6 August 2008. The Environmental Management Commission, pursuant to N.C. Gen. Stat. § 143B-282.1(b), issued the Final Agency Decision dated 4 September 2008 which was served on 5 September 2008. On 16 September 2008, Petitioner filed a Petition for Judicial Review in the Wake County Superior Court. The parties acknowledge the Office of Administrative Hearings, the Environmental Management Commission and the Superior Court of Wake County had personal and subject-matter jurisdiction.

The example set out above concerns an appeal of an agency decision pursuant to the Administrative Procedure Act. When the appeal of an agency decision is not governed by the Administrative Procedure Act, this example should be tailored accordingly.

[Copy of Complaint]

[Copy of Answer]

[Copies of other pleadings necessary to understand assignments of error. See Rule 9(1), (2) or (3) for a description of the documents to be included here.]

Tip: Rule 9(c) requires all the papers to show the date on which they were filed. Often the Clerk's time stamp is illegible when copied. The normal solution is to make a clear, handwritten or typed entry on the copy you are including in the Record (say, below the Clerk's stamp) of something like: "Filed 24 Jan 08." Obviously this should only be done where there is no dispute about the filing of the document: if there is some dispute, don't mark on the copy.

STATEMENT OF TRANSCRIPT OPTION

Per Appellate Rule 9(c), the transcript of the entire proceedings in this case (excepting the jury selection and arguments of counsel), taken by Elaine Wicker, Court Reporter, from 12 May 2008 through 15 May 2008, consisting of 399 pages, numbered 1-399, bound in one volume, is filed contemporaneously with this record.

Also transmitted are the portions of the depositions of Wyle E. Coyote (Vol. 1, pages 10-45) that were submitted to the court in ruling on the motion for summary judgment.

Neither the transcript nor the depositions are printed in the Record on Appeal at this point - see Rule 9(c). What is included here is a reference to the materials that are being sent with the record. This might include trial transcripts, depositions and even discovery materials (if relevant to the issues on appeal).

Rule 9(c)(6) provides for the narration of the trial evidence in lieu of a transcript. Practitioners will have to use this option if a verbatim transcript cannot be produced. Narration involves producing a written summary of the evidence which is placed directly in the record. If the parties cannot agree on the content of the narration, the trial judge can settle the narration under Rule 11(c), upon timely request for judicial resolution.

[Copy of jury's verdict sheet]

[Copy of judgment]

AVERY COUNTY IN THE GENERAL COURT OF JUSTICE
NORTH CAROLINA SUPERIOR COURT DIVISION
File No. 06 CVS 1234

Name of the Plaintiff,)
Plaintiff)
)
v.) NOTICE OF APPEAL
)
Name of Defendant,)
Defendant)

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiff [name] hereby gives notice of appeal to the Court of Appeals of North Carolina from the final judgment of [name of judge], Superior Court Judge, entered on May 15, 2008 in the Superior Court of Avery County, which dismissed the plaintiff's action.

This 21st day of May, 2008.

____
Name of Counsel
Name of Counsel's Firm
160 N. Main Street
Newland, NC 28786
(828) 456-1245

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing pleading on the opposing party by placing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 21st day of May, 2008, addressed as follows:

Name of Counsel
Suite 1450, Third Megatower Center
Metropolis, NC 27510

____
Name of Counsel

[In a criminal or juvenile case, where notice of appeal is given orally in open court, you insert here the "Appeal Entries." In criminal cases, this is a printed form (AOC CR 350). In juvenile cases, the trial attorney would prepare and have the trial judge sign something like the "appeal entries" document described in Appendix D of the Rules of Appellate Procedure.]

[Copy of any order in the Trial Division extending time to file transcript or proposed record]

[Copy of any order in the Appellate Division extending time to file record, etc.]

[If needed, order of court settling the contents of the record on appeal. If settled by agreement of the parties, see following page.]

If extensions of time are granted (to prepare the transcript and to prepare the proposed Record on Appeal, for example), they would appear at this point. See Rule 9(a)(1)(i) for other pleadings or agreements that would appear here.

Tip: The idea is to demonstrate compliance with the time limits of the Appellate Rules by showing appropriate extensions of time in the trial division, and, if necessary, the appellate division, at this point in the Record.

STIPULATION OF SERVICE AND SETTLEMENT OF RECORD

Rule 11 of the North Carolina Rules of Appellate Procedure, which governs settlement of the record on appeal, was amended significantly in 2004 and 2007. The amendments limit and clarify judicial settlement of the record on appeal and focus largely on the procedure for settlement of the Record when the parties do not agree as to whether a document was filed or served at the trial court level.

The 2007 amendments create a new type of document, the "Rule 11(c) Supplement to the Printed Record on Appeal." This supplement enables a party who seeks admission of material in the record over objection of another party to submit the material in the Rule 11(c) Supplement to the Printed Record. The Supplement is also the proper location for any document to which a party has objected.

Note also that Rule 11(c) provides that "if a party does not agree to the exclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement."

At this point in the Record it is important to explain how the Record was settled and to explain to the Court why you are filing certain items separately from the Record, both to show compliance with the Rules and to allow clear identification of the status of material transmitted to the Court. For example, items are now placed in the Supplement because all parties do not agree to their inclusion in the Record. The Record should readily identify those items. The simplest and clearest way to do that is through a statement of settlement of the Record. This manual provides two examples of the statement of settlement.

Counsel for the appellant and appellee stipulate as follows:

1. The proposed record on appeal was timely served on 10 April 2008. The certificate showing service of the proposed record is omitted from the settled record.

2. Objections were served on 29 April 2008. Appellee objected to the omission of certain documents from the Record on Appeal and the inclusion of certain documents in the Record on Appeal. All documents to which the appellee objected or sought to include in the record are contained in the Rule 11(c) Supplement to the printed Record on Appeal.

[Alternate 2, where parties do not agree on the record]

2. Objections were served on 29 April 2008. Appellee objected to the omission of certain documents from the record. The parties were unable to reach an agreement about the inclusion of these documents in the record. Accordingly, all of these documents are included in the Rule 11(c) Supplement to the Printed Record on Appeal.

3. All captions, signatures, headings of papers, certificates of service and documents filed with the trial court that are not necessary for an understanding of the appeal may be omitted from the record, except as required by Rule 9 of the Rules of Appellate Procedure.

4. The foregoing, including the transcript described in the Statement of Transcript option (accompanying this record) and the trial exhibit labeled "Defendant's Exhibit 2" (which is being transmitted directly from the Clerk of Court of Avery County to the Clerk of the Court of Appeals), constitutes the agreed-upon Record on Appeal.

This 13th day of May, 2008.

For the Plaintiff Appellant: ______________________________
Name of Counsel

For the Defendant Appellee: ______________________________
Name of Counsel

If the parties can stipulate to the contents of the Record, you may avoid the inclusion of a certificate showing the service of the proposed Record. (It is sensible and conventional, however, to recite the dates of serving the proposed Record and later actions leading to the settlement of the record, so the appellate court can calculate your compliance with the time limits.) Appellate Rule 11 describes five different methods for settling the record and the time limits for those methods. At this point you should demonstrate the settlement method you used.

Assignments of error follow immediately afterwards.

ASSIGNMENTS OF ERROR

The defendant assigns as error:

1. The court's failure to grant the defendant's pre-trial motion for summary judgment, on the ground that there was no genuine issue of material fact that the statute of limitations had run and that the defendant was therefore entitled to judgment as a matter of law.

R p. 4 (Order denying motion)

2. The court's admission of the testimony of the witness E.F., on the ground that the testimony was inadmissible hearsay under Rule 802 of the Rules of Evidence.

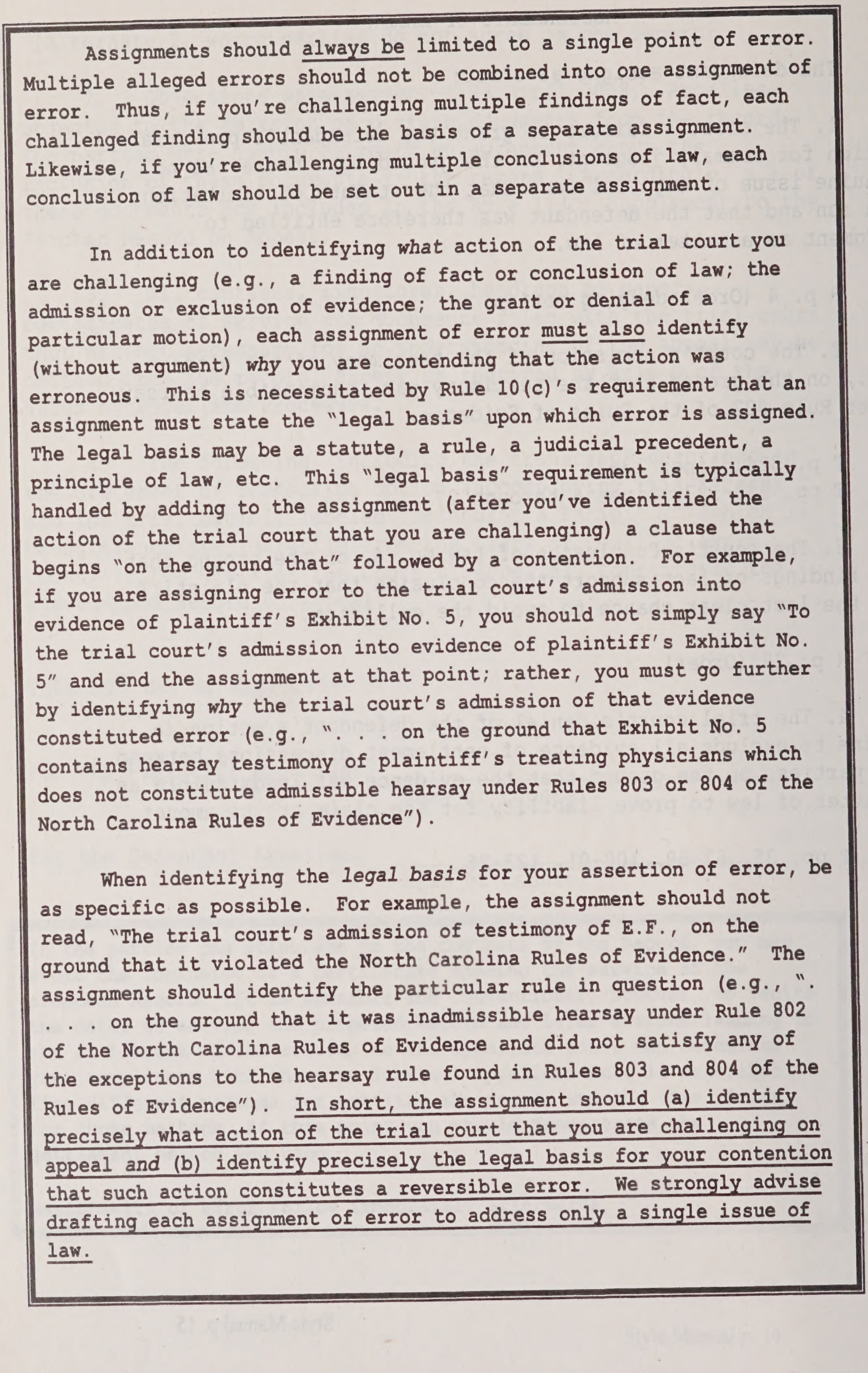
T p. 324, lines 23-25
T pp. 325-327, lines 4 through 27

3. The court's Conclusion of Law No. 4, on the ground that the findings of fact support the conclusion that the plaintiff had the last clear chance to avoid the collision.

R p. 29 (Order)

4. The trial court's denial of the defendant's motion *in limine* to exclude all evidence of settlement discussions between the parties, on the ground that the evidence was inadmissible as a matter of law to prove liability for the claim or its amount.

T pp. 35, 57-59, 100-01, 123-26



Assignments should always be limited to a single point of error. Multiple alleged errors should not be combined into one assignment of error. Thus, if you're challenging multiple findings of fact, each challenged finding should be the basis of a separate assignment. Likewise, if you're challenging multiple conclusions of law, each conclusion of law should be set out in a separate assignment.

In addition to identifying *what* action of the trial court you are challenging (e.g., a finding of fact or conclusion of law; the admission or exclusion of evidence; the grant or denial of a particular motion), each assignment of error must also identify (without argument) *why* you are contending that the action was erroneous. This is necessitated by Rule 10(c)'s requirement that an assignment must state the "legal basis" upon which error is assigned. The legal basis may be a statute, a rule, a judicial precedent, a principle of law, etc. This "legal basis" requirement is typically handled by adding to the assignment (after you've identified the action of the trial court that you are challenging) a clause that begins "on the ground that" followed by a contention. For example, if you are assigning error to the trial court's admission into evidence of plaintiff's Exhibit No. 5, you should not simply say "To the trial court's admission into evidence of plaintiff's Exhibit No. 5" and end the assignment at that point; rather, you must go further by identifying *why* the trial court's admission of that evidence constituted error (e.g., ". . . on the ground that Exhibit No. 5 contains hearsay testimony of plaintiff's treating physicians which does not constitute admissible hearsay under Rules 803 or 804 of the North Carolina Rules of Evidence").

When identifying the *legal basis* for your assertion of error, be as specific as possible. For example, the assignment should not read, "The trial court's admission of testimony of E.F., on the ground that it violated the North Carolina Rules of Evidence." The assignment should identify the particular rule in question (e.g., ". . . . on the ground that it was inadmissible hearsay under Rule 802 of the North Carolina Rules of Evidence and did not satisfy any of the exceptions to the hearsay rule found in Rules 803 and 804 of the Rules of Evidence"). In short, the assignment should (a) identify precisely what action of the trial court that you are challenging on appeal *and* (b) identify precisely the legal basis for your contention that such action constitutes a reversible error. We strongly advise drafting each assignment of error to address only a single issue of law.

NAMES AND ADDRESSES OF COUNSEL FOR THE APPEAL

For the Appellant:	Name of Counsel Name of Counsel's Firm 160 N. Main Street Newland, NC 28786 (704) 456-7890 Counsel's email address
For the Appellee:	Name of Counsel Name of Counsel's Firm Suite 1450, Third Megatower Center Metropolis, NC 27510 (704) 124-5678 Counsel's email address

In criminal cases, the firm name is omitted if the attorney is appointed, but included if the attorney is privately retained.

A note on filing and serving papers:

Rule 26 describes the process of filing and serving papers in the Appellate Division. There are strict deadlines to be met in filing the record on appeal and in filing and serving briefs and other papers. Because of the varieties of deadlines and service methods, you should consult Rule 26.

A Typical Appellant's Brief

A note on typefaces or fonts: Most of the examples which follow are printed in a 12-point Courier typeface. Rule 28(j) of the Rules of Appellate Procedure has been revised to provide "safe harbor" provisions: if you use a 14-point proportional font (such as Times New Roman) or a 12-point nonproportional font (such as Courier) you will be safe on font sizes. In the Court of Appeals (but not the Supreme Court) you have page limitations/word counts to consider: see the revised Rule 28(j) for the details. If you use a proportional font in the Court of Appeals, you must include a Certificate of Compliance (see the example after the signature block at the end of the brief).

Style Manual p. 18

No. COA 08-133 TWENTY-FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

`********************************`

Plaintiff's Name as on)
Final Judgment,)
Plaintiff,)
) From Avery County
v.)
)
Defendant's Name as on)
Final Judgment,)
Defendant.)

`**************************************`

PLAINTIFF APPELLANT'S BRIEF

`**************************************`

Note on filing: The brief is due 30 days after the date that the Clerk's office mails its notification of the printing of the record on appeal (except in civil cases *in forma pauperis*, where it runs 30 days from the docketing date of the Record). The brief is considered filed when it is mailed by you, if you use the U.S. Postal Service. If you use a commercial carrier, it is not considered filed until it is actually received at the Clerk's office in Raleigh - so if you are in a pinch, mail it. Rule 26(a)(1).

Note on the title of briefs: Briefs filed in the North Carolina Supreme Court in a case previously heard and decided by the Court of Appeals should be entitled "New Brief" (e.g., "Plaintiff Appellant's New Brief"). See Appendix B of the Rules of Appellate Procedure.

INDEX

TABLE OF CASES AND AUTHORITIES ii
QUESTIONS PRESENTED 1
STATEMENT OF THE CASE 2
STATEMENT OF GROUNDS FOR APPELLATE REVIEW 3
STATEMENT OF THE FACTS 4
ARGUMENT 6

I. STANDARD OF REVIEW 6

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE IT WAS THE PRODUCT OF AN ILLEGAL DETENTION. 7

CONCLUSION 8
CERTIFICATE OF COMPLIANCE 9
CERTIFICATE OF SERVICE 10
APPENDIX:
  Voir Dire Direct examination of John Q. Public App. 1-7
  Voir Dire Cross examination of John Q. Public App. 8-12

Index entries are indented ¾ inch from both standard 1″ margins (or, put another way, the index line has margins of 1.75″ from each side, yielding a 5″ line in the middle).

The ALL-CAPS typography is optional. Some practitioners use dot leaders (". . . .") to the page numbers.

TABLE OF CASES AND AUTHORITIES

Dunaway v. New York, 442 U.S. 200 (1979)	11
State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979)	9
State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979)	13
U.S. Const. amend. IV	14
U.S. Const. amend. XIV	15
N.C. Const. art. VI, § 4	18
N.C. Gen. Stat. § 15A-221	13
N.C. Gen. Stat. § 15A-245(a)	11

As with the Index, the Table of Cases should have margins of 1.75″ from each side, yielding a 5″ line in the middle.

Cases, arranged alphabetically, come first; then constitutional provisions and statutes, each arranged numerically; then regulations and other authorities. Leave out the subsequent history of the cases when bringing the citation to this table.

Citations should follow the latest edition of A Uniform System of Citation.

No. COA 08-133 TWENTY-FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

Plaintiff's Name as on)
Final Judgment,)
Plaintiff,)
) From Avery County
v.)
)
Defendant's Name as on)
Final Judgment,)
Defendant.)

****

PLAINTIFF APPELLANT'S BRIEF

****

QUESTIONS PRESENTED

I. Did the trial court err in admitting a hearsay statement made to a non-treating physician when the physician's examination was made solely for the purpose of testimony at the trial of the case?

II. Was the trial court's award of attorney fees to the prevailing party in a contempt proceeding contrary to North Carolina law governing contempt?

The Questions Presented are typed margin-to-margin, single-spaced. This page (and the rest of the brief) has the regular margins of 1" all around. Some practitioners type the Questions Presented in ALL CAPS.

If the Questions Presented go on past this page, then immediately follow them with the Statement of the Case - otherwise, start the Statement of the Case at the top of the next page.

STATEMENT OF THE CASE

Very Large Corporation, Inc. commenced this trespass action by the filing of a complaint and issuance of summons on 1 July 2005. A judgment and order dismissing the case was entered 10 May 2006. The plaintiff filed and served notice of appeal on 8 June 2006. Transcript was ordered on 14 June 2006 and delivered 1 August 2006. The time to file the proposed record was extended by the trial division until 15 September 2006. The record was settled by stipulation on 1 November 2006, filed in the Court of Appeals on 13 November 2006 and docketed 15 November 2006.

Note the page numbering at the top (flanked by dashes). One-inch margins all around. Double spacing for the text, with triple spacing before the section headings ("Statement of the Facts" etc.).

The Statement of the Case recites the procedural steps and dates that got the case to the appellate court. It is usually quite short. The appellee's brief needn't have a Statement of the Case.

Tip: Idiomatically, the North Carolina appeals courts use the date style shown ("14 November 2007").

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Judge Smith's summary judgment order, dismissing all the plaintiff's claims, is a final judgment and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

OR

Judge Smith's partial summary judgment order, dismissing the plaintiff's negligence claim based on the statute of limitations, is a final disposition of that claim. Other claims remain outstanding and Judge Smith's order contains a finding, pursuant to Rule 54(b) of the Rules of Civil Procedure, that there is no just reason for delaying the appeal of his order.

Tip: Note that Rule 54(b) of the Rules of Civil Procedure expressly requires a final judgment. If the order is in fact a final judgment on one or more, but fewer than all claims or parties, and the trial court makes the Rule 54(b) certification that there is no just reason for delay, then appellate review is mandatory. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). However, the trial court may not, by certification, render its order immediately appealable if it is not a final judgment. Where the appeal is from an interlocutory, non-final order as to any party (e.g., one which disposes of some but not all claims against that party), the appellant must include an explanation of why the case affects a substantial right, even if the trial court certified that there is no just reason for delay. *See James River Equipment, Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340, 634 S.E.2d 548, 552-53 (2006).

OR

Judge Smith's partial summary judgment order, dismissing the plaintiff's negligence claim based on the statute of limitations, is a final disposition of that claim. Other claims remain outstanding, so this appeal from Judge Smith's order is interlocutory. It is appropriate, however, to pursue the appeal of this order now because Judge Smith's ruling affects a substantial right of the plaintiff, as described in G.S. 1-277 and G.S. 7A-27(d)(1), in that [go on to describe the facts and law that support a "substantial right" determination by the appellate court].

The Statement of Grounds for Appellate Review is a requirement for North Carolina appellant briefs. The rule requires the appellant to provide an explanation of the grounds for review of an interlocutory appeal. If you have this kind of issue, look at the annotations to G.S. 1-277 and G.S. 7A-27 for what the courts have considered "substantial rights" and tailor your statement accordingly.

The Statement of the Facts follows immediately afterwards.

STATEMENT OF THE FACTS

Appellant, V. Ward McClure, is the owner of property in the town of Canton, North Carolina (R pp. 4-6). His property adjoins an unopened private street known as East Street. Until recently, streets were used by the residents of Canton and maintained as city streets (R p. 19, Stipulation 7).

The town passed a "Resolution of Intent" on 26 November

2007 (R p. 49) and an Order Closing a Portion of East Street on 1 December 2008 which resulted in the imposition of a series of

[Recitation of facts continues]

The appellant's brief contains a "full and complete" "non-argumentative" Statement of the Facts that are important to understanding the issues argued in the brief. Long quotations from the transcript or the Record are not encouraged, but accurate references to the place where the facts can be found are.

The appellee's brief needn't contain a Statement of the Facts unless the appellee disagrees with the appellant's Statement.

Sometimes the appellee will include a Statement of Facts that just adds some facts to the appellant's recitation.

Tip: It is better to make the statement of facts coherent (by weaving the testimony of the various witnesses together, tying them by time or subject) than to mechanically recite what each witness said. If there is a conflict in the evidence on an important point, recite first the evidence on one side, then recite the evidence on the other side.

Tip: The Statement of Facts must be scrupulously accurate and include even those facts you must later spend a lot of time explaining away in the argument section. If you leave out a harmful fact, you can be sure the appellee will point it out to the court and your credibility will suffer.

ARGUMENT

I. Standard of Review

An appeal of a superior court order granting a motion to dismiss for failure to state a claim is subject to *de novo* review. *Leary v. N.C. Forest Prods.*, Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). When determining whether a complaint should be dismissed under Rule 12(b)(6) of the Rules of Civil Procedure, the complaint must be liberally construed in favor of the plaintiff. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985).

Under Rule 28(b), the appellant's brief must contain "a concise statement of the Standard(s) of Review for each question presented." Location of the Standard of Review in your brief is important. Rule 28(b) requires it to be placed either: (1) at the beginning of the discussions of each question presented (with this option the brief will have a discussion of the standard of review at the beginning of each section of the argument) or (2) under a separate heading placed before the beginning of all sections of the argument (with this option, the brief will have a separate section labeled "Standard(s) of Review" placed immediately under the caption "Argument").

II. THE TRIAL COURT ERRED IN ALLOWING A PSYCHOLOGIST TO EXPRESS HIS OPINION ABOUT THE CAUSE OF THE POST-TRAUMATIC STRESS DISORDER, WHEN THAT OPINION WAS DELIVERED WITHOUT ANY LIMITING INSTRUCTION.

ASSIGNMENT OF ERROR NO. 3 (R p. 45)

The trial court erred in allowing Dr. Fine to testify, over objection, about his diagnosis of post-traumatic stress disorder and specifically that the disorder was caused in this case by

[Argument continues]

Each numbered argument is followed by the Assignments of Error that relate to it. The Assignments of Error are followed by the location in the Record where the Assignments may be found. All of that is single-spaced, as shown.

A. The Doctor's Testimony Was Received Without a Limiting Instruction

The testimony of the doctor was received in violation of the requirement of *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), that testimony of this sort be admitted only after a limiting instruction that required the jury to consider the

[Argument continues]

Subsection headings are set out as shown (underlined at the left margin). One-inch margins all around.

Long quotations from a reported case or statute (more than 3 lines) are indented ¾″ from each margin (making a 5″ line) and single-spaced. The case citation immediately follows the quotation, beginning at the regular left margin.

The Conclusion follows immediately after the Arguments.

CONCLUSION

The Court of Appeals should reverse the trial court's order denying the defendant's motion to dismiss and should remand the case for the entry of an order granting the motion to dismiss. Alternatively, for the error of the court in admitting the hearsay testimony of the non-treating physician, the case should be remanded for a new trial.

Respectfully submitted, this ______ day of March, 2008.

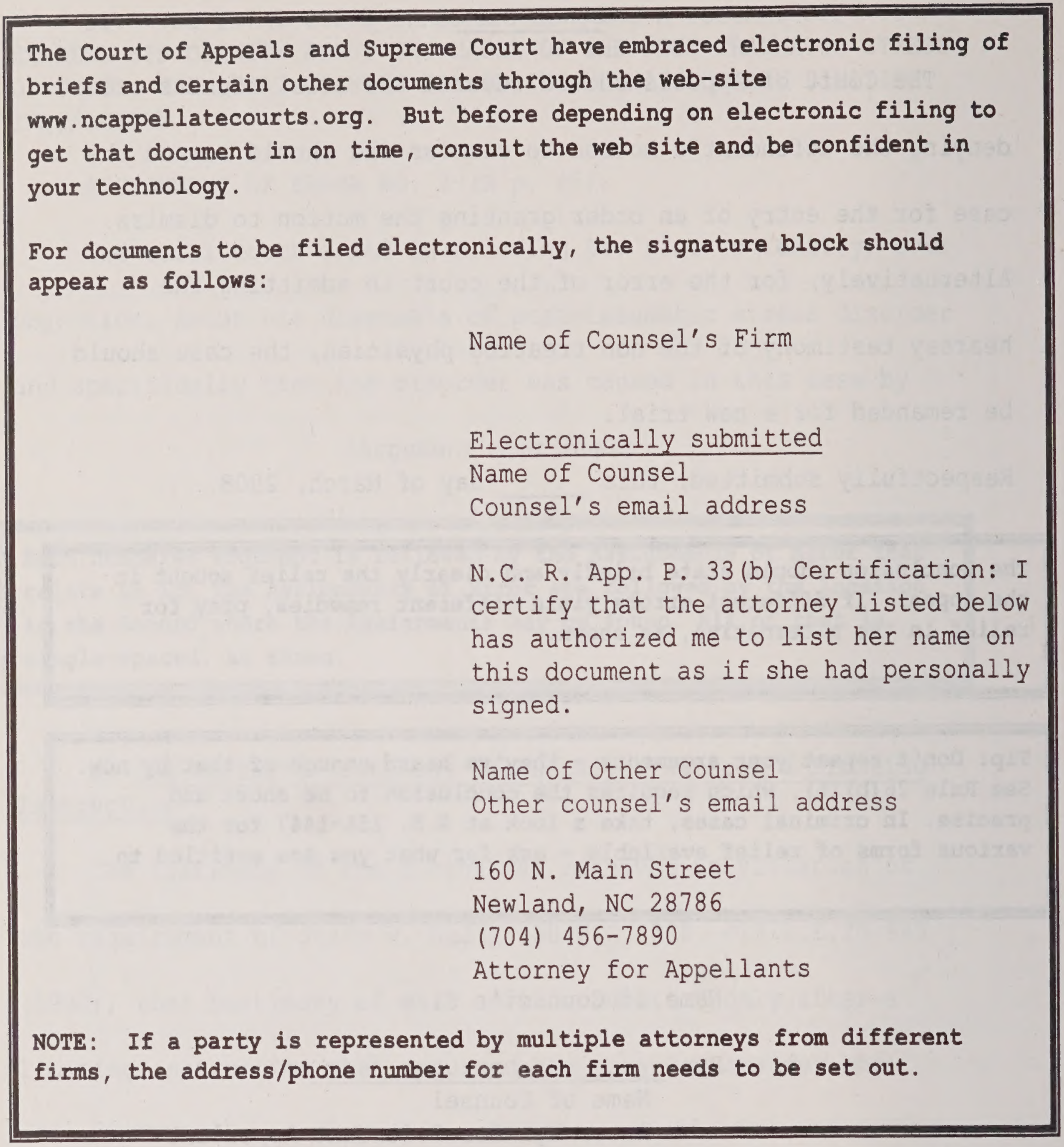
The Conclusion should state briefly and clearly the relief sought in the appeal. If different errors yield different remedies, pray for relief in the alternative, as shown.

Tip: Don't repeat your arguments - they've heard enough of that by now. See Rule 28(b)(6), which requires the conclusion to be short and precise. In criminal cases, take a look at G.S. 15A-1447 for the various forms of relief available - ask for what you are entitled to.

Name of Counsel's Firm

By: ____________________
Name of Counsel
Attorneys for Defendant Appellant
160 N. Main Street
Murphy, NC 28736
(828) 234-5678
Counsel's email address

If you want to appear at oral argument, you have to sign the brief. Recall that in indigent criminal cases, where the attorney is appointed, the firm name is omitted (but the firm name may appear if the attorney is privately retained). The e-mail address is required.



The Court of Appeals and Supreme Court have embraced electronic filing of briefs and certain other documents through the web-site www.ncappellatecourts.org. But before depending on electronic filing to get that document in on time, consult the web site and be confident in your technology.

For documents to be filed electronically, the signature block should appear as follows:

Name of Counsel's Firm

Electronically submitted
Name of Counsel
Counsel's email address

N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list her name on this document as if she had personally signed.

Name of Other Counsel
Other counsel's email address

160 N. Main Street
Newland, NC 28786
(704) 456-7890
Attorney for Appellants

NOTE: If a party is represented by multiple attorneys from different firms, the address/phone number for each firm needs to be set out.

Style Manual p. 30

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

____

Counsel for Appellant

The certificate of compliance is only applicable to the Court of Appeals and only when a proportional font (such as Times New Roman) is used. There are no length limitations for briefs in the Supreme Court.

Style Manual p. 31

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the appellee by depositing a copy, contained in a first-class-postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows, this ______ day of March, 2008:

[Name and address of opposing counsel]

____
Name of Counsel

The brief is considered both filed and served when you put it in the mail, if you use first-class U.S. Mail. However, if you use a commercial carrier, it is not considered filed until it is actually received in the Clerk's office. See Rule 26 of the Rules of Appellate Procedure. Thus, if you are in a time crunch, use the mail.

Table of Contents for Appendix

Appendix Pages		Appearing in brief at
1-7	Voir dire direct examination of Officer Name (T pp. 38-45)	6
8-16	Voir dire cross examination of Officer Name (T pp. 46-54)	12

The page numbers on the right refer to the page in the brief where the material is cited. For further information on the appendix, see the end of Appendix E of the Rules of Appellate Procedure.

This is a 5″ line, indented ¾ inch from each 1″ regular margin, just like the other Indexes and Tables.

Following the brief is an appendix, which collects those portions of the transcript, the statutes and the regulations referred to in the brief. Not every brief will have an appendix - if you directly quote the relevant material in the body of the brief, there is no need to have an appendix of that same material. See Rule 28(d), for guidance on when an appendix is required.

Tip: The purpose of the appendix, which is reproduced "as is" and attached to the printed brief, is to avoid the judges having to rifle through the transcript to find what you are talking about. It is probably more persuasive to actually just include the relevant material directly in the brief at the appropriate point, if technically possible. At a certain point, though, the page limits for briefs in the Court of Appeals (Rule 28(j)) might come into play - recall that there is no page limit for appendixes.

The North Carolina Court of Appeals has stated that it is improper for a party to attach to its brief "a document not in the record and not permitted under N.C. R. App. P. 28(d) in an appendix to a brief." *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996); *see Citifinancial, Inc. v. Messer,* 167 N.C. App. 742, 748, 606 S.E.2d 453, 457 (2005) (Steelman, J., concurring).

A Typical Appellee's Brief

Style Manual p. 34

No. COA07-1234 THIRTIETH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

Norma Schoolhouse and)
David Schoolhouse,)
Plaintiffs)
)
v.) From Haywood County
)
Dee Mann and Joyce Mann,)
Defendants)

****

PLAINTIFF APPELLEES' BRIEF

****

The appellee has thirty days after service of the appellant's brief to file the appellee's brief (add three days if the appellant's brief was served by mail). Rule 13(a).

INDEX

TABLE OF CASES AND AUTHORITIES ii

ARGUMENTS -

I. THE COURT PROPERLY DIRECTED VERDICT ON THE WIDTH OF THE DRIVEWAY, BECAUSE THERE WAS NO GENUINE ISSUE OF A MATERIAL FACT CONCERNING IT. 1

II. THE LOCATION OF THE BASEMENT WAS SUFFICIENTLY ESTABLISHED TO REQUIRE THE TRIAL COURT TO DENY THE DEFENDANTS' MOTION FOR DIRECTED VERDICT ON THAT ISSUE. 3

III. THE TRIAL COURT PROPERLY GRANTED THE PLAINTIFFS' MOTION FOR DIRECTED VERDICT ON THE CLAIM OF TRESPASS, BECAUSE THE DEFENDANTS FAILED TO SHOW THAT ANY TRESPASS TOOK PLACE OUTSIDE THE BASEMENT AREA. 4

IV. THE TRIAL COURT PROPERLY DID NOT SUBMIT AN ISSUE OF ABANDONMENT ON THE UPPER PART OF THE DRIVEWAY, WHEN THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUBMISSION OF THAT ISSUE. 5

CERTIFICATE OF COMPLIANCE 6
CONCLUSION 6

See the notes in Appellant's Brief for layout of this page.

TABLE OF CASES AND AUTHORITIES

Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979)	2
Cochran v. Keller, 84 N.C. App. 205, 352 S.E.2d 458 (1987)	3
Jacobs v. Jennings, 221 N.C.24, 18 S.E.2d 715 (1942)	2
Skvaria v. Park, 62 N.C. App. 48, 303 S.E.2d 354 (1983)	6
Thompson v. Umberger, 221 N.C. 178. 19 S.E.2d 484 (1942)	4
Zaaaroli v. Pollock, 94 N.C. App. 46, 379 S.E.2d 653 (1989)	5

See notes in the Appellant's Brief for the layout of this section.

No. COA07-1234 THIRTIETH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

Norma Schoolhouse and)
David Schoolhouse,)
Plaintiffs)
)
v.) From Haywood County
)
Dee Mann and Joyce Mann,)
Defendants)

****

PLAINTIFF APPELLEES' BRIEF

****

ARGUMENT

I. THE COURT PROPERLY DIRECTED VERDICT ON THE WIDTH OF THE DRIVEWAY, BECAUSE THERE WAS NO GENUINE ISSUE OF A MATERIAL FACT CONCERNING IT.

Assignment of Error No. 2 (R p. 123)

The plaintiffs established that there was no genuine issue concerning the width of the driveway easement and that the court

[Argument continues]

The appellee's brief generally goes directly to the argument, unless the appellee desires to amend the appellant's Statement of the Facts, Statement of Grounds for Appellate Review, Standard of Review, or present additional questions. See Rule 28(c) for the additional contents of appellee's brief in such cases.

Plaintiff Norma Schoolhouse described the width of the easement in 1973 as follows:

> We had a, it was a black-top drive. The driveway was only like two lanes. It was, but they were wide black-top lanes when we bought that. I guess you'd call it the lip or whatever of the driveway where we turned.

(T p. 12)

Mrs. Schoolhouse identified photographs of the driveway and in a jury view showed the court and jury the location of the

[Argument continues]

This illustrates the method of including long transcript sections into the brief (which is by indenting and single-spacing the material).

Tip: It is easier to get the court to follow your argument if you directly import the material, rather than just referring to an appendix or the transcript pages.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted, this 10th day of November, 2008.

Name of Counsel's Firm

By: ______________________
Name of Counsel
Attorneys for the Appellees
1234 Highrise Tower
Metropolis, NC 28786
(704) 124-5678
Counsel's email address

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellee certifies that the foregoing brief, which is prepared using a proportional font, is fewer than 8,750 words(excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

Counsel for the appellee

The certificate of compliance is only required in the Court of Appeals and only when a proportional font (such as Times New Roman) is used. There are no length limitations for briefs in the Supreme Court.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing brief on counsel for the defendant appellants by depositing a copy enclosed in a first-class postage-paid wrapper into a depository under the exclusive care and custody of the United States Postal Service this 10th day of November, 2008, addressed as follows:

Name of Counsel's Firm
41 Clayton Street
Newland, NC 28801

Name of Counsel

Follow the brief with an appendix, if one is needed (see Rule 26 (d)). See the note about appendixes following the Appellant's Brief.

The brief is considered both filed and served when you put it in the mail, if you use first-class U.S. Mail. However, if you use a commercial carrier, it is not considered filed until it is actually received in the Clerk's office. See Rule 26 of the Rules of Appellate Procedure. Thus, if you are in a time crunch, use the mail.

A Typical Memorandum of Additional Authority

Style Manual p. 41

No. COA 08-133 TWENTY-FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

Plaintiff's Name as on)
Final Judgment,)
Plaintiff,)
) From Avery County
v.)
)
Defendant's Name as on)
Final Judgment,)
Defendant.)

****

PLAINTIFF APPELLANT'S MEMORANDUM
OF ADDITIONAL AUTHORITY

****

Pursuant to N.C.R. App. P. 28(g), Plaintiff Appellant submits the following additional authority for the Court's consideration in the above-captioned case:

1. *Habitat for Humanity v. Board of Comm'rs*, __ N.C. App. ___, ___, 653 S.E.2d 886, 887-88 (2007).

2. *In re D.D.F.*, __ N.C. App. ___, ___, 654 S.E.2d 1, 3 (2007).

The cited cases concern the issue of standing. (Plaintiff Appellant's Br., pp. 9-12) (Issue I).

Respectfully submitted, this ___ day of March, 2008.

Name of Counsel's Firm

By: ________________________
Name of Counsel
Attorneys for Defendant Appellant
160 N. Main Street
Murphy, NC 28736
(828) 234-5678
Counsel's email address

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing Memorandum of Additional Authority by depositing a copy, contained in a first-class-postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows, this ______ day of March, 2008:

[Name and address of opposing counsel]

____
Name of Counsel

Tip: Pursuant to Rule 28(g), a memorandum of additional authority may be filed to bring to the court's attention authority not cited in the brief. The North Carolina Court of Appeals has stated that a memorandum of additional authority should not include parenthetical summaries or quotes from the cases set out in the memorandum. *State v. Cunningham,* 140 N.C. App. 315, 317, 536 S.E.2d 341, 344 (2000). Rule 28(g) states that when a memorandum of additional authority is filed, it "may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority."

A Typical Petition for Discretionary Review

Style Manual p. 44

No. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NAMES AS IN TRIAL DIVISION, PLAINTIFF,	)	
	)	From Wake County
v.	)	No. 07 CVS 316
	)	COA07-10
NAMES AS IN TRIAL DIVISION, DEFENDANT	)	

****

PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31(c)

****

The petition number in the upper left corner is blank, to be filled in by the Supreme Court.

Note the addition of the Court of Appeals docket number below the county name on the right side.

Consult Rule 15 of the Rules of Appellate Procedure, Appendix D, Section 3 of the Rules, and G.S. 7A-31 for time limits and similar information.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE AND FACTS 1
REASONS WHY CERTIFICATION SHOULD ISSUE 4

I. THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE 5

A. Because Century is not a "claimant" or "policyholder" and does not possess a "covered claim" Under the Act, it is not entitled to any recovery from the Association 6

II. THE SUBJECT MATTER OF THIS APPEAL HAS SIGNIFICANT PUBLIC INTEREST 8

ISSUE TO BE BRIEFED 8
CERTIFICATE OF SERVICE 9

This illustrates another form of a contents page, with a mixture of ALL-CAPS and lower-case section titles.

The margins are indented ¾" from each regular (1") margin, leaving a 5" line.

The dot leaders (". . . .") for the page numbers are optional.

TABLE OF AUTHORITIES

City of Greensboro v. Reserve Ins. Co.,
70 N.C. App. 651, 321 S.E.2d 232(1984)..... 7

If the petition is fewer than ten substantive pages, this table may be omitted. If included, the format is the same as any brief (see the Appellant's Brief for a fuller discussion on the formatting).

No. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA INSURANCE)
ASSOCIATION,)
PLAINTIFF,)
) From Wake County
v.) No. 06 CVS 3913
) COA08-1544
MID-CENTURY INDEMNITY COMPANY,)
DEFENDANT.)

****

PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31(c)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff, the North Carolina Insurance Association ("The Association"), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the North Carolina Court of Appeals filed on 21 February 2008 in this cause, on the grounds that the subject matter of this case involves legal principles of major significance to the jurisprudence of this State and raises issues of significant public interest. In support of this Petition, the Association shows the following:

STATEMENT OF THE CASE AND FACTS

The plaintiff filed a complaint on 23 June 2006 in the Superior Court of Wake County. Judge Jonathan R. Smith granted the defendant's summary judgment motion at the 21 August 2007 Civil Session. The plaintiff filed notice of appeal to the Court of Appeals on 10 September 2007. The Court of Appeals affirmed the order of dismissal in a published opinion, filed 14 February 2008.

The first part of this section sets out the procedural history of the case through the trial division and the Court of Appeals.

The Association is an unincorporated non-profit entity created pursuant to the North Carolina Insurance Guaranty Act

[Factual background continues]

The second part of this section sets out the factual background, enough for the Court to understand the basis of the petition.

REASONS WHY CERTIFICATION SHOULD ISSUE

The decision below imposes a liability on the Association that is contrary to the language and intent of the statutory scheme governing the Association's existence and presents

[Argument continues]

The focus of this section should be to show: a) how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court, b) how the case is significant to the jurisprudence of the State, or c) why the case is one of significant public interest. See G.S. 7A-31 and Rule 15 of the Rules of Appellate Procedure.

Tip: Some factual and legal argument will be necessary in this section, but the new brief will be the place for the substantive discussion of the arguments, if the Supreme Court takes the case. See G.S. 7A-31 for situations involving a petition prior to the determination of the case in the Court of Appeals.

ISSUE TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issue in its brief to the Court:

I. Whether a claim founded upon the doctrine of equitable subrogation entitles an insurer to recover from the Association to the extent of the Association's statutory obligations, despite the Act's clear exclusion of claims founded upon subrogation from the definition of a "covered claim."

Respectfully submitted, this the 1st day of March, 2008.

Name of Counsel's Firm

By: ______________________________
Name of Counsel
Attorneys for Petitioner
Post Office Box 12345
Raleigh, North Carolina 27601
Telephone: (919) 123-4567
Counsel's email address

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petition for Discretionary Review Under N C. Gen. Stat. 7A-31 has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

[Counsel's name and address]

This the 1st day of March, 2008.

____
Name of Counsel

Following the petition, attach a copy of the decision of the Court of Appeals, if you are petitioning after a decision by that court.

A Typical Petition for Writ of Certiorari

No. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NAMES AS IN TRIAL DIVISION,)
PLAINTIFF,)
)
v.) From Wake County
) No. 06 CVS 2549
NAMES AS IN TRIAL DIVISION,) COA07-1544
DEFENDANT)

****

PETITION FOR WRIT OF CERTIORARI

****

The petition number in the upper left corner is blank, to be filled in by the Supreme Court.

Note the addition of the Court of Appeals docket number below the county name and county case file number on the right side, when appropriate.

Consult Rule 21 of the Rules of Appellate Procedure and Appendix D, Section 4 of the Rules for the circumstances where this petition is appropriate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii
STATEMENT OF THE CASE AND FACTS. 1
REASONS WHY WRIT SHOULD ISSUE. 4

I. THE EXISTENCE OF THE TRIAL COURT'S INTERLOCUTORY ORDER IMPAIRS THE DEFENSE OF THIS CASE AND MAKES IT IMPRACTICAL FOR THE DEFENDANT TO PROCEED FURTHER IN THE TRIAL COURT. . 5

II. THE TRIAL COURT'S ORDER IS DIRECTLY CONTRARY TO THIS COURT'S RECENT DECISIONS ON THIS SUBJECT. 8

ISSUES TO BE BRIEFED. 8
CERTIFICATE OF SERVICE. 9

Note: Index entries are indented ¾ inch from both standard 1″ margins (or, put another way, the index line has margins of 1.75″ from each side, yielding a 5″ line in the middle).

A petition which is "long or complex or treats multiple issues" needs an index. If the petition is none of these things, the index could be omitted.

TABLE OF AUTHORITIES

City of Greensboro v Reserve Ins. Co.,
70 N.C. App. 651, 321 S.E.2d 232 (1984). 7

If the petition is fewer than ten substantive pages, this table may be omitted. If included, the format is the same as any brief (see the Appellant's Brief for a fuller discussion on the formatting).

No. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA INSURANCE)
ASSOCIATION,)
PLAINTIFF,)
) From Wake County
v.) No. 06CVS5468
) COA07-1544
MID-CENTURY INDEMNITY CO.,)
DEFENDANT.)

****

PETITION FOR WRIT OF CERTIORARI

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff, the North Carolina Insurance Association ("The Association"), respectfully petitions the Supreme Court of North Carolina to issue its writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review the partial summary judgment order of the Honorable Frank Lee Wright, Judge Presiding, Wake County Superior Court dated 21 June 2007 [further describe the order appealed from, if necessary] and in support of this petition shows the following:

FACTS

The plaintiff filed a complaint on 23 June 2006 in the Superior Court of Wake County. Judge Frank Lee Wright granted the defendant's summary judgment motion as to the applicability of the Statute of Limitations to the plaintiff's First and Second Causes of Action [discussion of facts continues]

Here set out the factual background necessary to understand why you are petitioning for certiorari (e.g., failure to perfect an appeal of right because of circumstances constituting excusable neglect; non-appealability of an interlocutory order, etc.). If the availability of a transcript is the problem, include an estimate of the date of availability and attach a supporting affidavit from the court reporter.

REASONS WHY WRIT SHOULD ISSUE

The trial judge's partial summary judgment order has the effect of imposing a liability on the Association that is contrary to this Court's recent decisions in

[Argument continues]

Here set out the factual and legal argument to justify the issuance of the writ. See Rule 21 of the Rules of Appellate Procedure for the bases of the writ and tailor the argument to that law.

Tip: Because this writ is so flexible, the argument section of the petition is likewise flexible. Brevity, however, is always going to be appreciated and possibly rewarded.

ATTACHMENTS

Attached to this petition for the consideration of the court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits or evidentiary copies which are pertinent to the petition).

Wherefore, the petitioner respectfully prays this Court to issue its writ of certiorari to the [Superior Court of (name) County] [North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon errors [(to be assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure] [stated as follows: (here list the errors, written as issues, in the same manner as in the Petition for Discretionary Review)]; and that the petitioner have such other relief as to the Court may seem just.

Respectfully submitted, this ____ day of July, 2007.

Name of Counsel's Firm

By: ______________________________
Name of Counsel
Attorneys for Petitioner
Post Office Box 12345
Raleigh, North Carolina 27601
Telephone: (919) 123-4567
Counsel's email address

VERIFICATION

The undersigned [petitioner or attorney for petitioner], after being duly sworn, says:

The contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

[If verified by attorney, recast this to state: a) that the material allegations of the petition are true to the attorney's personal knowledge and b) give the reason the verification is not being made by the petitioner.]

____
Petitioner or attorney

Sworn to and subscribed before me,
this ____ day of ___________, 2007.

__________________________ __________________________
My Commission expires Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

[Opposing counsel's name and address]

This the 15th day of July, 2007.

____
Name of Counsel

Style Manual p. 59

Following the petition, attach certified copies of the documents described in the "Attachments" section.

Index to Rules of Appellate Procedure

A

ADMINISTRATIVE BOARDS AND AGENCIES.
Appeals from superior court review.
  Record on appeal, AppProc Rule 9(b).
Further procedures for perfecting and prosecuting the appeal, AppProc Rule 18(e).
Miscellaneous provisions of law governing in agency appeals, AppProc Rule 20.
Record on appeal.
  Composition, AppProc Rule 18(c).
  Settling the record, AppProc Rule 18(d).
Taking appeal.
  Extensions of time, AppProc Rule 18(f).
  Generally, AppProc Rule 18(a).
  Time and method, AppProc Rule 18(b).

AMICUS CURIAE BRIEFS, AppProc Rule 28(i).

APPEAL BONDS.
Forma pauperis, AppProc Rule 17(d).
Supreme court review.
  Appeals of right from court of appeals, AppProc Rule 17(a).
  Discretionary review on certification, AppProc Rule 17(b)(c).

APPEAL INFORMATION STATEMENT, AppProc Rule 41.

APPEARANCES.
Attorneys at law, AppProc Rule 33(a).

APPELLANTS.
Brief.
  Content, AppProc Rule 28(b).
Joinder of parties on appeal, AppProc Rule 5(a).
Supreme court review.
  Discretionary review on certification.
    Definition of appellant, AppProc Rule 15(i).
  Scope of review of decisions.
    Definition of appellant, AppProc Rule 16(c).

APPELLEES.
Brief.
  Content.
    Presentation of additional questions, AppProc Rule 28(c).
Joinder of parties on appeal, AppProc Rule 5(b).
Supreme court review.
  Discretionary review on certification.
    Definition of appellee, AppProc Rule 15(i).
  Scope of review of decisions.
    Definition of appellee, AppProc Rule 16(c).

ARGUMENTS.
Oral argument.
  See ORAL ARGUMENT.

ATTORNEYS AT LAW.
Agreements, AppProc Rule 33(c).
Appearances, AppProc Rule 33(a).
Signatures on electronically filed documents.
  More than one attorney listed as representing party, AppProc Rule 33(b).

B

BONDS, SURETY.
Appeal bonds, AppProc Rule 17.

BRIEFS.
Additional authorities, AppProc Rule 28(g).
Amicus curiae briefs, AppProc Rule 28(i).
Appendices to briefs, AppProc Rule 28(d).
Citing unpublished opinions of court of appeals.
  Service of copy on all parties, AppProc Rule 30(e).
Contents.
  Appellant's brief, AppProc Rule 28(b).
  Appellee's brief, AppProc Rule 28(c).
    Presentation of additional questions, AppProc Rule 28(c).
Copies reproduced by clerk, AppProc Rule 13(b).
Death penalty cases.
  Filing and service.
    Time for, AppProc Rule 13(a).
Filing and service.
  Appeal of right from court of appeals, AppProc Rule 14(d).
  Consequence of failure to file and serve, AppProc Rule 13(c).
  Copies reproduced by clerk, AppProc Rule 13(b).
  Death penalty cases.
    Time for, AppProc Rule 13(a).
  Discretionary review by supreme court, AppProc Rule 15(g).
  Failure to file.
    Consequences, AppProc Rule 13(c).
  Time, AppProc Rule 13(a).
    Appeal of right from court of appeals, AppProc Rule 14(d).
Function, AppProc Rule 28(a).
Joinder of multiple parties in briefs, AppProc Rule 28(f).
Juvenile matters.
  Expedited appeals procedures.
    Service and filing, time, AppProc Rule 3A(b).
Length limitation, AppProc Rule 28(j).
Page limitation, AppProc Rule 28(j).
References to record, AppProc Rule 28(e).
Reply briefs, AppProc Rule 28(h).
  Time for filing and service, AppProc Rule 13(a).
    Appeal of right from court of appeals, AppProc Rule 14(d).
    Discretionary review by supreme court, AppProc Rule 15(g).
Submission of case on written briefs in lieu of oral argument, AppProc Rule 30(d).
Supreme court review.
  Appeal of right from court of appeals, AppProc Rule 14(d).
  Discretionary review on certification by supreme court, AppProc Rule 15(g).
Termination of parental rights and juvenile matters.
  Name of juvenile and identifying matter not included, AppProc Rule 28(k).

BRIEFS —Cont'd
Type style and size, AppProc Rule 28(j).
Word count limitation, AppProc Rule 28(j).

C

CALENDAR OF CASES FOR HEARING, AppProc Rule 29(b).

CERTIORARI.
Death penalty cases, AppProc Rule 21(f).
  Post-conviction matters, petition for writ, AppProc Rule 21(e).
Generally, AppProc Rule 21(a).
Petition for writ.
  Content, AppProc Rule 21(c).
  Filing and service, AppProc Rule 21(c).
  Post conviction matters, AppProc Rule 21(e).
    Death penalty cases, AppProc Rule 21(f).
  To which appellate court addressed, AppProc Rule 21(b).
Response.
  Determination by court, AppProc Rule 21(d).
Scope of the writ, AppProc Rule 21(a).

CIVIL CASES.
How and when taken, AppProc Rule 3.
Indigency of party.
  Ordering transcript, AppProc Rule 21(a).
Judgments and orders rendered, AppProc Rule 3(a).
Notice of appeal.
  Content, AppProc Rule 3(d).
  Service, AppProc Rule 3(e).
  Time for filing, AppProc Rule 3(c).
Ordering transcript, AppProc Rule 7(a).
Preparation and delivery of transcript, AppProc Rule 7(b).
Record on appeal, AppProc Rule 9(b).
Stay pending appeal, AppProc Rule 8.
Time for taking, AppProc Rule 3(c).
Withdrawal of appeal, AppProc Rule 37(e).

CLERKS OF COURT.
Briefs.
  Copies reproduced by clerk, AppProc Rule 13(b).
Docket book, AppProc Rule 39(b).
Duties generally, AppProc Rule 39(a).
Judgment docket, AppProc Rule 39(b).
Minute book, AppProc Rule 39(b).
Records, AppProc Rule 39.

CLOSING.
Documents filed with court, AppProc Rule 26(g).

COMPUTATION OF TIME.
Generally, AppProc Rule 27.

CONSOLIDATION OF ACTIONS ON APPEAL, AppProc Rule 40.

CONTENT OF NOTICE OF APPEAL, AppProc Rule 3(d).

COPIES.
Briefs.
  Reproduction by clerk, AppProc Rule 13(b).
Extraordinary writs, AppProc Rule 24.
Record on appeal, AppProc Rule 12(c).

COSTS, AppProc Rule 6.
Criminal appeals.
  No security for costs, AppProc Rule 6(e).

COSTS —Cont'd
Execution to collect costs in appellate courts, AppProc Rule 35(d).
Forma pauperis, AppProc Rule 6(b).
Mandates of the courts.
  Direction as to costs, AppProc Rule 35(b).
Record on appeal.
  Filing of security for cost with record on appeal, AppProc Rule 6(c).
  Inclusion of unnecessary matter.
    Penalty for inclusion, AppProc Rule 9(b).
Security for costs.
  Criminal appeals.
    No security for costs, AppProc Rule 6(e).
  Dismissal of appeal for failure to file or for defect in security, AppProc Rule 6(d).
  Filing with record on appeal, AppProc Rule 6(c).
  In forma pauperis appeals, AppProc Rule 6(b).
  Regular course, AppProc Rule 6(a).
Taxable in trial tribunals, AppProc Rule 35(c).
To whom allowed, AppProc Rule 35(a).

COURT OF APPEALS.
Supreme court review.
  Appeals of right under G.S. 7A-30, AppProc Rule 14.
Terms and sittings, AppProc Rule 29(a).

CRIMINAL CASES.
Briefs.
  Time for filing and service.
    Death penalty cases, AppProc Rule 13(a).
Certiorari, petition for writ, AppProc Rule 21.
Content of notice of appeal, AppProc Rule 4(b).
Death penalty cases.
  Briefs.
    Time for filing and service, AppProc Rule 13(a).
How and when taken, AppProc Rule 4.
Manner of taking, AppProc Rule 4(a).
Notice of appeal.
  Content, AppProc Rule 4(b).
  Service, AppProc Rule 4(c).
  Time for filing, AppProc Rule 4(a).
Ordering transcript, AppProc Rule 7(a).
Petition for rehearing.
  Not entertained, AppProc Rule 31(g).
Preparation and delivery of transcript, AppProc Rule 7(b).
Record on appeal, AppProc Rule 9(b).
Service of notice of appeal, AppProc Rule 4(c).
Time for taking appeal, AppProc Rule 4(a).
To which appellate court addressed, AppProc Rule 4(d).
Withdrawal of appeal, AppProc Rule 37(d).

D

DEATH OF PARTY.
Substitution of parties, AppProc Rule 38(a).

DEFINITIONS.
Supreme court review.
  Appellants and appellees, AppProc Rules 15(c)(i), 16.
Trial tribunal, AppProc Rule 1(c).

DISTRICT COURTS.
Trial tribunals.
  Inclusion within term, AppProc Rule 1(c).

DOCKETS, AppProc Rule 12(b).
Clerk's docket book, judgment book and minute book, AppProc Rule 39(b).

E

ELECTRONIC MEANS, FILING BY, AppProc Rule 26(a).
Signatures of attorneys.
  More than one attorney representing party, AppProc Rule 33(b).

EMAIL.
Filing by electronic means, AppProc Rule 26(a).

EXECUTIONS.
Costs.
  Collection of costs in appellate courts, AppProc Rule 35(d).

EXPEDITED APPEALS PROCEDURES.
Juvenile matters, AppProc Rule 3A(b).

EXTENSIONS OF TIME.
Administrative boards and agencies.
  Taking appeal, AppProc Rule 18(f).
Granting, AppProc Rule 27(c).
Motions.
  How determined, AppProc Rule 27(d).

EXTRAORDINARY WRITS.
Copies, AppProc Rule 24.
Forms, AppProc Rule 24.

F

FACSIMILE FILING, AppProc Rule 26(a).

FAILURE TO COMPLY.
Penalties for failure, AppProc Rule 25.

FAX.
Filing by electronic means, AppProc Rule 26(a).

FILING, AppProc Rule 26(a).
Closing, AppProc Rule 26(g).
Copies, AppProc Rule 26(g).
Form of papers, AppProc Rule 26(g).
Index to documents filed, AppProc Rule 26(g).
Juvenile's name and identifying information excluded, AppProc Rule 26(g).

FORMA PAUPERIS.
Appeal bonds, AppProc Rule 17(d).
Costs.
  Security for costs, AppProc Rule 6(b).
Extraordinary writs, AppProc Rule 24.
Record on appeal, AppProc Rule 9(c).

FORMS, AppProc Appx D.

FRIVOLOUS APPEALS.
Sanctions, AppProc Rule 34.

I

INDEX.
Documents filed with court, AppProc Rule 26(g).

INDUSTRIAL COMMISSION.
Appeals of right, AppProc Rule 14(a).
Inclusion in term "trial tribunal,"AppProc Rule 1(c).

INFORMATION STATEMENT.
Appeal information statement, AppProc Rule 41.

INSURANCE.
Commissioner of insurance.
  Inclusion within term "trial tribunal,"AppProc Rule 1(c).

INTERLOCUTORY ORDERS.
Supreme court review.
  Discretionary review on certification, AppProc Rule 15(h).

J

JOINDER OF ACTIONS AND PARTIES, AppProc Rule 5.
Briefs.
  Joinder of multiple parties in brief, AppProc Rule 28(f).
Consolidation of actions on appeal, AppProc Rule 40.
Procedure after joinder, AppProc Rule 5(c).

JOINT APPELLANTS AND APPELLEES.
Service of process, AppProc Rule 26(e).

JUDGES.
Trial judges authorized to enter orders.
  Death, incapacity or absence of particular judge authorized, AppProc Rule 36(b).
  When particular judge not specified by rule, AppProc Rule 36(a).

JURISDICTION.
Rules do not affect jurisdiction, AppProc Rule 1(b).

JUVENILE MATTERS.
Appeal information statement.
  Juvenile's name not included, AppProc Rule 41(b).
Briefs.
  Name of juvenile and identifying information excluded, AppProc Rule 28(k).
  Service, time, AppProc Rule 3A(b).
Calendaring priority, AppProc Rule 3A(c).
Expedited appeals procedures, AppProc Rule 3A(b).
Identifying information of juvenile subject of action.
  Exclusion from filings, documents, exhibits or arguments, AppProc Rules 3A(b), 3(b), 26(g).
Name of juvenile subject of action.
  Referenced by initials, AppProc Rules 3A(b), 3(b), 26(g).
Notice of appeal.
  Filing, serving, signing, AppProc Rule 3A(a).
Oral argument.
  Name of juvenile not used, AppProc Rule 30(a).
Personal identifying information.
  Exclusion from filings, exhibits or arguments, AppProc Rules 3A(b), 3(b).
Record on appeal.
  Preparation and service, AppProc Rule 3A(b).
  Verbatim transcripts.
    Submitted to court in signed and sealed envelope, AppProc Rule 9(c).
Time and manner for taking appeals, AppProc Rule 3(b).

JUVENILE MATTERS —Cont'd
Transcript.
  Preparation, time, AppProc Rule 3A(b).

M

MAIL.
Additional time after service by mail, AppProc Rule 27(b).
Filing by, AppProc Rule 26(a).

MANDAMUS AND PROHIBITION.
Determination by court, AppProc Rule 22(c).
Petition for writ.
  Contents, AppProc Rule 22(b).
  Filing and service, AppProc Rule 22(b).
  Response, AppProc Rule 22(c).
  To which appellate court addressed, AppProc Rule 22(a).

MANDATES OF THE COURTS.
Costs.
  Direction as to costs in mandates, AppProc Rule 35(b).
Generally, AppProc Rule 32(a).
Time of issuance, AppProc Rule 32(b).

MEMORANDA.
Citing unpublished opinions of court of appeals.
  Service of copy on all parties, AppProc Rule 30(e).

MERGER OF ACTIONS ON APPEAL, AppProc Rule 40.

MOTIONS IN APPELLATE COURTS.
Content, AppProc Rule 37(a).
Determination, AppProc Rule 37(b).
Juvenile's name or identifying information not used, AppProc Rule 37(c).
Response, AppProc Rule 37(a).
Time, AppProc Rule 37(a).

N

NONCOMPLIANCE.
Penalties for failure to comply with rules, AppProc Rule 25.

NOTICE OF APPEAL.
Civil cases and special proceedings.
  Content, AppProc Rule 3(d).
  Service, AppProc Rule 3(e).
  Time for filing, AppProc Rule 3(c).
Criminal cases.
  Content, AppProc Rule 4(b).
  Service, AppProc Rule 4(c).
  Time for filing, AppProc Rule 4(a).
Juvenile matters.
  Filing, serving, signing, AppProc Rule 3A(a).

O

OFFICIAL WEB SITE ADDRESS.
Electronic filing, AppProc Rule 26(a).

ORAL ARGUMENT.
Briefs.
  Submission on written briefs, AppProc Rule 30(d).

ORAL ARGUMENT —Cont'd
Citing unpublished opinions of court of appeals.
  Service of copy on all parties, AppProc Rule 30(e).
Content, AppProc Rule 30(a).
Decision of appeal without publication on opinion, AppProc Rule 30(e).
Decision without oral argument, AppProc Rule 30(f).
Juvenile's name not used, AppProc Rule 30(a).
Nonappearance of parties, AppProc Rule 30(c).
Order of argument, AppProc Rule 30(a).
Pre-argument review, AppProc Rule 30(f).
Time allowed for argument, AppProc Rule 30(b).

ORDERS.
Trial judges authorized to enter orders.
  Death, incapacity or absence of particular judge authorized, AppProc Rule 36(b).
  When particular judge not specified by rule, AppProc Rule 36(a).

P

PARTIES.
Joinder on appeal, AppProc Rule 5.
Multiple parties.
  Service of process upon numerous parties proceeding separately, AppProc Rule 26(f).
Substitution of parties.
  Death of party, AppProc Rule 38(a).
  Public officers.
    Death or separation from office, AppProc Rule 38(c).
  Reasons other than death, AppProc Rule 38(b).

PERSONAL IDENTIFYING INFORMATION.
Juvenile matters.
  Exclusion from filings, exhibits or arguments, AppProc Rules 3A(b), 3(b).

PRE-ARGUMENT REVIEW, AppProc Rule 30(f).

PROHIBITION, AppProc Rule 22.

PUBLIC OFFICERS AND EMPLOYEES.
Death or separation from office.
  Substitution of parties, AppProc Rule 38(c).

PUBLIC UTILITIES.
Utilities commission.
  Parties to appeal from agencies, AppProc Rule 19(a).

PUBLISHED OPINIONS.
Decision without, AppProc Rule 30(e).

R

RECORD ON APPEAL.
Additions and amendments, AppProc Rule 9(b).
Administrative boards and agencies.
  Appeals from superior court review, AppProc Rule 9(a).
  Composition of record on appeal, AppProc Rule 18(c).
  Settling the record, AppProc Rule 18(d).
Alternative record, AppProc Rule 11(c).
Amendments, AppProc Rules 9(b), 11(c).

RECORD ON APPEAL —Cont'd
Assignments of error in record, AppProc Rule 10.
  Cross assignments of error by appellee, AppProc Rule 10(d).
  Form, AppProc Rule 10(c).
Briefs.
  References in briefs to record, AppProc Rule 28(e).
Civil cases and special proceedings, AppProc Rule 9(a).
Composition, AppProc Rule 9(a).
Copies, AppProc Rule 12(c).
Costs.
  Inclusion of unnecessary matter, AppProc Rule 9(b).
Counsel identified, AppProc Rule 9(b).
Criminal cases, AppProc Rule 9(a).
Diagrams, AppProc Rule 9(d).
Discovery materials.
  Presentation, AppProc Rule 9(c).
Docketing the appeal, AppProc Rule 12(b).
Electronic recording of narrative or transcript, AppProc Rule 9(c).
Evidence.
  Presentation of testimonial evidence and other proceedings, AppProc Rule 9(c).
Exhibits, AppProc Rule 9(d).
Filing.
  Time for filing, AppProc Rule 12(a).
Filing dates and signatures on papers, AppProc Rule 9(b).
Form, AppProc Rule 9(b).
Function, AppProc Rule 9(a).
  Limiting scope of review, AppProc Rule 10(a).
Inclusion of unnecessary matter.
  Costs charged as penalty, AppProc Rule 9(b).
Juvenile matters.
  Preparation, time, AppProc Rule 3A(b).
  Verbatim transcripts.
   Submitted to court in signed and sealed envelope, AppProc Rule 9(c).
Limiting scope of review.
  Function, AppProc Rule 10(a).
Models, AppProc Rule 9(d).
Objections, AppProc Rule 11(c).
Order of arrangement, AppProc Rule 9(b).
Pagination, AppProc Rule 9(b).
Presentation of testimonial evidence and other proceedings, AppProc Rule 9(c).
Scope of review.
  Function in limiting scope, AppProc Rule 10(a).
Security for costs on appeal.
  Filing with record, AppProc Rule 6(c).
Settling the record, AppProc Rule 11.
  Agreement of parties, AppProc Rule 11(a)(c).
  Amendments, objections or alternative record, AppProc Rule 11(c).
  Approval by appellee of appellant's proposed record on appeal, AppProc Rule 11(b).
  Extensions of time, AppProc Rule 11(f).
  Hearing to settle record, AppProc Rule 11(c).
  Multiple appellants.
   Single record on appeal, AppProc Rule 11(d).
  Requesting judge to settle record, AppProc Rule 11(c).
  Time.
   Extensions of time, AppProc Rule 11(f).
Signatures on papers, AppProc Rule 9(b).

RECORD ON APPEAL —Cont'd
Social security number.
  Exclusion, AppProc Rule 9(a).
Supreme court review.
  Appeal of right from court of appeals, AppProc Rule 14(c).
  Discretionary review on certification, AppProc Rule 15(f).
Termination of parental rights.
  Confidentiality of juvenile's, protecting.
   Redaction of juvenile's name, AppProc Rule 9(b).
  Preparation, time, AppProc Rule 3A(b).
Testimonial evidence.
  Presentation, AppProc Rule 9(c).
Transcripts, AppProc Rule 7.

REHEARING.
Petition for rehearing.
  Content, AppProc Rule 31(a).
  Determination, AppProc Rule 31(c).
  Filing, AppProc Rule 31(b).
  How addressed, AppProc Rule 31(b).
  No petition in criminal cases, AppProc Rule 31(g).
  Procedure upon granting, AppProc Rule 31(d).
  Stay of execution, AppProc Rule 31(e).
  Time for filing, AppProc Rule 31(a).
  Waiver by appeal from court of appeals, AppProc Rule 31(f).

S

SANCTIONS FOR FRIVOLOUS APPEALS, AppProc Rule 34.

SCOPE OF REVIEW.
Record on appeal.
  Function in limiting scope, AppProc Rule 10(a).
Supreme court review.
  Appeal based solely upon dissent, AppProc Rule 16(b).
  How determined, AppProc Rule 16(a).

SCOPE OF RULES, AppProc Rule 1(a).

SERVICE OF PROCESS.
Briefs.
  Time for filing and service, AppProc Rule 13(a).
   Appeal of right from court of appeals, AppProc Rule 14(d).
   Discretionary review by supreme court, AppProc Rule 15(g).
Copies of all papers required to be served, AppProc Rule 26(b).
Form of papers, AppProc Rule 26(g).
Joint appellants and appellees, AppProc Rule 26(e).
Juvenile matters.
  Notice of appeal, AppProc Rule 3A(a).
Mail.
  Additional time after service by mail, AppProc Rule 27(b).
Manner of service, AppProc Rule 26(c).
Notice of appeal, AppProc Rules 3(c)(e), 4.
Numerous parties to appeal proceeding separately, AppProc Rule 26(f).
Proof of service, AppProc Rule 26(d).
Size of papers, AppProc Rule 26(g).
Supreme court review.
  Appeals of right from court of appeals or industrial commission, AppProc Rule 14(a).

SERVICE OF PROCESS —Cont'd
Termination of parent rights.
Notice of appeal, AppProc Rule 3A(a).
Unpublished opinion cited in brief, memoranda or oral argument.
Copy served on all parties, AppProc Rule 30(e).

SESSIONS OF COURT, AppProc Rule 29(a).

SHOW CAUSE.
Frivolous appeal, why sanction should not be imposed, AppProc Rule 34(d).

SIGNATURES ON FILED DOCUMENTS.
Electronic filing.
More than one attorney listed as representing party, AppProc Rule 33(b).

SOCIAL SECURITY NUMBER.
Record on appeal.
Exclusion, AppProc Rule 9(a).

STAYS.
Petition for rehearing, AppProc Rule 31(e).
Supersedeas, AppProc Rule 23.

STAYS PENDING APPEAL.
Civil cases, AppProc Rule 8.
Criminal cases, AppProc Rule 8(b).

SUBSTITUTION OF PARTIES, AppProc Rule 38.

SUPERIOR COURT.
Trial tribunals, AppProc Rule 1(c).

SUPERSEDEAS.
Determination by court, AppProc Rule 23(d).
Petition.
Content, AppProc Rule 23(c).
Filing and service, AppProc Rule 23(c).
Response, AppProc Rule 23(d).
Supreme court review.
Pending review by supreme court, AppProc Rule 23(b).
Temporary stay, AppProc Rule 23(e).
Trial tribunal judgments and orders.
Pending review of trial tribunal judgments and orders, AppProc Rule 23(a).

SUPREME COURT REVIEW.
Appeal bonds.
Forma pauperis, AppProc Rule 17(d).
Appeal of right from court of appeals, AppProc Rule 14.
Appeal bond, AppProc Rule 17(a).
Briefs, AppProc Rule 14(d).
Filing and service, AppProc Rule 14(d).
Failure to file or serve, AppProc Rule 14(d).
Content of notice, AppProc Rule 14(b).
Definition of appellant and appellee, AppProc Rule 16(c).
Notice of appeal.
Content, AppProc Rule 14(b).
Filing and service, AppProc Rule 14(a).
Record on appeal, AppProc Rule 14(c).
Scope of review, AppProc Rule 16(a).
Appeal based solely upon dissent, AppProc Rule 16(b).
Appeal of right from industrial commission.
Notice of appeal.
Filing of service, AppProc Rule 14(a).
Discretionary review on certification.
Appeal bonds, AppProc Rule 17(b)(c).

SUPREME COURT REVIEW —Cont'd
Discretionary review on certification —Cont'd
Appellants.
Defined, AppProc Rules 15(c)(i), 16.
Appellee.
Defined, AppProc Rules 15(c)(i), 16.
Briefs.
Filing and service, AppProc Rule 15(g).
Interlocutory orders, AppProc Rule 15(h).
Petition of party, AppProc Rule 15(a).
Content, AppProc Rule 15(c).
Filing and service, AppProc Rule 15(b).
Response to petition, AppProc Rule 15(d).
Procedure for certification, AppProc Rule 15(e).
Record on appeal, AppProc Rule 15(f).
Response to petition of party, AppProc Rule 15(d).
Scope of review, AppProc Rule 16(a).
Forma pauperis.
Appeal bonds, AppProc Rule 17(d).
Scope of review of decisions of court of appeals.
Appeal based solely upon dissent, AppProc Rule 16(b).
How scope determined, AppProc Rule 16(a).
Terms and sittings, AppProc Rule 29(a).

SUSPENSION OF RULES.
Grounds, AppProc Rule 2.

T

TERMINATION OF PARENTAL RIGHTS.
Appeal information statement.
Juvenile's name not included, AppProc Rule 41(b).
Briefs.
Name of juvenile and identifying information excluded, AppProc Rule 28(k).
Service and filing, time, AppProc Rule 3A(b).
Calendaring priority, AppProc Rule 3A(c).
Expedited appeals procedures, AppProc Rule 3A(b).
Name of juvenile subject of action.
Referenced by initials, AppProc Rules 3A(b), 28(k).
Notice of appeal.
Filing, serving, signing, AppProc Rule 3A(a).
Oral argument.
Name of juvenile not used, AppProc Rule 30(a).
Personal identifying information.
Exclusion from filings, documents, exhibits and arguments, AppProc Rules 3A(b), 28(k).
Record on appeal.
Confidentiality of juvenile's, protecting.
Redaction of juvenile's name, AppProc Rule 9(b).
Preparation, time, AppProc Rule 3A(b).
Verbatim transcripts.
Submitted to court in signed and sealed envelope, AppProc Rule 9(c).
Transcript.
Preparation, time, AppProc Rule 3A(b).

TERMS AND SITTINGS OF COURTS, AppProc Rule 29(a).

TIME.
Administrative agencies.
Extensions of time, AppProc Rule 18(f).

TIME —Cont'd
Administrative agencies —Cont'd
  Method and time of taking appeal, AppProc Rule 18(b).
Briefs.
  Filing and service, AppProc Rule 13(a).
    Appeal of right from court of appeals, AppProc Rule 14(d).
    Discretionary appeal by supreme court, AppProc Rule 15(g).
Civil case.
  Taking appeal, AppProc Rule 3(c).
Computation, AppProc Rule 27.
Criminal cases, AppProc Rule 4(a).
Extensions of time.
  Granting, AppProc Rule 27(c).
Juvenile matters.
  Expedited appeals procedures, AppProc Rule 3A(b).
Mail.
  Additional time after service by mail, AppProc Rule 27(b).
  Filing by, AppProc Rule 26(a).
Mandates of the courts.
  Time of issuance, AppProc Rule 32(b).
Motions in appellate courts, AppProc Rule 37(a).
Notice of appeal.
  Criminal cases.
    Filing, AppProc Rule 4(a).
  Filing in civil cases and special proceedings, AppProc Rule 3(c).
Oral argument.
  Allowable time for argument, AppProc Rule 30(b).
Petition for rehearing, AppProc Rule 31(a).
Record on appeal.
  Filing, AppProc Rule 12(a).
  Settling the record.
    Extensions of time, AppProc Rule 11(f).
Service by mail.
  Additional time, AppProc Rule 27(b).
Transcripts.
  Ordering, AppProc Rule 7(a).
  Preparation and delivery, AppProc Rule 7(b).

TIMETABLE OF APPEALS, AppProc Appx A.

TITLE OF RULE, AppProc Rule 42.

TRANSCRIPTS.
Delivery, AppProc Rule 7(b).
Indigency of party or defendant.
  Ordering transcript, AppProc Rule 21(a).

TRANSCRIPTS —Cont'd
Juvenile matters.
  Expedited appeals procedure.
    Preparation, time, AppProc Rule 3A(b).
Ordering of transcript, AppProc Rule 7(a).
Preparation, AppProc Rule 7(b).
Service of documentation of transcript arrangement, AppProc Rule 7(a).

TRIAL TRIBUNAL.
Defined, AppProc Rule 1(c).

U

UNPUBLISHED OPINIONS.
Citing in briefs, memoranda and oral arguments, service of copy, AppProc Rule 30(e).
Posting text on Internet, moving for publication, AppProc Rule 30(e).

UTILITIES COMMISSION.
Inclusion within term "trial tribunal,"AppProc Rule 1(c).

V

VARIANCES OF RULES.
Grounds for variance, AppProc Rule 2.

W

WEB SITE ADDRESS.
Official web site, electronic filing, AppProc Rule 26(a).

WITHDRAWAL OF APPEAL.
Civil cases, AppProc Rule 37(e).
Criminal cases, AppProc Rule 37(d).
Cross-appeal.
  Right to file or continue not affected, AppProc Rule 37(f).

WORKERS' COMPENSATION.
Industrial commission.
  Inclusion within term "trial tribunal,"AppProc Rule 1(c).
  Parties to appeal from agencies, AppProc Rule 19(b).

WRITS.
Extraordinary writs.
  Copies, AppProc Rule 24.
  Form of papers, AppProc Rule 24.

RULES OF THE JUDICIAL STANDARDS COMMISSION

Adopted January 1, 1973,
with amendments received through January 1, 2007.

Rule
1. Authority.
2. Organization.
3. Executive Director.
4. Counsel.
5. Investigator.
6. Confidentiality.
7. Disqualification.
8. Advisory opinions.
9. Procedure upon receipt of complaint or information.
10. Record of proceedings.
11. Letter of caution; public reprimand.
12. Initiation of disciplinary proceedings.
13. Answer.
14. Ex Parte contacts.

Rule
15. Discovery.
16. Amendments to notice or answer.
17. Disciplinary hearing.
18. Rights of respondent; burden of proof.
19. Witnesses; oaths; subpoenas.
20. Rules of evidence.
21. Medical examination.
22. Stipulations.
23. Contempt powers.
24. Procedure following disciplinary hearing.
25. Transmittal of record to the Supreme Court.
26. Proceedings in the Supreme Court.

Index follows Rules.

Rule 1. Authority.

These rules are promulgated pursuant to the authority contained in G.S. 7A-380(a), and are effective January 1, 2007.

Rule 2. Organization.

(a) The Commission shall have a Chairperson, who is the Court of Appeals member, and two Vice-Chairpersons, each of whom shall be a superior court judge. The Vice-Chairperson with the longest tenure of service on the Commission shall preside in the absence of the Chairperson. The Executive Director shall serve as the secretary to the full Commission and to each panel, and shall perform such duties as the full Commission or a panel may assign.

(b) The Chairperson shall divide the Commission into two six (6) member panels, one to be designated Panel A and the other Panel B. Each panel shall include one (1) superior court judge, one (1) district court judge, two (2) members appointed by the North Carolina State Bar, one (1) citizen appointed by the Governor, and one (1) citizen appointed by the General Assembly. Membership on the panels may rotate in a manner determined by the Chairperson of the Commission, provided that no member, other than the Chairperson, shall sit on both the hearing and investigative panel for the same proceeding. The Chairperson of the Commission shall preside over all panel meetings. The two Vice-Chairpersons shall be assigned to different panels and each shall preside over their respective panel meetings in the absence of the Chairperson. No member, other than the Commission Chairperson who shall preside over all disciplinary hearings, who has served on an investigative panel for a particular inquiry shall serve upon the hearing panel for the same matter.

(c) The full Commission shall meet on the call of the Chairperson or upon the written request of any five (5) members. Each panel of the Commission shall meet every other month, alternating such meetings with the other panel, or upon the call of the Chairperson. Hearing panels shall also meet as needed to conduct disciplinary hearings upon the call of the Chairperson. Each member of the Commission, including the Chairperson, Vice-Chairpersons, or other presiding member shall be a voting member.

(d) A quorum for the conduct of business of the full Commission shall consist of any nine (9) members. A quorum for the conduct of the business of a panel shall consist of five (5) members. The affirmative vote of five (5) members of a panel is required to issue a public reprimand pursuant to Rule 11. A quorum for the conduct of any disciplinary proceeding instituted pursuant to Rule 12 shall consist of five (5) members of the panel assigned to hear the proceeding. The affirmative vote of five (5) members of a hearing panel is required to make a recommendation to the Supreme Court that a judge be censured, suspended, or removed from office.

(e) The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P.O. Box 1122, Raleigh, N.C. 27602.

CASE NOTES

Applied in In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Rule 3. Executive Director.

The Executive Director shall have duties and responsibilities prescribed by the Commission including but not limited to:

(1) Receive and screen complaints and allegations as to misconduct or disability, and make preliminary evaluations with respect thereto;

(2) Maintain the Commission's records;

(3) Maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;

(4) Prepare the Commission's budget for approval by the Commission and administer its funds;

(5) Employ and supervise other members of the Commission's staff;

(6) Prepare an annual report of the Commission's activities for presentation to the Commission, to the Supreme Court and to the public;

(7) Employ, with the approval of the Chairperson, a special counsel, and an investigator as necessary to investigate and process matters before the Commission and before the Supreme Court.

CASE NOTES

Convicting Defendants of Traffic Violations with Which They Were Not Charged. — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000).

Rule 4. Counsel.

Commission counsel shall have duties and responsibilities prescribed by the Commission including but not limited to:

(1) Advise the Commission during its investigations and to draft decisions, orders, reports and other documents;

(2) Supervise investigations involving alleged misconduct or disability;

(3) Direct letters of notice to respondents when directed to do so by the Commission;

(4) Prosecute disciplinary proceedings before the Commission;

(5) Appear on behalf of the Commission in the Supreme Court in connection with any recommendation made by the Commission;

(6) Perform other duties at the direction of the Executive Director or Commission Chairperson.

CASE NOTES

Minority Recommendations Not Confidential. — A written minority recommendation filed with the Judicial Standards Commission by one or more of its members is not confidential and should be filed with the State Supreme Court together with the Commission's recommendation. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

Cited in In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Rule 5. Investigator.

The Investigator shall have duties and responsibilities prescribed by the Commission including, but not limited to:

(1) Conduct preliminary investigations;

(2) Conduct formal investigations, upon authorization of the Commission;

(3) Assist Counsel in the preparation and coordination of disciplinary proceedings initiated pursuant to Rule 12;

(4) Maintain records of the investigations and subsequent proceedings as set forth above;

(5) Perform other duties at the direction of the Executive Director or Commission Chairperson.

Rule 6. Confidentiality.

(a) During investigative and initial proceedings.

(1) Except as otherwise provided herein, or unless waived by the judge, at all times prior to the issuance of a public reprimand or the institution of a disciplinary proceeding alleging misconduct by or incapacity of a judge, all Commission proceedings including Commission deliberations, investigative files, records, papers and matters submitted to the Commission, shall be held confidential by the Commission, its Executive Director, Counsel, Investigator and staff except as follows:

(A) With the approval of the Commission, the investigative officer may notify respondent that a complaint has been received and may disclose to respondent the name of the person making the complaint.

(B) The Commission may inform a complainant or potential witness of the date when respondent is first notified that a complaint alleging misconduct or incapacity has been filed with the Commission.

(C) The Commission may disclose information upon written waiver by the subject judge when:

(i) Public statements that charges are pending before the Commission are substantially unfair to respondent; or

(ii) Respondent is publicly accused or alleged to have engaged in misconduct or with having a disability, and the Commission, after a formal investigation, has determined that no basis exists to warrant further proceedings or a recommendation of discipline or retirement.

(D) When the Commission has determined that there is a need to notify another person or agency in order to protect the public or the administration of justice.

(E) In any case in which a complaint filed with the Commission is made public by the complainant, the judge involved, independent sources, or by rule of law, the Commission may issue such statements of clarification and correction as it deems appropriate in the interest of maintaining confidence in the justice system. Such statements may address the status and procedural aspects of the proceeding, the judge's right to a fair hearing in accordance with due process requirements, and any official action of disposition by the Commission, including release of its written notice to the complainant or the judge of such action or disposition.

(2) The fact that a complaint has been made, or that a statement has been given to the Commission, shall be confidential during the investigation and initial proceeding except as provided in this Rule.

(3) No person providing information to the Commission shall disclose information they have obtained from the Commission concerning the investigation, including the fact that an investigation is being conducted, until the Commission issues a public reprimand, files a complaint and disciplinary proceeding, or dismisses the complaint.

(b) After Public Reprimand or Initiation of Disciplinary proceedings.

(1) Upon the issuance by the Commission of a public reprimand or the initiation of a complaint and disciplinary proceeding by the Commission, all subsequent proceedings shall be public, except as may be provided by protective order.

(2) The Commission complaint alleging misconduct or incapacity shall be available for public inspection after it has been served upon the respondent judge. Investigative files and records shall not be disclosed unless they formed the basis for probable cause. Those records of the initial proceeding that were the basis of a finding of probable cause shall become public as of the date of the Commission's hearing.

(3) The work product of the Commission members, its Executive Director, Commission Counsel and investigator shall be confidential and shall not be disclosed.

(c) Commission Deliberations. All deliberations of the Commission in reaching a decision on the statement of charges shall be confidential and shall not be disclosed.

(d) General Applicability.

(1) No person shall disclose information obtained from Commission proceedings or papers filed only with the Commission, except information obtained from documents disclosed to the public by the Commission pursuant to this Rule. All information disclosed publicly at disciplinary hearings conducted by the Commission is not deemed confidential.

(2) Any person violating the confidentiality requirements of this Rule 6 may be subject to punishment for contempt.

(3) A judge shall not intimidate, coerce, or otherwise attempt to induce any person to disclose, conceal or alter records, papers, or information made confidential by the Rule. A violation of this subsection may be charged as a separate violation of the Code of Judicial Conduct.

(4) All written communications from the Commission or its employees to a judge or his or her counsel which are deemed confidential pursuant to these rules shall be enclosed in a securely sealed inner envelope which is clearly marked "Confidential".

Rule 7. Disqualification.

A judge who is a member of the Commission is disqualified from acting in any case in which he or she is a respondent, except in his or her own defense.

CASE NOTES

Cited in In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993); In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Rule 8. Advisory opinions.

(a) A judge may seek an informal advisory opinion as to whether conduct, actual or contemplated, conforms to the requirements of the Code of Judicial Conduct. Such informal advisory opinion may be requested verbally or in writing. The Chairperson, Executive Director, or Counsel may grant or deny a request for an informal advisory opinion. Information contained in a request for an informal advisory opinion shall be confidential, however, when a request for an informal advisory opinion discloses actual conduct which may be actionable as a violation of the Code of Judicial Conduct, the Chairperson, Executive Director, or Counsel shall refer the matter to an investigative panel of the Commission for consideration. The Chairperson, Executive Director, or Counsel may issue an informal advisory opinion to guide the inquiring judge's own prospective conduct if the inquiry is routine, the responsive advice if readily available from the Code of Judicial Conduct and formal Commission opinions, or the inquiry requires immediate response to protect the inquiring judge's right or interest. An informal advisory opinion may be issued verbally, but shall be confirmed in writing and shall approve or disapprove only the matter in issue and shall not otherwise serve as precedent and shall not be published. An inquiry requesting an opinion concerning past conduct or that presents a matter of first impression shall be referred to the Commission for formal opinion. Such informal advisory opinions shall be reviewed periodically by the Commission and, if upon such review, a majority of the Commission present and voting decided that such informal advisory opinion should be withdrawn or modified, the inquiring judge shall be notified in writing by the Executive Director. Until such notification, the judge shall be deemed to have acted in good faith if he or she acts in conformity with the informal advisory opinion which is later withdrawn or modified. If an inquiring judge disagrees with the informal advisory opinion issued by the Chairperson, Executive Director, or Counsel, such judge may submit a written request, in accordance with subsection (b), for consideration of the inquiry by the Commission at its next regularly scheduled meeting.

(b) Any person may request that the Commission issue a formal opinion as to whether actual or contemplated conduct on the part of a judge conforms to the requirements of the Code of Judicial Conduct. Such requests for formal opinions shall be submitted to the Executive Director. Information contained in a request for a formal opinion shall not be confidential. The Commission shall determine whether to issue a formal opinion in response to such request; if the Commission determines to issue a formal opinion, it shall prepare a formal written opinion which shall state its conclusion with respect to the question asked and the reason therefor. Such formal opinions shall be provided to interested parties in the manner deemed appropriate by the Chairperson and a copy shall be provided the Appellate Reporter for publication and such Reporter shall, from time to time as directed by the Commission, publish an index of advisory opinions. Formal advisory opinions shall have precedential value in determining whether similar conduct conforms to the Code of Judicial Conduct, but shall not constitute controlling legal authority for the purposes of review of a disciplinary recommendation by a reviewing court. A formal opinion may be reconsidered or withdrawn by the Commission in the same manner in which it was issued. Until a formal advisory opinion is modified or withdrawn by the Commission or overturned by a reviewing court, a judge shall be deemed to have acted in good faith if he or she acts in conformity therewith.

(c) All inquiries, whether requesting a formal opinion or an informal advisory opinion, shall present in detail all operative facts upon which the inquiry is based, but should not disclose privileged or sensitive information which is not necessary to the resolution of the question presented.

Rule 9. Procedure upon receipt of complaint or information.

(a) The Executive Director and Commission Counsel shall review each complaint or information received by the Commission to determine whether the complaint or information, if true, discloses facts indicating that a judge has engaged in conduct which is in violation of the Code of Judicial Conduct, has engaged in willful misconduct in office, has willfully and persistently failed to perform the duties of his or her judicial office, has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or is habitually intemperate, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent. If such initial review discloses no such facts so that the complaint is obviously unfounded or frivolous, the Executive Director shall notify the Chairperson who, if he or she agrees, may dismiss the complaint. The Chairperson shall inform the investigative panel of any such dismissal at the panel's next meeting and, upon the request of any member, such determination may be reconsidered; otherwise the dismissal of the complaint shall be final and the complainant shall be notified.

(b) If a complaint or information is not dismissed as frivolous or unfounded, the Executive Director and Investigator shall conduct such preliminary review as may be necessary to apprise the investigative panel of the nature thereof, and such panel shall review the complaint or information at the next meeting occurring after the complaint or information is received.

(c) If the investigative panel, by the affirmative vote of not less than five (5) members, determines that the complaint alleges, or information discloses, facts indicating that a judge has engaged in conduct which is in violation of the Code of Judicial Conduct, has engaged in willful misconduct in office, has willfully and persistently failed to perform the duties of his or her judicial office, has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or is habitually intemperate, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, such panel shall order a formal investigation to determine whether disciplinary proceedings should be instituted.

(d) The judge shall be notified of the formal investigation, the nature of the allegations which the Commission is investigating, and whether the formal investigation is on the Commission's own motion or upon written complaint. The notice shall afford the judge a reasonable opportunity to present such relevant information as he or she may deem advisable. Such notice shall be in writing and may be personally delivered by the Chairperson, Executive Director, Commission Counsel, or Investigator, or it may be delivered by certified mail, return receipt requested.

(e) If, upon ordering an formal investigation in accordance with subparagraph (d) above, the investigative panel determines that immediate suspension of the judge is required for the proper administration of justice, it may recommend to the Chief Justice that such judge be temporarily suspended from the performance of his or her judicial duties pending final disposition of the inquiry. A copy of such recommendation shall be provided the judge by certified mail, return receipt requested.

CASE NOTES

Cited in In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001); In re Inquiry Concerning a Judge (Hill), 357 N.C. 559, 591 S.E.2d 859, 2003 N.C. LEXIS 1264 (2003); In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005); In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005); In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Rule 10. Record of proceedings.

The Commission shall keep a record of all formal investigations and disciplinary proceedings concerning a judge. In disciplinary hearings, testimony shall be recorded verbatim by a court reporter and by video recording and, if the Commission recommends to the Supreme Court that the judge be censured, suspended, or removed, a transcript of the evidence and all proceedings therein shall be prepared, including a video recording of the testimony of all witnesses who testify at the disciplinary hearing, and made a part of the record.

CASE NOTES

Cited in In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

Rule 11. Letter of caution; public reprimand.

(a) If the inquiry discloses conduct by a judge which requires attention but is not of such a nature as to warrant a public reprimand or a recommendation by Commission that the judge be disciplined by the Supreme Court, the investigative panel may issue a letter of caution to the judge. No letter of caution may be issued after a disciplinary proceeding has been initiated pursuant to Rule 12.

(b) If, after completion of the formal investigation, the investigative panel determines that probable cause exists that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but such misconduct is minor and does not warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court, the investigative panel may, in the name of the Commission, issue a public reprimand to the judge and may require that the judge follow a corrective course of action. Before issuing a public reprimand to a judge, the Commission shall cause a copy of the proposed reprimand to be served on the judge, who shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12.

Rule 12. Initiation of disciplinary proceedings.

If, after completion of the formal investigation, the investigative panel determines, by the affirmative vote of not less than five (5) members, that probable cause exists that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice and that such conduct, if proven, would warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court, or that a judge is temporarily incapacitated or is suffering from an incapacity which is, or is likely to become, permanent, it shall initiate disciplinary proceedings by the filing, at the Commission offices, a Statement of Charges alleging the charge or charges. The Statement of Charges shall identify the complainant and state the charge or charges in plain and concise language and in sufficient detail to give fair and adequate notice of the nature of the alleged conduct or incapacity. The Statement of Charges shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge No. ____." A copy of the Statement of Charges shall be personally served upon the respondent judge by the Chairperson, the Executive Director, the Commission's Investigator, or by some person of suitable age and discretion designated by the Commission. If, after reasonable efforts to do so, personal service upon the respondent judge cannot be effected, service may be made by registered or certified mail with a delivery receipt, and proof of service in accordance with G.S. 1-75.10(4) shall be filed with the Commission. Service of a copy of the Statement of Charges shall constitute notice to the respondent judge of the initiation of disciplinary proceedings.

Rule 13. Answer.

Unless the time is extended by order of the Commission, the respondent judge shall file at the Commission offices, within twenty (20) days after service of the Statement of Charges, a written original and 10 copies of an Answer, which shall be verified. The Statement of Charges and Answer shall constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings. The assertion of a mental or physical condition as a defense by the respondent judge shall constitute a waiver of medical privilege for the purpose of the Commission proceeding.

Failure to answer the Statement of Charges shall constitute an admission of the factual allegations contained in the Statement of Charges.

Rule 14. Ex Parte contacts.

After the filing of a Statement of Charges and disciplinary proceedings by the Commission, members of the Commission shall not engage in ex parte communications regarding the matter with the respondent judge, counsel for the respondent judge, Commission counsel, or any witness, except that Commission members may communicate with Commission staff and others with respect to procedural and administrative matters as may be required to perform their duties in accordance with these rules.

Rule 15. Discovery.

(a) Upon written demand after the time for filing an Answer has expired, Commission Counsel and respondent judge will each disclose to the other, within 20 days after such demand, the following:

(1) the name and address of each witness the party expects to offer at the disciplinary hearing;

(2) a brief summary of the expected testimony of each witness;

(3) copies of any written statement and a transcript of any electronically recorded statement made by any person the party anticipates calling as a witness;

(4) copies of documentary evidence which may be offered;

(b) Failure to disclose the name of any witness, or to provide any material required to be disclosed by section (a) may result in the exclusion of the testimony of such witness or the documentary evidence which was not provided.

(c) Commission Counsel shall provide the respondent judge with any exculpatory evidence of which he or she is aware and which is relevant to the allegations of the complaint.

(d) Both Commission Counsel and respondent judge shall have a continuing duty to supplement information required to be exchanged under this rule.

(e) The taking of depositions, serving of requests for admission, and other discovery procedures authorized by the Rules of Civil Procedure, shall be permitted only by stipulation of the parties or by order of the Commission Chairperson for good cause shown, and in such manner and upon such conditions as the Chairperson may prescribe.

(f) Disputes concerning discovery shall be determined by the Chairperson, whose decision may not be appealed prior to the conclusion of the disciplinary hearing and the entry of a recommendation for discipline or other final order by the Commission.

(g) Unless the time is extended by order of the Commission, all discovery shall be completed within 60 days of the filing of the answer.

Rule 16. Amendments to notice or answer.

At any time prior to the conclusion of the disciplinary hearing, the hearing panel may allow or require amendments to the Statement of Charges or to the Answer. The Statement of Charges may be amended to conform to the proof or to set forth additional facts, whether occurring before or after the commencement of the disciplinary hearing. In the event of an amendment setting forth additional facts, the respondent judge shall be given a reasonable time to answer the amendment and to prepare and present his or her defense to the matters charged thereby.

Rule 17. Disciplinary hearing.

Upon the filing of an Answer, or upon the expiration of the time allowed for its filing, the hearing panel shall order a disciplinary hearing before it upon the charges contained in the Statement of Charges. The disciplinary hearing shall be held no sooner than 60 days after filing of the Answer or, if no Answer is filed, 60 days after the expiration of time allowed for its filing, unless the judge consents to an earlier disciplinary hearing. The Commission shall serve a notice of the disciplinary hearing upon the respondent judge in the same manner as service of the Statement of Charges under Rule 12.

Upon the date set for the disciplinary hearing, such disciplinary hearing shall proceed whether or not the respondent judge has filed an Answer, and whether or not he or she appears in person or through counsel. At least six members, or alternates, shall be present continually during the presentation of evidence at the disciplinary hearing.

Commission Counsel, or other counsel appointed by the Commission for that purpose, shall present evidence in support of the charges alleged in the Statement of Charges. Commission counsel may call the respondent judge as a witness.

The disciplinary hearing shall be recorded verbatim in accordance with the provisions of Rule 10.

Rule 18. Rights of respondent; burden of proof.

The respondent judge shall have the right to representation by counsel and the opportunity to defend against the charges by the introduction of evidence, examination and cross-examination of witnesses and to address the hearing panel in argument at the conclusion of the disciplinary hearing. The respondent judge shall also have the right to the issuance of subpoenas to compel the attendance of witnesses or the production of documents and other evidentiary material.

Upon the entry of an appearance by counsel for the respondent judge, a copy of any notices, pleadings, or other written communications sent to the respondent judge shall be furnished to such counsel by the Executive Director.

Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline by clear, cogent and convincing evidence, as that term is defined by the Supreme Court.

Rule 19. Witnesses; oaths; subpoenas.

Every witness who testifies before the hearing panel at a disciplinary hearing shall be required to declare, by oath or affirmation, to testify truthfully. The oath or affirmation may be administered by any member of the Commission.

A subpoena to compel the attendance of a witness at a disciplinary hearing before the Commission, or a subpoena for the production of documentary evidence, shall be issued in the name of the State upon request of any party, and shall be signed by a member of the Commission, by the Executive Director, or by Commission Counsel. A subpoena shall be served, without fee, by any officer authorized to serve a subpoena pursuant to the provisions of G.S. 1A-1, Rule 45(e).

Witnesses shall be reimbursed in the manner provided in civil cases in the General Court of Justice, and their expenses shall be borne by the party calling them unless, when mental or physical disability of the judge is in issue, in which case the Commission shall bear the reasonable expenses of the witnesses whose testimony is related to the disability. Vouchers authorizing disbursements by the Commission for witnesses shall be signed by the Chairperson or Executive Director.

Rule 20. Rules of evidence.

Except as otherwise provided in these rules, the Rules of Evidence as set forth in Chapter 8C of the North Carolina General Statutes shall apply in all public proceedings under these rules. Rulings on evidentiary matters shall be made by the Chairperson, or by member presiding in the absence of the Chairperson.

Rule 21. Medical examination.

When the mental or physical condition or health of the respondent judge is in issue, a denial of the alleged condition shall constitute a waiver of medical privilege for the purpose of the Commission proceeding, and the respondent judge shall be required to produce, upon request of Commission Counsel, his or her medical records relating to such condition. The respondent judge shall also be deemed to have consented to a physical or mental examination by a qualified licensed physician or physicians designated by the Commission. A copy of the report of such examination shall be provided to the respondent judge and to the Commission. The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

Rule 22. Stipulations.

At any time prior to the conclusion of a disciplinary hearing, the respondent judge may stipulate to any or all of the allegations of the Statement of Charges in exchange for a stated disposition, which may include a stated recommendation to the Supreme Court for discipline. The stipulation shall be in writing and shall set forth all material facts relating to the proceeding and the conduct of respondent. The stipulation shall be signed by the respondent judge, his or her counsel, and by Commission Counsel. The stipulation shall be submitted to the hearing panel, which shall either approve the stipulation or reject it. If the stipulation provides for a stated recommendation for discipline, it must be approved by the affirmative vote of not less than five members of the hearing panel. If the stipulation is rejected by the hearing panel, it shall be deemed withdrawn and will not be considered in any proceedings before, or deliberations of, the hearing panel. If the hearing panel approves the stipulation, it shall prepare a written recommendation to the Supreme Court consistent therewith and transmit such recommendation in accordance with the provisions of Rules 24 and 25.

Rule 23. Contempt powers.

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process of the Commission. See G.S. 7A-379(f) (proposed).

Rule 24. Procedure following disciplinary hearing.

At the conclusion of the disciplinary hearing, the hearing panel shall deliberate and determine whether to dismiss the proceeding or to file a recommendation with the Supreme Court. In all cases, the Executive Director shall notify the respondent judge in writing of the decision of the hearing panel within 60 days after the conclusion of the disciplinary hearing, unless the time is extended by order of the Chairperson.

If the hearing panel reaches a decision to recommend the censure, suspension or removal of a judge, the Executive Director shall prepare a proposed record of the proceedings and a written decision setting forth the hearing panel's findings of fact, conclusions of law, and recommendation. The proposed record of the proceeding shall include a verbatim transcript of the disciplinary hearing as well as a copy of the video recording of such disciplinary hearing. Such proposed record and decision shall be served upon the respondent judge and his or her counsel, if any, in the same manner as service of the complaint under Rule 12.

Rule 25. Transmittal of record to the Supreme Court.

Unless the respondent judge files objections to the proposed record, or a proposed alternative record, within 10 days after the proposed record and the recommendation of the hearing panel have been served upon him or her, the proposed record shall constitute the official record. If the respondent judge files objections or a proposed alternative record, the Commission Chairperson shall send written notice to Commission Counsel and to the respondent judge and his or her counsel, setting a time and place for a hearing to settle the record, and the record as settled by the Commission Chairperson shall be the official record.

Within 10 days after the official record has been settled, the Executive Director shall certify the record and decision of the Commission and file it with the Clerk of the Supreme Court. The Executive Director shall concurrently serve upon the respondent judge, in the same manner as service of the complaint under Rule 12, a notice of the filing of such record and decision, specifying the date upon which it was filed in the Supreme Court. The Executive Director shall also transmit to the respondent judge copies of any changes to the official record occurring as a result of the settlement of the record.

Rule 26. Proceedings in the Supreme Court.

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. See G.S. 7A-33.

Index to Rules of the Judicial Standards Commission

A

ACCEPTANCE OF PUBLIC REPRIMAND.
Time, JudStdsComm Rule 11.

ADMISSION OF FACTUAL ALLEGATIONS.
Failure to answer statement of charges, JudStdsComm Rule 13.

ADVISORY OPINIONS, JudStdsComm Rule 8.

AFFIRMATIVE VOTE.
Required to issue public reprimand or recommend censure, suspension or removal, JudStdsComm Rule 2.

AMENDMENT.
Statement of charges or answer, JudStdsComm Rule 16.

ANSWER, JudStdsComm Rule 13.
Amendment prior to conclusion of disciplinary hearing, JudStdsComm Rule 16.

APPEAL OF HEARING PANEL DECISION.
Proceedings in supreme court, JudStdsComm Rule 26.

AUTHORITY, JudStdsComm Rule 1.

B

BURDEN OF PROOF.
Disciplinary hearing, JudStdsComm Rule 18.

C

CENSURE.
Vote required to recommend, JudStdsComm Rule 2.

CHAIRPERSON, JudStdsComm Rule 2.

CHARGES.
Statement of charges.
  Amendment prior to conclusion of disciplinary hearing, JudStdsComm Rule 16.
  Filing, initiation of disciplinary proceedings, JudStdsComm Rule 12.
  Stipulation to allegations in exchange for stated disposition, JudStdsComm Rule 22.

COMPLAINTS.
Procedure upon receipt, JudStdsComm Rule 9.

CONFIDENTIALITY OF PROCEEDINGS, JudStdsComm Rule 6.
Informal advisory opinions.
  Information contained in request, JudStdsComm Rule 8.

CONTEMPT.
Confidentiality violations, JudStdsComm Rule 6.
Power of commission, JudStdsComm Rule 23.

COUNSEL.
Complaint or information.
  Review upon receipt, JudStdsComm Rule 9.
Duties and responsibilities, JudStdsComm Rule 4.

D

DECISION OF HEARING PANEL, JudStdsComm Rule 24.

DEFENSE OF MEDICAL OR PHYSICAL CONDITION.
Assertion.
  Waiver of medical privilege, JudStdsComm Rule 13.

DELIBERATIONS.
Confidentiality, JudStdsComm Rule 6.
Following disciplinary hearing, JudStdsComm Rule 24.

DISCIPLINARY HEARING.
Burden of proof, JudStdsComm Rule 18.
Ordering, time for holding, notice, conduct, JudStdsComm Rule 17.
Procedure following, JudStdsComm Rule 24.
Rights of respondent, JudStdsComm Rule 18.
Rules of evidence, JudStdsComm Rule 20.
Witnesses, JudStdsComm Rule 19.

DISCIPLINARY PROCEEDINGS.
Answer.
  Amendment, JudStdsComm Rule 16.
  Filing, time, verification, failure to file, JudStdsComm Rule 13.
Burden of proof, JudStdsComm Rule 18.
Decision of panel, JudStdsComm Rule 24.
Disciplinary hearing, JudStdsComm Rule 17.
Discovery.
  Disclosure prior to disciplinary hearing, JudStdsComm Rule 15.
Ex parte communications by commission members, JudStdsComm Rule 14.
Initiation, JudStdsComm Rule 12.
Mental or physical condition or health issue.
  Waiver of medical privilege, medical examination, JudStdsComm Rule 21.
Procedure following hearing, JudStdsComm Rule 24.
Proceedings in supreme court, JudStdsComm Rule 26.
Quorum, JudStdsComm Rule 2.
Record of proceedings, JudStdsComm Rule 10.
  Certification, filing, notice, service, JudStdsComm Rule 25.
  Proposed record of proceedings.
    Decision of panel to recommend censure, suspension or removal, JudStdsComm Rule 24.
    Objections, time, notice, hearing to settle, JudStdsComm Rule 25.
  Transmittal to supreme court, JudStdsComm Rule 25.

DISCIPLINARY PROCEEDINGS —Cont'd
Rejection of public reprimand, JudStdsComm Rule 11.
Rights of respondent, JudStdsComm Rule 18.
Rules of evidence, JudStdsComm Rule 20.
Statement of charges.
  Amendment, JudStdsComm Rule 16.
  Filing, requirements, caption, service, JudStdsComm Rule 12.
  Stipulation to allegations in exchange for stated disposition, JudStdsComm Rule 22.
Stipulations.
  Allegations in statement of charges, JudStdsComm Rule 22.
Subpoenas, JudStdsComm Rules 18, 19.
Witnesses, JudStdsComm Rule 19.

DISCLOSURE OF INFORMATION.
Restrictions, JudStdsComm Rule 6.

DISCOVERY.
Disclosure prior to disciplinary hearing, time, JudStdsComm Rule 15.

DISMISSAL OF COMPLAINT.
Initial review finding complaint unfounded or frivolous, JudStdsComm Rule 9.

DISQUALIFICATION FROM ACTING IN CASE, JudStdsComm Rule 7.

DIVIDED INTO PANELS, JudStdsComm Rule 2.

E

EVIDENCE, JudStdsComm Rule 15.
Disclosure, JudStdsComm Rule 15.
Exclusion.
  Failure to disclose witnesses or documentary evidence, JudStdsComm Rule 15.
Rules of evidence.
  Public proceedings under rules, applicability, JudStdsComm Rule 20.
Subpoenas.
  Issuance, request, service, JudStdsComm Rule 19.
  Right of respondent to issue, JudStdsComm Rule 18.

EXCLUSION OF TESTIMONY OR EVIDENCE.
Failure to disclose witnesses or documentary evidence, JudStdsComm Rule 15.

EXCULPATORY EVIDENCE.
Commission counsel to provide, JudStdsComm Rule 15.

EXECUTIVE DIRECTOR.
Complaint or information.
  Review upon receipt, JudStdsComm Rule 9.
Duties and responsibilities, JudStdsComm Rule 3.
Secretary to full commission, JudStdsComm Rule 2.

EXPARTE CONTACTS.
Commission members, JudStdsComm Rule 14.

F

FORMAL ADVISORY OPINIONS.
Actual or contemplated conduct conforming to Code of Judicial Conduct, JudStdsComm Rule 8.

FORMAL INVESTIGATION.
Investigative panel ordering, JudStdsComm Rule 9.
Record of proceedings, JudStdsComm Rule 10.

I

INFORMAL ADVISORY OPINIONS, JudStdsComm Rule 8.

INFORMATION.
Procedure upon receipt, JudStdsComm Rule 9.

INVESTIGATIONS.
Confidentiality of investigative proceedings, JudStdsComm Rule 6.
Formal investigation order by investigative panel, JudStdsComm Rule 9.

INVESTIGATOR.
Duties and responsibilities, JudStdsComm Rule 5.

L

LETTER OF CAUTION, JudStdsComm Rule 11.

M

MEDICAL EXAMINATION.
Disciplinary proceedings.
  Mental or physical condition or health issue, JudStdsComm Rule 21.

MEDICAL PRIVILEGE.
Waiver.
  Assertion of mental or physical condition as defense, JudStdsComm Rule 13.
  Disciplinary proceedings.
    Mental or physical condition or health issue, JudStdsComm Rule 21.

MEETINGS.
Full commission, panels, JudStdsComm Rule 2.

MENTAL OR PHYSICAL CONDITION OR DISABILITY.
Assertion as defense.
  Waiver of medical privilege, JudStdsComm Rule 13.
Expenses of witnesses testifying to, JudStdsComm Rule 19.
Issue at disciplinary proceeding.
  Waiver of medical privilege, medical examination, JudStdsComm Rule 21.

N

NOTICE.
Decision of hearing panel, time, JudStdsComm Rule 24.
Disciplinary hearing, JudStdsComm Rule 17.
Filing of record of proceedings, JudStdsComm Rule 25.
Formal investigation ordered, JudStdsComm Rule 9.
Objections to proposed record, JudStdsComm Rule 25.
Public reprimand, JudStdsComm Rule 11.
Statement of charges, JudStdsComm Rule 12.

O

OBJECTIONS.
Proposed record of proceedings, JudStdsComm Rule 25.

ORGANIZATION, JudStdsComm Rule 2.

P

PANEL MEETINGS, JudStdsComm Rule 2.

PANELS, JudStdsComm Rule 2.

PLEADINGS IN DISCIPLINARY PROCEEDINGS.
Statement of charges and answer to constitute, JudStdsComm Rules 12, 13.

PRODUCTION OF DOCUMENTS AND EVIDENTIARY MATERIALS.
Subpoenas.
  Issuance, request, service, JudStdsComm Rule 19.
  Right of respondent to issue, JudStdsComm Rule 18.

PROPOSED RECORD OF PROCEEDINGS.
Decision to recommend censure, suspension or removal, JudStdsComm Rule 24.
  Objections, time, notice, hearing to settle, JudStdsComm Rule 25.

PUBLIC PROCEEDINGS AND INSPECTION.
Upon issuance of public reprimand or initiation of complaint, JudStdsComm Rule 6.

PUBLIC REPRIMAND, JudStdsComm Rule 11.
Vote required to issue, JudStdsComm Rule 2.

Q

QUORUM, JudStdsComm Rule 2.

R

RECORD OF PROCEEDINGS, JudStdsComm Rule 10.
Certification, filing, notice, service, JudStdsComm Rule 25.
Disciplinary hearing, JudStdsComm Rule 17.
Proposed record.
  Decision to recommend censure, suspension or removal, JudStdsComm Rule 24.
    Objections, time, notice, hearing to settle, JudStdsComm Rule 25.
Transmittal to supreme court, JudStdsComm Rule 25.

REJECTION OF PUBLIC REPRIMAND.
Time, demand for disciplinary proceedings, JudStdsComm Rule 11.

REMOVAL.
Vote required to recommend, JudStdsComm Rule 2.

REPRIMAND.
Public reprimand, JudStdsComm Rule 11.
  Vote required to issue, JudStdsComm Rule 2.

RIGHTS OF RESPONDENT.
Disciplinary hearing, JudStdsComm Rule 18.

RULES OF EVIDENCE.
Public proceedings under rules, applicability, JudStdsComm Rule 20.

S

SECRETARY OF FULL COMMISSION.
Executive director to serve as, JudStdsComm Rule 2.

SERVICE.
Notice of filing of record of proceedings, JudStdsComm Rule 25.
Proposed record of proceedings.
  Decision to recommend censure, suspension or removal, JudStdsComm Rule 24.
Public reprimand, JudStdsComm Rule 11.
Statement of charges, JudStdsComm Rule 12.
Subpoenas, JudStdsComm Rule 19.

STATEMENT OF CHARGES.
Amendment prior to conclusion of disciplinary hearing, JudStdsComm Rule 16.
Filing, initiation of disciplinary proceedings, JudStdsComm Rule 12.
Stipulation to allegations in exchange for stated disposition, JudStdsComm Rule 22.

STIPULATIONS.
Allegations in statement of charges, JudStdsComm Rule 22.

SUBPOENAS.
Issuance, request, service, JudStdsComm Rule 19.
Right of respondent to issue, JudStdsComm Rule 18.

SUPREME COURT.
Proceedings in, JudStdsComm Rule 26.
Transmittal of record to, JudStdsComm Rule 25.

SUSPENSION FROM PERFORMANCE OF DUTIES.
Temporary suspension pending final disposition.
  Investigative panel recommending, JudStdsComm Rule 9.
Vote required to recommend, JudStdsComm Rule 2.

T

TEMPORARY SUSPENSION PENDING FINAL DISPOSITION.
Investigative panel recommending, JudStdsComm Rule 9.

V

VICE-CHAIRPERSON, JudStdsComm Rule 2.

VOTE.
Required to issue public reprimand or recommend censure, suspension or removal, JudStdsComm Rule 2.

W

WITNESSES.
Disclosure, JudStdsComm Rule 15.
Exclusion of testimony.
  Failure to disclose witnesses or documentary evidence, JudStdsComm Rule 15.
Expenses, reimbursement, responsibility, vouchers, JudStdsComm Rule 19.
Mental or physical disability of judge.
  Expenses of witnesses testifying to, JudStdsComm Rule 19.
Oath or affirmation, JudStdsComm Rule 19.
Subpoenas.
  Issuance, request, service, JudStdsComm Rule 19.
  Right of respondent to issue, JudStdsComm Rule 18.

WORK PRODUCT.
Confidentiality, JudStdsComm Rule 6.

RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

Adopted September 25, 1975,
with amendments received through September 10, 1997.

Rule
1. Definitions.
2. Petition for hearing.
3. Decision by the court.
4. Reproduction of record and briefs.
5. Costs.

Index follows Rules.

Rule 1. Definitions.

In these rules, unless the context or subject matter otherwise requires:

(a) Commission means the Judicial Standards Commission.

(b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) Court means the Supreme Court of North Carolina. Clerk means the Clerk of the Supreme Court.

(d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

CASE NOTES

Cited in In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995).

Rule 2. Petition for hearing.

(a) *Notice to judge.* When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.

(b) *Petition for hearing.* The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate showing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) *Failure to file petition.* If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) *Briefs.* Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) *Oral argument.* After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

CASE NOTES

Cited in In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993); In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993); In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Rule 3. Decision by the court.

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports. (Amended April 14, 1976.)

CASE NOTES

Censure Held Appropriate. — Where judge was publicly intoxicated out of State which resulted in his arrest and in a negotiated plea of nolo contendere to the criminal offense of trespass after warning, was publicly intoxicated which resulted in his conviction of the criminal offense of indecent exposure, and the respondent refused, even after admitting psychological dependency, to abstain from the consumption of alcohol, he was properly censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Leonard, 339 N.C. 596, 453 S.E.2d 521 (1995).

Respondent/judge was censured under this section where he found defendant who was pleading guilty not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings. In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999).

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005).

Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Conduct Prejudicial to Administration of Justice. — Judge was censured for conduct prejudicial to the administration of justice where he failed to continue a bad check action and improperly issued an arrest order. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

Censure Recommendation Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge since this created grounds for disqualification as the judge's impartiality could reasonably have been questioned; the findings of the Judicial Standards Commission that the judge's conduct violated N.C. Code Jud. Conduct 2A, 3C(1) were supported by the evidence and were adopted by the court. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Applied in In re Brown, 356 N.C. 278, 570 S.E.2d 102, 2002 N.C. LEXIS 941 (2002); In re Inquiry Concerning a Judge (Allen), 362 N.C. 73, 653 S.E.2d 423, 2007 N.C. LEXIS 1227 (2007).

Cited in In re Bullock, 36 N.C. 586, 444 S.E.2d 174 (1994); In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001); In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

Rule 4. Reproduction of record and briefs.

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

Rule 5. Costs.

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

Rule 6. Costs.

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to this Court, except there will be no filing fee.

Index to Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission

B

BRIEFS.
Filing, JudStdsComm SupCtReview Rule 2.
Reproduction of briefs, JudStdsComm SupCtReview Rule 4.

C

COSTS, JudStdsComm SupCtReview Rule 5.

D

DECISION BY THE COURT, JudStdsComm SupCtReview Rule 3.

DEFINITIONS, JudStdsComm SupCtReview Rule 1.

H

HEARINGS.
Notice to judge, JudStdsComm SupCtReview Rule 2.
Oral arguments, JudStdsComm SupCtReview Rule 2.
Petition for hearing, JudStdsComm SupCtReview Rule 2.

R

RECORDS.
Reproduction of records and briefs, JudStdsComm SupCtReview Rule 4.

CODE OF JUDICIAL CONDUCT

Adopted September 26, 1973,
with amendments received through January 31, 2006.

Preamble

Canon

Rule

1. A judge should uphold the integrity and independence of the judiciary.
2. A judge should avoid impropriety in all his activities.
3. A judge should perform the duties of the judge's office impartially and diligently.
4. A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

Rule

5. A judge should regulate the judge's extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties.
6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.
7. A judge may engage in political activity consistent with the judge's status as a public official.

Limitation of Proceedings

Scope and Effective Date of Compliance.

Index follows Rules.

PREAMBLE

An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct. (Amended effective April 2, 2003.)

Canon 1. A judge should uphold the integrity and independence of the judiciary.

A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved. (Amended effective April 2, 2003; amended effective January 31, 2006.)

Editor's note. — For North Carolina court system website, see www.aoc.state.nc.us.

Legal Periodicals. — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Code Is Guide to Meaning of G.S. 7A-376. — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of G.S. 7A-376. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

A judge willfully abuses the power and prestige of his office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Drug Conviction. — Judge's conduct resulting in his entering a plea of guilty to all charges concerning possession of cocaine, marijuana and drug paraphernalia constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed and be disqualified from holding further judicial office and ineligible for retirement benefits. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

Conviction of Failure to File Federal Income Tax Returns. — Judge was removed from office based on his guilty plea to failure to file federal income tax returns because this conviction involved moral turpitude and conduct prejudicial to administration of justice that brought the judicial office into disrepute. In re Inquiry Concerning a Judge (Ballance), 361 N.C. 338, 643 S.E.2d 584, 2007 N.C. LEXIS 406 (2007).

Interference with Divorce Proceedings. — Where, during the course of his divorce proceedings, respondent judge had ex parte contact with another judge in which he questioned the fairness of the judge's decision and attempted to exert pressure on him, resulting in the other judge's withdrawal from respondent's case; where respondent threatened members of the staff of the district attorney's office, his ex-wife's attorneys, and other attorneys with professional reprisal for their involvement in his case; and where respondent presided over cases in which his attorney or members of his attorney's law firm represented parties while respondent's divorce case was pending, the finding by the Judicial Standards Commission that the respondent be censured for conduct prejudicial to the administration of justice that brought the judicial office into disrepute was affirmed. In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993).

Interference With Former Client's Proceedings. — Because a judge stipulated that his conduct, which included encouraging another judge to go easy on a former client, violated N.C. Jud. Conduct 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute, the court censured him pursuant to G.S. 7A-376 and G.S. 7A-377. In re Inquiry Concerning a Judge (Allen), 362 N.C. 73, 653 S.E.2d 423, 2007 N.C. LEXIS 1227 (2007).

Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Solicitation of Support in Election. — Judge's conduct in soliciting support and votes in an upcoming contested judicial election from attorneys and defendants appearing before the judge violated N.C. Code Jud. Conduct 1, 2A, 3A(1), and 7, and warranted censure of the judge by the North Carolina Supreme Court. In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001).

Ex Parte Order Improper. — Judge was censured for misconduct under circumstances in which the judge entered an ex parte order striking an earlier order which had been entered by a different district court judge which had found a party in contempt for failure to pay child support, and the judge did not deny that he entered the ex parte order without notice to the plaintiff and without taking evidence; the defendant in that case subsequently vanished, causing problems to the other party, who had obtained an order in her favor, and thus the judge engaged in conduct prejudicial to the administration of justice so as to bring his judicial office into disrepute regardless of his good intentions. In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

Inappropriate Comments. — Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005).

Judge was removed from office for conduct which included, inter alia, falsely reporting to newspapers, the North Carolina State Bar, and the United States Department of Justice that certain lawyers and judges had conspired and tried to have her assassinated, had conspired to file false professional complaints against her, and had conspired to violate her civil rights; the judge also publicly discussed with a newspaper a pending custody case over which she had presided, and had allowed her election campaign to conduct an improper raffle. In re Inquiry Concerning a Judge (Harrison), 359 N.C. 415, 611 S.E.2d 834, 2005 N.C. LEXIS 459 (2005).

Sexual Harassment. — Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Conduct Warranting Disciplinary Action. — Judge was censured and suspended because: the judge (1) had an undisclosed business relationship with an attorney and did not disqualify himself in cases involving the attorney, thereby calling into question his impartiality; (2) attempted to coerce a district attorney into signing a remittal of disqualification; (3) engaged in retaliatory conduct against the district attorney's office after the district attorney refused to sign the remittal; (4) coerced or attempted to coerce a guilty plea from criminal defendants; and (5) was habitually rude and condescending to those who appeared before him and demonstrated an arrogant and contemptuous demeanor while presiding over court. In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Applied in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Cited in In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001); In re Hayes, 356 N.C. 389, 584 S.E.2d 260, 2002 N.C. LEXIS 1104 (2002).

Canon 2. A judge should avoid impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin. (Amended May 25, 1997, effective September 1, 1997; Amended effective April 2, 2003; Amended effective January 31, 2006.)

CASE NOTES

Conduct in Conferring Alone with Defendant Concerning Pending Cases Held Violation of This Canon. — See In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

A judge willfully abuses the power and prestige of his office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Knowing Erroneous Conviction. — Convicting defendants of reckless driving when they were charged with driving while impaired was an act which respondent judge knew to be improper and ultra vires, or beyond the powers of his office; therefore, respondent's actions constituted conduct in violation of Canons 2A and 3A(1) of the Code of Judicial Conduct. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

Convicting Defendants of Traffic Violations with Which They Were Not Charged. — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000).

Derogatory Remarks. — Judge's conduct in making of derogatory remarks in court concerning a group supporting woman in assault on female case and in making statements in traffic case to the effect that he had driven just over the proscribed speed limit himself to impress defendant that speeding in excess of leeway allowed by police was a serious offense, violated Canons 2A and 3A, and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of G.S. 7A-376. In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991).

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005).

Sexual Harassment — Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Directives to Attorney. — Where after judge in criminal case denied attorney's motion to withdraw and after inquiring as to the basis for such withdrawal and attorney's answer that he could not reply because to do so would require him to reveal confidential information in violation of attorney client privilege, judge directed attorney to remain in the courtroom while defendant was sent to another room to be interviewed for first offenders' program and during a recess, judge discussed the matter with an experienced attorney who called the judge's attention to the adverse impact judge's directives would have on the attorney's ability to practice law, and thereafter, despite expressions of concern about the judge's directives, judge again addressed himself to the attorney in open court in front of all those present and stated that the matter had gotten out of hand but that everything he had said earlier regarding his refusal in the future to grant to such attorney recommendations, continuances, indigent appointments, and pleas still applied, actions of the judge constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute and violated Canon 2A. In re Bullock, 328 N.C. 712, 403 S.E.2d 264 (1991).

Misled by Counsel. — A judge's actions did not amount to conduct prejudicial to the administration of justice that brought the judicial office into disrepute, where in dismissing two DUI cases based on defense counsel's ex parte representations without determining if the state consented or wanted to be heard, the judge was acting pursuant to a shorthand disposition practice that had been acquiesced in by the state, and the judge had no reason to suspect that defense counsel had not been authorized to proceed in that manner. In re Inquiry Concerning Judge Tucker, 348 N.C. 677, 501 S.E.2d 67 (1998).

Action Against Attorneys. — Evidence supported the Judicial Standards Commission's conclusions that respondent judge's actions in declaring counsel, who initiated preliminary investigation of her before Judicial Standards Commission, persona non grata constituted conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and G.S. 7A-376. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

Drug Conviction. — Judge's conduct resulting in his entering a plea of guilty to all charges concerning possession of cocaine, marijuana and drug paraphernalia constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed and be disqualified from holding further judicial office and ineligible for retirement benefits. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

Conviction of failure to file federal income tax returns. — Judge was removed from office based on his guilty plea to failure to file federal income tax returns because this conviction involved moral turpitude and conduct prejudicial to administration of justice that brought the judicial office into disrepute. In re Inquiry Concerning a Judge (Ballance), 361 N.C. 338, 643 S.E.2d 584, 2007 N.C. LEXIS 406 (2007).

Solicitation of Support in Election. — Judge's conduct in soliciting support and votes in an upcoming contested judicial election from attorneys and defendants appearing before the judge violated N.C. Code Jud. Conduct 1, 2A, 3A(1), and 7, and warranted censure of the judge by the North Carolina Supreme Court. In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge; this created grounds for disqualification since the judge's impartiality could reasonably have been questioned. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Conduct Held Prejudicial to Administration of Justice. — Former judge's conduct amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of G.S. 7A-376 where he (1) attempted an assignation with a woman convicted of prostitution and on probation and gave the impression that he could assist her with her legal problems, (2) changed verdicts in motor vehicle violation cases upon ex parte communications from defendants without providing the state an opportunity to be heard, (3) made an inappropriate advance toward a woman detective, (4) made improper and potentially embarrassing and humiliating remarks to the victim in a criminal proceeding before the court and the victim's girl friend, and (5) made what could be construed as implied threats to attorneys who were representing clients in cases heard by the respondent or pending before his court. In re Hair, 324 N.C. 324, 377 S.E.2d 749 (1989).

Where respondent took it upon himself to give legal advice and counsel to a former probationary employee with regard to her discharge from employment by the Department of Social Services and undertook in his official capacity to intervene on her behalf, the evidence was sufficient to establish violations of Canons 2A and 2B of the Code of Judicial Conduct and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993).

Judge's ex parte meeting with defence counsel regarding a motion for appropriate relief seeking expungement of a prior conviction, and the entry of an order both vacating the conviction and dismissing the case, was prejudicial to the administration of justice. In re Brown, 356 N.C. 278, 570 S.E.2d 102, 2002 N.C. LEXIS 941 (2002).

Evidence that the judge engaged in ex parte communications with and displayed excessive personal familiarity toward the plaintiff in a case in which the judge was hearing a motion, made unwarranted critical and demeaning remarks to an attorney during her argument in support of a motion before the judge, and assaulted a deputy sheriff by reaching for his genitals after directing him to get out of her way as she entered the Franklin County Clerk of Superior Court's offices supported the Judicial Standards Commission's finding that the judge's actions rose to a level conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C. Code Jud. Conduct 2A and 3A(3). In re Inquiry Concerning a Judge (Hill), 357 N.C. 559, 591 S.E.2d 859, 2003 N.C. LEXIS 1264 (2003).

Because a judge stipulated that his conduct violated N.C. Jud. Conduct 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute, the court censured him pursuant to G.S. 7A-376 and G.S. 7A-377. In re Inquiry Concerning a Judge (Allen), 362 N.C. 73, 653 S.E.2d 423, 2007 N.C. LEXIS 1227 (2007).

Judge was censured and suspended because: the judge (1) had an undisclosed business relationship with an attorney and did not disqualify himself in cases involving the attorney, thereby calling into question his impartiality; (2) attempted to coerce a district attorney into signing a remittal of disqualification; (3) engaged in retaliatory conduct against the district attorney's office after the district attorney refused to sign the remittal; (4) coerced or attempted to coerce a guilty plea from criminal defendants; and (5) was habitually rude and condescending to those who appeared before him and demonstrated an arrogant and contemptuous demeanor while presiding over court. In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Willful Misconduct Shown. — Judges may not be disciplined for error of judgment or error of law; however, when judges knowingly act beyond the bounds of their judicial power, their actions amount to willful misconduct which brings the judicial office into disrepute and prejudices the administration of justice. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

Ex Parte Order Improper. — Judge was censured for misconduct under circumstances in which the judge entered an ex parte order striking an earlier order which had been entered by a different district court judge which had found a party in contempt for failure to pay child support, and the judge did not deny that he entered the ex parte order without notice to the plaintiff and without taking evidence; the defendant in that case subsequently vanished, causing problems to the other party, who had obtained an order in her favor, and thus the judge engaged in conduct prejudicial to the administration of justice so as to bring his judicial office into disrepute regardless of his good intentions. In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

Correction of Errors. — Judge who solicited and accepted a plea of guilty to a charge which was not a lesser included offense of the charged offense, but who then corrected his mistake when the error was called to his attention, was not censured. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

Censure Recommendation Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Judge was removed from office for conduct which included, inter alia, falsely reporting to newspapers, the North Carolina State Bar, and the United States Department of Justice that certain lawyers and judges had conspired and tried to have her assassinated, had conspired to file false professional complaints against her, and had conspired to violate her civil rights; the judge also publicly discussed with a newspaper a pending custody case over which she had presided, and had allowed her election campaign to conduct an improper raffle. In re Inquiry Concerning a Judge (Harrison), 359 N.C. 415, 611 S.E.2d 834, 2005 N.C. LEXIS 459 (2005).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Griffin, 320 N.C. 163, 357 S.E.2d 682 (1987); In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995); In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999); In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001); In re Hayes, 356 N.C. 389, 584 S.E.2d 260, 2002 N.C. LEXIS 1104 (2002).

Canon 3. A judge should perform the duties of the judge's office impartially and diligently.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

A. *Adjudicative responsibilities.*

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the judge.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately

adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. *Administrative responsibilities.*

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. A judge should exercise the judge's power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

C. *Disqualification.*

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (i.e., an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. *Remittal of disqualification.*

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers. (Amended June 13, 1990; Amended May 25, 1997, effective September 1, 1997; Amended effective April 2, 2003; Amended effective January 31, 2006.)

Editor's note. — An order adopted Sept. 21, 1982, and effective Oct. 18, 1982, as amended, provided that former versions of this rule and Rule 15 of the General Rules of Practice for the Superior and District Courts, published in 276 N.C. at p. 740, were thereby suspended to and including June 30, 1990, and that electronic media and still photograph coverage of public judicial proceedings in the appellate and trial courts of this State would be allowed on an experimental basis, in accordance with the terms of the order. The amended versions of this rule, set out above, and Rule 15 of the General Rules of Practice for the Superior and District Courts now contain provisions regarding electronic media and still photography coverage of public judicial proceedings.

Legal Periodicals. — For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For article, "The Perils of Caesar's Wife: Special Litigation Committees v. The Judiciary; Is Anyone Above Reproach?", see 22 Wake Forest L. Rev. 57 (1987).

For note on determining the proper standard for recusal of judges in North Carolina, see 65 N.C.L. Rev. 1138 (1987).

CASE NOTES

Jurisdiction. — Whether or not a judge's comments at a hearing on motions violated N.C. Code Jud. Conduct 3(A)(3) was the province of the North Carolina Judicial Standards Commission under G.S. 7A-374.1 Carpenter v. Carpenter, — N.C. App. —, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

Conduct need not be criminal in order to constitute willful misconduct in office. — In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Conduct in Conferring Alone with Defendant Concerning Pending Cases Held Violation of This Canon. — See In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

A judge willfully abuses the power and prestige of his office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

The failure of a judge to make due inquiry into the facts and law upon which his judgments were based and his execution of them upon a mere ex parte application of counsel for defendants violates this Canon. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Conduct Violative of Subdivision A(4). — A judge violated subdivision A(4) of this canon where, in disposing of a traffic case, (a) the plea of guilty was not taken in open court in the presence of the defendant, the assistant district attorney and the prosecuting officer; (b) the plea of guilty was taken without prior notice to the assistant district attorney; (c) the judgments signed by the judge were signed out of the presence of the defendant, assistant district attorney and prosecuting officer; (d) the judgments were signed by the judge when court was not in session and in places where court is not held; and (e) the judgments were signed without prior notice to the assistant district attorney. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates this Canon. In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Conduct Not Violative of Subdivision A(4). — The trial court did not violate this section by receiving a written communication from the jury, summarizing its content and responding to it in open court. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001), cert. denied, — N.C. —, 604 S.E.2d 919 (2004).

When Recusal Warranted. — A trial judge should recuse himself or refer the recusal motion to another judge if there is sufficient force in the allegations contained in defendant's motion to proceed to find facts. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Respondent/judge was censured for violating this section when he found defendant who was pleading guilty not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings. In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999).

The test to apply in deciding what is reasonable under subdivision (1) is whether a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Failure to Disqualify Himself on Motion to Recuse. — The trial judge committed error by not disqualifying himself from considering a motion to recuse himself from hearing the plaintiffs' motion to set aside a judgment on grounds of excusable neglect, since a reasonable man knowing all the circumstances would have had doubts about the judge's ability to rule on the motion to recuse in an impartial manner. McClendon v. Clinard, 38 N.C. App. 353, 247 S.E.2d 783 (1978).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge; this created grounds for disqualification since the judge's impartiality could reasonably have been questioned. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Recusal Not Required. — Judge did not err in denying the motion for recusal in a parental rights termination case where, some eight months earlier, he had conducted a review hearing pursuant to G.S. 7A-657 and had concluded that the three children should remain with Department of Social Services. In re LaRue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

Judge who issued search warrant did not have to recuse himself from presiding over a suppression hearing which sought to have the warrant declared invalid. State v. Monserrate, 125 N.C. App. 22, 479 S.E.2d 494 (1997).

Trial court did not err in denying a father's motion to recuse the trial judge from a termination of parental rights hearing, as the knowledge of evidentiary facts gained by the trial judge from an earlier proceeding did not require disqualification. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002).

G.S. 15A-1223 and N.C. Code Jud. Conduct Canon 3, control the disqualification of a judge presiding over a criminal trial and the burden is on the defendant in an appeal to show objectively that grounds exist consisting of substantial evidence that there exists such a personal bias, prejudice, or interest on the part of the judge that he would be unable to rule impartially. The mere fact that a trial judge is intimately familiar with the proceedings does not automatically require his disqualification, so a the same judge who presided over defendant's murder trial was not disqualified form serving as the presiding judge in a retrospective competency hearing. State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71, 2004 N.C. App. LEXIS 413 (2004), appeal dismissed, cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Trial judge did not err by denying plaintiff's motion to recuse himself; that the trial judge's daughter had worked for the law firm retained by one of the defendants in a personal injury suit was insufficient to require recusal since the daughter had no involvement with the case, the parties were informed about the matter and had no problem with the situation, and there was no indication that the daughter's employment during the summer at the firm in any way prevented the trial judge from being evenhanded and unbiased. Further,the fact that the trial judge urged the parties to settle was not improper and also provided no ground for recusal. In re Pedestrian Walkway Failure, 173 N.C. App. 237, 618 S.E.2d 819, 2005 N.C. App. LEXIS 2032 (2005).

In a guest's personal injury claims against a motor speedway and a concrete manufacturer, when the ex parte communications were of an entirely administrative nature, concerning only the timing and order of the dozen or more of the consolidated cases still to be tried, the guest failed to show that the communications constituted bias, prejudice or interest on the part of the judge under N.C. Code Jud. Conduct 3. Baker v. Charlotte Motor Speedway, Inc., 180 N.C. App. 296, 636 S.E.2d 829, 2006 N.C. App. LEXIS 2306 (2006).

Although an attorney challenged the propriety of a trial court imposing sanctions against him under G.S. 1A-1-11 and the process by which the sanctions were imposed under N.C. Code Jud. Conduct 3(C)(1)(a), he submitted no affidavits providing evidence of the judge's personal bias, prejudice, or interest, but instead he argued that the judge's annoyance with his disruption of settlement proceedings warranted recusal; the attorney failed to demonstrate that his motion for recusal should have been granted. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Knowing Erroneous Conviction. — Convicting defendants of reckless driving when they were charged with driving while impaired was an act which respondent judge knew to be improper and ultra vires, or beyond the powers of his office; therefore, respondent's actions constituted conduct in violation of Canons 2A and 3A(1) of the Code of Judicial Conduct. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

No Affirmative Duty on Judge. — N.C. Code Jud. Conduct 3 did not impose an affirmative duty upon a trial judge to disqualify himself upon his own motion. In re Key, — N.C. App. —, 643 S.E.2d 452, 2007 N.C. App. LEXIS 799 (2007), cert. denied, 361 N.C. 428, 648 S.E.2d 506 (2007).

Convicting Defendants of Traffic Violations with Which They Were Not Charged. — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000).

Involvement in Divorce Proceedings. — Where, during the course of his divorce proceedings, respondent judge had ex parte contact with another judge in which he questioned the fairness of the judge's decision and attempted to exert pressure on him, resulting in the other judge's withdrawal from respondent's case; where respondent threatened members of the staff of the district attorney's office, his ex-wife's attorneys, and other attorneys with professional reprisal for their involvement in his case; and where respondent presided over cases in which his attorney or members of his attorney's law firm represented parties while respondent's divorce case was pending, the finding by the Judicial Standards Commission that the respondent be censured for conduct prejudicial to the administration of justice that brought the judicial office into disrepute was affirmed. In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993).

Actions Toward Counsel. — Evidence supported the Judicial Standards Commission's conclusions that respondent judge's actions in declaring counsel, who initiated preliminary investigation of her before Judicial Standards Commission, persona non grata constituted conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and G.S. 7A-376. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

Prior Sharing of Office Space. — Defendant was not prejudiced by trial judge's prior sharing of office space with counsel for former wife in a child support case, as the primary issue before the judge was the amount of support to be provided. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Derogatory Remarks. — Judge's conduct in making of derogatory remarks in court concerning a group supporting woman in assault on female case and in making statements in traffic case to the effect that he had driven just over the proscribed speed limit himself to impress defendant that speeding in excess of leeway allowed by police was a serious offense violated Canons 2A and 3A, and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of G.S. 7A-376. In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991).

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005).

Sexual Harassment. — Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Use of a judge's office to grant leniency or favors to a defendant because of sexual activities between a judge and a defendant is willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Assistant District Attorney on Behalf of Another Who Faced Driving Under the Influence Charge Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Changing of Parole Conditions Without Notice to Solicitor Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Trial judge's alleged opinions regarding the crime of driving while impaired did not constitute proper grounds to require the judge to recuse himself. State v. Kennedy, 110 N.C. App. 302, 429 S.E.2d 449 (1993).

A court has not only the inherent power but also the duty to discipline attorneys for unprofessional conduct. — Unprofessional conduct subject to this power and duty includes misconduct, malpractice, or deficiency in character, and any dereliction of duty except mere negligence or mismanagement. In re Hunoval, 294 N.C. 740, 247 S.E.2d 230 (1977).

Solicitation of Support in Election. — Judge's conduct in soliciting support and votes in an upcoming contested judicial election from attorneys and defendants appearing before the judge violated N.C. Code Jud. Conduct 1, 2A, 3A(1), and 7, and warranted censure of the judge by the North Carolina Supreme Court. In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001).

Conduct Held Prejudicial to the Administration of Justice. — Former judge's conduct amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of G.S. 7A-376 where he (1) attempted an assignation with a woman convicted of prostitution and on probation and gave the impression that he could assist her with her legal problems, (2) changed verdicts in motor vehicle violation cases upon ex parte communications from defendants without providing the state an opportunity to be heard, (3) made an inappropriate advance toward a woman detective, (4) made improper and potentially embarrassing and humiliating remarks to the victim in a criminal proceeding before the court and the victim's girl friend, and (5) made what could be construed as implied threats to attorneys who were representing clients in cases heard by the respondent or pending before his court. In re Hair, 324 N.C. 324, 377 S.E.2d 749 (1989).

Judge's ex parte meeting with defence counsel regarding a motion for appropriate relief seeking expungement of a prior conviction, and the entry of an order both vacating the conviction and dismissing the case, was prejudicial to the administration of justice and contrary to N.C. Code Jud. Conduct Canon 3.A.(1). In re Brown, 356 N.C. 278, 570 S.E.2d 102, 2002 N.C. LEXIS 941 (2002).

Evidence that the judge engaged in ex parte communications with and displayed excessive personal familiarity toward the plaintiff in a case in which the judge was hearing a motion, made unwarranted critical and demeaning remarks to an attorney during her argument in support of a motion before the judge, and assaulted a deputy sheriff by reaching for his genitals after directing him to get out of her way as she entered the Franklin County Clerk of Superior Court's offices supported the Judicial Standards Commission's finding that the judge's actions rose to a level conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C. Code Jud. Conduct 2A and 3A(3). In re Inquiry Concerning a Judge (Hill), 357 N.C. 559, 591 S.E.2d 859, 2003 N.C. LEXIS 1264 (2003).

Because a judge stipulated that his conduct violated N.C. Jud. Conduct 1, 2A, 2B, 3A(4), 3C(1)(a), and 3D and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute, the court censured him pursuant to G.S. 7A-376 and G.S. 7A-377. In re Inquiry Concerning a Judge (Allen), 362 N.C. 73, 653 S.E.2d 423, 2007 N.C. LEXIS 1227 (2007).

Judge was censured and suspended because: the judge (1) had an undisclosed business relationship with an attorney and did not disqualify himself in cases involving the attorney, thereby calling into question his impartiality; (2) attempted to coerce a district attorney into signing a remittal of disqualification; (3) engaged in retaliatory conduct against the district attorney's office after the district attorney refused to sign the remittal; (4) coerced or attempted to coerce a guilty plea from criminal defendants; and (5) was habitually rude and condescending to those who appeared before him and demonstrated an arrogant and contemptuous demeanor while presiding over court. In re Inquiry Concerning a Judge, 362 N.C. 202, 657 S.E.2d 346, 2008 N.C. LEXIS 143 (2008).

Willful Misconduct Shown. — Judges may not be disciplined for error of judgment or error of law; however, when judges knowingly act beyond the bounds of their judicial power, their actions amount to willful misconduct which brings the judicial office into disrepute and prejudices the administration of justice. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

Bias of Judge in Magistrate Removal Hearing. — Every Resident Regular Superior Court Judge who appoints a magistrate does not have as a matter of law a personal bias or prejudice which would disqualify him under Code of Judicial Conduct, Canon 3 from conducting a magistrate's removal hearing pursuant to G.S. 7A-173(c). In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

Correction of Errors. — Judge who solicited and accepted a plea of guilty to a charge which was not a lesser included offense of the charged offense, but who then corrected his mistake when the error was called to his attention, was not censured. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

Judge Censured for Entering Improper Ex Parte Order. — Judge was censured for misconduct under circumstances in which the judge entered an ex parte order striking an earlier order which had been entered by a different district court judge which had found a party in contempt for failure to pay child support, and the judge did not deny that he entered the ex parte order without notice to the plaintiff and without taking evidence; the defendant in that case subsequently vanished, causing problems to the other party, who had obtained an order in her favor, and thus the judge engaged in conduct prejudicial to the administration of justice so as to bring his judicial office into disrepute regardless of his good intentions. In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

Censure Recommendation Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Applied in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980); Fin. Servs. of Raleigh, Inc. v. Barefoot, 163 N.C. App. 387, 594 S.E.2d 37, 2004 N.C. App. LEXIS 402 (2004).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Griffin, 320 N.C. 163, 357 S.E.2d 682 (1987); State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987); Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998); In re Bullock, 328 N.C. 712, 403 S.E.2d 264 (1991); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995); State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996); State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998); In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001); In re Hayes, 356 N.C. 389, 584 S.E.2d 260, 2002 N.C. LEXIS 1104 (2002).

Canon 4. A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of the judge's judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge:

A. A judge may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and the judge may otherwise consult with an executive or legislative body or official.

C. A judge may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. A judge may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization. (Amended effective April 2, 2003; Amended effective January 31, 2006.)

Canon 5. A judge should regulate the judge's extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties.

A. *Avocational activities.* A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties.

B. *Civic and charitable activities.* A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge.

(2) A judge may be listed as an officer, director or trustee of any cultural, educational, historical, religious, charitable, fraternal or civic organization. A judge may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. *Financial activities.*

(1) A judge should refrain from financial and business dealings that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his/her investments and other financial interests to minimize the number of cases in which the judge is disqualified.

(4) Neither a judge nor a member of the judge's family residing in the judge's household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to the judge; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and the judge's spouse to attend a bar-related function, a cultural or historical activity, or an event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of the judge's family residing in the judge's household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of the judge's family residing in the judge's household may accept any other gift only if the donor is not a party presently before the judge and, if its value exceeds $500, the judge reports it in the same manner as the judge reports compensation in Canon 6C.

(5) For the purposes of this section "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(6) A judge is not required by this Code to disclose his/her income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

D. *Fiduciary activities.* A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties. "Member of the judge's family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his/her personal capacity.

E. *Arbitration.* A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. *Practice of law.* A judge should not practice law.

G. *Extra-judicial appointments.* A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his/her country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities. (Amended effective April 2, 2003; Amended effective January 31, 2006.)

CASE NOTES

Recusal Was Erroneous. — Trial judge was erroneously recused in a divorce action upon the motion of plaintiff wife based on the fact that the trial judge and defense counsel shared a vacation property, along with a group of other people, located in the mountains; the joint ownership was not such a frequent transaction to have caused a violation of N.C. Code Jud. Conduct 5(C)(1). Lange v. Lange, 167 N.C. App. 426, 605 S.E.2d 732, 2004 N.C. App. LEXIS 2334 (2004).

Expressing Personal Opinions. — Although an attorney challenged the propriety of a trial court imposing sanctions against him, he provided no authority to support his contention that the judge, by expressing personal opinions regarding the case during a hearing, violated N.C. Code Jud. Conduct 5(E) by improperly assuming the role of a mediator, and therefore was stripped of the authority to impose sanctions. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Canon 6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. *Compensation and honoraria.* Compensation and honoraria should not exceed a reasonable amount.

B. *Expense reimbursement.* Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of such an amount is compensation.

C. *Public reports.* A judge shall report the name and nature of any source or activity from which the judge received more than $2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which the judge resides. For each calendar year, such report shall be filed, absent good cause shown, not later than May

15th of the following year. (Amended December 30, 1974; Amended November 3, 1983; Amended effective April 2, 2003; Amended effective January 31, 2006.)

Canon 7. A judge may engage in political activity consistent with the judge's status as a public official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. *Terminology.* For the purposes of this Canon only, the following definitions apply.

(1) A "candidate" is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as the person makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in that person's efforts to be elected to public office.

B. *Permissible political conduct.* A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself/herself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he/she does not expressly endorse a candidate (other than himself/herself) for a specific office or expressly solicit funds from the audience during the event;

(2) if a judge is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself/herself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he/she may not personally make financial contributions or loans to any individual seeking election to office (other than himself/herself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his/her own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that the judge should resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. *Prohibited political conduct.* A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself/herself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his/her identity or qualifications.

D. *Political conduct of family members.* The spouse or other family member of a judge or a candidate is permitted to engage in political activity. (Amended December 30, 1974; further amended March 16, 1976; further amended May 25, 1997, effective September 1, 1997; further amended February 17, 1998; further amended effective April 2, 2003; further amended effective January 31, 2006.)

CASE NOTES

Political Organizations. — The political organizations envisioned by section A(2) of Canon 7 are entities such as the Republican Party, the Wake County Democratic Men's Club, the Democratic Party, the Conservative Party, etc. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

A campaign committee set up by a candidate to handle the contributions to his campaign is not a "political organization" as referred to by section A(2) of Canon 7, but is, in effect, the alter ego of the candidate. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

Under section (A)(1) of Canon 7, checks made to a candidate's campaign committee must be treated as contributions to the candidate. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

Solicitation of Support in Election. — Judge's conduct in soliciting support and votes in an upcoming contested judicial election from attorneys and defendants appearing before the judge violated N.C. Code Jud. Conduct 1, 2A, 3A(1), and 7, and warranted censure of the judge by the North Carolina Supreme Court. In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001).

Contributions to Political Campaigns. — The clear purpose of section A(1) of Canon 7 is to prevent judges from making contributions to the campaigns of candidates for political office other than judicial candidates or members of the judge's family. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

Contributions of a district court judge to the United States Senate campaign of former Governor and to the gubernatorial campaign of former Attorney General, by checks payable to the campaign committees of the candidates, violated Canon 7 and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, meriting censure. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

LIMITATION OF PROCEEDINGS

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at anytime against a judge convicted of a felony during the judge's tenure in judicial office.

SCOPE AND EFFECTIVE DATE OF COMPLIANCE

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of the judge's prior duties as legal counsel but the judge may not be compensated therefor. (Amended effective April 2, 2003; further amended effective January 31, 2006.)

Index to Code of Judicial Conduct

A

ADJUDICATIVE RESPONSIBILITIES, JudCond Canon 3.

ADMINISTRATIVE RESPONSIBILITIES, JudCond Canon 3.

APPEARANCE OF IMPROPRIETY.
Avoidance, JudCond Canon 2.

APPOINTMENTS.
Exercise of power, JudCond Canon 3.

ARBITRATION.
Judges not to act as arbitrators or mediators, JudCond Canon 5.

AVOCATIONAL ACTIVITIES, JudCond Canon 5.

B

BIAS OR PREJUDICE.
Disqualification, JudCond Canon 3.

C

CAMPAIGN CONDUCT, JudCond Canon 7.

CHARACTER WITNESS.
Prohibition, JudCond Canon 2.

CIVIC AND CHARITABLE ACTIVITIES, JudCond Canon 5.

COMPENSATION.
Reports on, JudCond Canon 6.

CONFLICT OF INTEREST.
Disqualification, JudCond Canon 3.

CULTURAL ACTIVITIES.
Engaging in, JudCond Canon 4.

D

DECORUM IN PROCEEDINGS.
Duty to maintain, JudCond Canon 3.

DIGNIFIED AND COURTEOUS TO PARTIES.
Duty, JudCond Canon 3.

DILIGENCE.
Performing duties, JudCond Canon 3.

DISCIPLINARY MEASURE AGAINST JUDGE OR LAWYER.
Duty to take or initiate, JudCond Canon 3.

DISQUALIFICATION, JudCond Canon 3.
Remittal of disqualification, JudCond Canon 3.

E

ELECTIONS.
Political activity, JudCond Canon 7.

EXECUTOR OR ADMINISTRATOR.
Serving as, JudCond Canon 5.

EXPENSE REIMBURSEMENT REPORTS, JudCond Canon 6.

EXTRA-JUDICIAL ACTIVITIES.
Minimizing risk of conflict with judicial duties, JudCond Canon 5.
Reports of compensation received, JudCond Canon 6.

EXTRA-JUDICIAL APPOINTMENTS, JudCond Canon 5.

F

FIDUCIARY ACTIVITIES, JudCond Canon 5.

FINANCIAL ACTIVITIES, JudCond Canon 5.

FINANCIAL INTEREST.
Disqualification, JudCond Canon 3.

FINANCIAL REPORTS, JudCond Canon 6.

FUND-RAISING ACTIVITIES, JudCond Canon 4.

G

GIFTS.
Accepting, JudCond Canon 5.

GOVERNMENT AGENCY.
Serving as member, officer or director, JudCond Canon 4.

GUARDIAN.
Serving as, JudCond Canon 5.

H

HISTORICAL ACTIVITIES.
Engaging in, JudCond Canon 4.

I

IMPARTIALITY.
Performing duties, JudCond Canon 3.

IMPROPRIETY.
Avoidance in all activities, JudCond Canon 2.

INCOME REPORTS, JudCond Canon 6.

INFLUENCE JUDICIAL CONDUCT.
Judge not to allow relationships to influence, JudCond Canon 2.

INTEGRITY AND INDEPENDENCE OF JUDICIARY.
Duty to uphold, JudCond Canon 1.

INVESTMENTS.
Holding and managing, JudCond Canon 5.

L

LETTER OF RECOMMENDATION.
Providing, JudCond Canon 2.

M

MEDIA COVERAGE OF COURT PROCEEDINGS, JudCond Canon 3.

MEDIATION.
Acting as mediator, JudCond Canon 5.

MEMBERSHIPS.
Discriminatory organization, JudCond Canon 2.

P

PARTISAN INTEREST OR PUBLIC CLAMOR, JudCond Canon 3.

PERSONAL REFERENCE.
Serving as, JudCond Canon 2.

POLITICAL ACTIVITY, JudCond Canon 7.

PRACTICE OF LAW.
Prohibited, JudCond Canon 5.

PRIVATE INTERESTS OF OTHERS.
Lending prestige of office to advance, JudCond Canon 2.

PROMPT DISPOSITION OF BUSINESS, JudCond Canon 3.

PUBLIC COMMENT ABOUT MERITS OF PROCEEDING, JudCond Canon 3.

PUBLIC HEARING.
Appearance at, JudCond Canon 4.

Q

QUASI-JUDICIAL ACTIVITIES, JudCond Canon 4.
Reports of compensation received, JudCond Canon 6.

R

REAL ESTATE INVESTMENTS.
Holding and managing, JudCond Canon 5.

RELATIONSHIP TO PARTY.
Disqualification, JudCond Canon 3.

REPORTS.
Compensation received for quasi-judicial and extra-judicial activities, JudCond Canon 6.

T

TRAVEL, FOOD AND LODGING.
Expense reimbursement, reports, JudCond Canon 6.

TRUSTEE.
Serving as, JudCond Canon 5.

RULES OF CONTINUING JUDICIAL EDUCATION

Adopted October 24, 1988,
with amendments received effective February 5, 2004.

Rule
I. Coverage.
II. Requirements.
III. Accredited sponsors.
IV. Reporting.
Rule
V. Exemptions.
VI. Expenses.
Index follows Rules.

Rule I. Coverage.

These rules are applicable only to North Carolina District Court, Superior Court, and Court of Appeals Judges and to the Chief Justice and Associate Justices of the Supreme Court of North Carolina, including retired judges and justices qualified as emergency or recalled judges or justices.

Upon leaving judicial service, a judge or justice shall be bound by the rules of the Supreme Court of North Carolina for continuing legal education of members of the Bar.

Continuing legal education hours earned prior to entering judicial service and judicial education hours earned prior to leaving judicial service shall be recognized and accepted on a pro rata basis by the appropriate accrediting and reporting agency.

Rule II. Requirements.

A. Every judge in the trial division shall, within the first year after appointment or election, attend a course of instruction or orientation for new judges provided by the Administrative Office of the Courts. Attendance will be counted as a part of the hours of instruction required for the biennium in which the instruction is received.

B. Each judge and justice of the trial and appellate division shall attend at least thirty (30) hours of instruction in one or more approved continuing legal or judicial education programs in each biennium, effective with the biennium beginning 1 July 1989 and ending 30 June 1991.

C. At least fifteen (15) of the thirty (30) hours required shall be continuing judicial education courses designed especially for judges and attended exclusively or primarily by judges. All Superior Court Judges are expected to attend the scheduled Superior Court Judges Conferences and the programs there presented. All District Court Judges are expected to attend the scheduled District Court Judges Conferences and the programs there presented.

For District Court Judges designated as Family Court Judges, at least twenty-four (24) of the thirty (30) hours shall be continuing judicial education courses designed especially for Family Court.

D. Judges participating as teachers, lecturers, discussion leaders, or panelists in an approved continuing judicial or legal education program shall receive five hours credit for each hour of actual presentation time. Presentation of the same material on subsequent occasions shall accrue credit for the actual time of presentation only.

E. Continuing judicial education hours shall be computed by the following formula:

$$\frac{\text{Sum of the Total Minutes of Actual Instruction}}{60} = \text{Total Hours.}$$

The instruction may be in no less than fifteen (15) minute segments. Only actual instruction shall be included in computing the total hours of instruction. The following shall not be included: introductory remarks, breaks, business meetings, keynote speeches, and speeches in connection with meals.

Except as otherwise provided in this subsection E and the preceding subsection D, computation for credit of continuing legal education courses shall be computed in accordance with Regulation 5 of the Board of Continuing Legal Education of the North Carolina State Bar. (Amended August 15, 2002; amended February 5, 2004.)

Rule III. Accredited sponsors.

A. Continuing legal education programs offered by the Conference of Superior Court Judges or the Conference of District Court Judges or others offered to judges by the Administrative Office of the Courts or the Institute of Government of the University of North Carolina at Chapel Hill are approved for credit as continuing judicial education under these rules.

B. All continuing legal education programs approved by the Board of Continuing Legal Education of the North Carolina State Bar are approved for credit as continuing legal education under these rules.

C. Programs offered for judges by any law school accredited by the American Bar Association and the following national providers of judicial education are approved for credit as continuing judicial education under these rules:

1. National Judicial College
2. American Academy of Judicial Education
3. National Council of Juvenile and Family Court Judges
4. American Bar Association
5. Institute for Court Management of the National Center for State Courts
6. Institute of Judicial Administration
7. National Institute of Justice
8. American Judges Association

D. Postgraduate law degree programs conducted by a law school accredited by the American Bar Association.

E. Any program not approved under A, B, C, or D above may be approved by the Chief Justice upon application by a judge who has attended or desires to attend the program. To be approved, a program must meet the following standards:

1. It must be an organized program of learning which contributes directly to the professional competency of a judge.
2. It must deal primarily with matter directly related to law or related fields or to the professional responsibility, administrative duties, or ethical obligations of a judge.
3. Instructors in the program must be qualified by practical or academic experience to teach in the topic or area of discipline covered by the course.
4. Thorough, high quality, written topic materials and/or outlines must be distributed to judges attending the program.

Rule IV. Reporting.

A. The Administrative Office of the Courts is designated as the office in which all records, reports, and documents pertaining to continuing judicial education shall be filed and compiled.

B. Each judge must report in writing to the Administrative Office of the Courts, no later than July 31 following the end of each year of an educational biennium, the continuing education programs he has attended. Reports may be made sooner after attendance, and the Administrative Office of the Courts will maintain a cumulative record of such reports for the submitting judges. One year after the beginning of each educational biennium, the Administrative Office of the Courts shall notify all judges and justices subject to these rules that reports are required and that they are due by the following July 31. If a program is other than a continuing judicial education program offered by the Conference of Superior Court Judges, the Conference of District Court Judges, or the Administrative Office of the Courts or the Institute of Government, the judge must attach a copy of the program brochure or other material which outlines the program presentation and identifies the instructors, unless the program is certified as having previously received approval of the Chief Justice, pursuant to Section III.E. Forms for the report will be provided by the Administrative Office of the Courts.

C. As soon as practical after August 1 of the second year of each educational biennium, the Administrative Office of the Courts shall notify any judge or justice in writing of his or her delinquency. Any such delinquent judge or justice shall have sixty (60) days within which to comply with the requirements of these rules and notify the Administrative Office of the Courts of his or her compliance.

D. The Director of the Administrative Office of the Courts shall report to the Chief Justice the name of any judge or justice who does not meet the continuing judicial education requirements specified in these rules or who has not filed a timely report of his or her continuing judicial education activities, and the Chief Justice shall make such inquiry or investigation and take such action as he deems appropriate.

Rule V. Exemptions.

The Chief Justice of the Supreme Court shall have the authority to relieve any judge or justice of the requirement of meeting the minimum hours required by these rules for undue hardship by reason of disability or other cause.

Rule VI. Expenses.

The Administrative Office of the Courts shall fund the regular judicial conferences of the Judges of the Superior and District Court divisions and shall ensure that a sufficient number of hours of instructional material are provided to permit the judges of the trial division regularly attending the conferences to satisfy the requirements of this Order and shall provide reimbursement for expenses incurred in attending the conferences in accordance with its regular policies and practices.

For Judges and Justices of the Appellate Division, the Administrative Office of the Courts shall ensure the availability of a sufficient number of hours of instruction to satisfy the requirements of the Order either by providing and funding Appellate Court conferences or providing funding for alternative methods of satisfying such requirements in accordance with its regular policies and practices.

Judges and Justices attending continuing judicial education programs other than those presented at judicial conferences shall be reimbursed for their expenses in accordance with policies and practices established by the Administrative Office of the Courts, subject to the availability of funds.

Priority in allocation of funds by the Administrative Office of the Courts will be given to the regular judicial conferences of the Superior Court and the District Court divisions and to other continuing judicial education programs sponsored or co-sponsored by the Administrative Office of the Courts.

his or her continuing judicial education activities, and the Chief Justice shall make such inquiry or investigation and take such action as he deems appropriate.

Rule V. Exemptions.

The Chief Justice of the Supreme Court shall have the authority to relieve any judge or justice of the requirement of meeting the minimum hours required by these rules for undue hardship by reason of disability or other cause.

Rule VI. Expenses.

The Administrative Office of the Courts shall fund the regular judicial conferences of the Judges of the Superior and District Court divisions and shall assure that a sufficient number of hours of instructional material are provided to permit the judges of the trial division regularly attending the conferences to satisfy the requirements of this Order and shall provide reimbursement for expenses incurred in attending the conferences in accordance with its regular policies and practices.

For Judges and Justices of the Appellate Division, the Administrative Office of the Courts shall assure the availability of a sufficient number of hours of instruction to satisfy the requirements of the Order either by providing and funding Appellate Court conferences or providing funding for alternative methods of satisfying such requirements in accordance with its regular policies and practices.

Judges and Justices attending continuing judicial education programs other than those presented at judicial conferences shall be reimbursed for their expenses in accordance with policies and practices established by the Administrative Office of the Courts, subject to the availability of funds.

Priority in allocation of funds by the Administrative Office of the Courts will be given to the regular judicial conferences of the Superior Court and the District Court divisions and to other continuing judicial education programs sponsored or cosponsored by the Administrative Office of the Courts.

Index to Rules of Continuing Judicial Education

A

ACCREDITATIONS.
Sponsors, CJE Rule III.

APPLICABILITY OF RULES, CJE Rule I.

ATTENDANCE, CJE Rule II.

C

CREDIT HOURS, CJE Rule II.

D

DELINQUENCY.
Notice, CJE Rule IV.

E

EXEMPTIONS, CJE Rule V.

EXPENSES, CJE Rule VI.

H

HOURS REQUIRED, CJE Rule II.

R

REPORTS.
Active members.
  Annual report, CJE Rule IV.

S

SCOPE OF RULES, CJE Rule I.

SPONSORS.
Accreditations, CJE Rule III.

RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

With amendments effective October 9, 2008.

Subchapter 1A. Organization of the North Carolina State Bar

Section .0100. Functions

Section
A.0101. Purpose.
A.0102. Division of work.
A.0103. Cooperation with local bar association committees.
A.0104. Organization of local bar associations.
A.0105. Annual program.
A.0106. Reports made to annual meeting.

Section .0200. Membership — Annual Membership Fees

Rule
A.0201. Classes of membership.
A.0202. Register of members.
A.0203. Annual membership fees; When due.
A.0204. Certificate of insurance coverage.

Section .0300. Election and Succession of Officers

A.0301. Officers.
A.0302. Eligibility for office.
A.0303. Term of office.
A.0304. Elections.
A.0305. Nominating committee.
A.0306. Vacancies and succession.
A.0307. Removal from office.

Section .0400. Duties of Officers

A.0401. Compensation of officers.
A.0402. President.
A.0403. President-elect, vice-president, and immediate past president.
A.0404. Secretary.

Section .0500. Meetings of the North Carolina State Bar

A.0501. Annual meetings.
A.0502. Special meetings.
A.0503. Notice of meetings.
A.0504. Quorum.
A.0505. Parliamentary rules.

Section .0600. Meetings of the Council

A.0601. Regular meetings.
A.0602. Special meetings.
A.0603. Notice of called special meetings.
A.0604. Quorum at meeting of council.

Section .0700. Standing Committees of the Council

A.0701. Standing committees and boards.

Section .0800. Election and Appointment of State Bar Councilors

A.0801. Purpose.
A.0802. Election — When held; Notice; Nominations.

Section
A.0803. Same — Voting procedures.
A.0804. Procedures Governing Elections by Mail.
A.0805. Vacancies.
A.0806. By-laws providing for geographical rotation or division of representation.

Section .0900. Organization of the Judicial District Bars

A.0901. Bylaws.
A.0902. Annual Membership Fee.
A.0903. Fiscal Period.

Section .1000. Model Bylaws for Use by Judicial District Bars

A.1001. Name.
A.1002. Authority and purpose.
A.1003. Membership.
A.1004. Officers.
A.1005. Councilor.
A.1006. Annual membership fee.
A.1007. Meetings.
A.1008. District bar finances.
A.1009. Prohibited activities.
A.1010. Committees.
A.1011. Board of directors or executive committee.
A.1012. Amendment of the bylaws.
A.1013. Selection of nominees for district court judge.

Section .1100. Office of the North Carolina State Bar

A.1101. Office.

Section .1200. Filing Papers with and Serving the North Carolina State Bar

A.1201. When papers are filed under these rules and regulations.

Section .1300. Seal

A.1301. Form and custody of seal.

Section .1400. Rulemaking Procedures

A.1401. Publication for Comment.
A.1402. Review by the Executive Committee.
A.1403. Action by the Council and Review by the North Carolina Supreme Court.

Subchapter 1B. Discipline and Disability Rules

Section .0100. Discipline and Disability of Attorneys

B.0101. General provisions.
B.0102. Procedure for discipline.
B.0103. Definitions.
B.0104. State bar council: Powers and duties in discipline and disability matters.

Section
B.0105. Chairperson of the Grievance Committee: Powers and duties.
B.0106. Grievance committee — Powers and duties.
B.0107. Counsel: Powers and duties.
B.0108. Chairperson of the hearing commission: Powers and duties.
B.0109. Hearing committee: Powers and duties.
B.0110. Secretary: Powers and duties in discipline and disability matters.
B.0111. Grievances: Form and filing.
B.0112. Investigations: Initial determination.
B.0113. Proceedings before the Grievance Committee.
B.0114. Formal hearing.
B.0115. Effect of a finding of guilt in any criminal case.
B.0116. Reciprocal discipline & disability proceedings.
B.0117. Surrender of license while under investigation.
B.0118. Disability hearings.
B.0119. Enforcement of powers.
B.0120. Notice to member of action and dismissal.
B.0121. Notice to complainant.
B.0122. Appointment of counsel to protect clients' interests when attorney disappears, dies, or is transferred to disability inactive status.
B.0123. Imposition of discipline; Findings of incapacity or disability; Notice to courts.
B.0124. Obligations of disbarred or suspended attorneys.
B.0125. Reinstatement.
B.0126. Address of record.
B.0127. Disqualification due to interest.
B.0128. Trust accounts; Audit.
B.0129. Confidentiality.
B.0130. Disciplinary amnesty in illicit drug use cases.

Section .0200. Rules Governing Judicial District Grievance Committees

B.0201. Organization of judicial district grievance committees.
B.0202. Jurisdiction & authority of district grievance committees.
B.0203. Meetings of the district grievance committees.
B.0204. Procedure upon institution of a grievance.
B.0205. Record keeping.
B.0206. Miscellaneous.
B.0207. Conflicts of interest.
B.0208. Letter to complainant where local grievance alleges fee dispute only.
B.0209. Letter to complainant where local grievance alleges fee dispute and other violations.
B.0210. Letter to complainant/respondent where district committee recommends finding of no probable cause.
B.0211. Letter to respondent where district committee recommends finding of probable cause.
Section
B.0212. Letter to complainant where district committee recommends finding of probable cause.
B.0213. Letter to complainant acknowledging grievance.
B.0214. Letter to investigating attorney assigning grievance.
B.0215. Letter to complainant from investigating attorney.
B.0216. Letter of notice to respondent attorney.
B.0217. Letter transmitting completed file to North Carolina State Bar.

Subchapter 1C. Rules Governing the Board of Law Examiners and the Training of Law Students

Section .0100. Board of Law Examiners

C.0101. Election.
C.0102. Examination of applicants for license.
C.0103. Admission to practice.
C.0104. Approval of rules and regulations of Board of Law Examiners.
C.0105. Approval of Law Schools.

Section .0200. Rules Governing Practical Training of Law Students

C.0201. Purpose.
C.0202. Definitions.
C.0203. Eligibility.
C.0204. Certification as Legal Intern.
C.0205. Supervision.
C.0206. Activities.
C.0207. Use of student's name.

Subchapter 1D. Rules of the Standing Committees of the North Carolina State Bar

Section .0100. Procedures for Ruling on Questions of Legal Ethics

D.0101. Definitions.
D.0102. General provisions.
D.0103. Informal Ethics Advisories and Ethics advisories.
D.0104. Formal ethics opinions and ethics decisions.

Section .0200. Procedures for the Authorized Practice Committee

D.0201. General provisions.
D.0202. Procedure.
D.0203. Definitions.
D.0204. State Bar Council — Powers and duties.
D.0205. Chairperson of the Authorized Practice Committee — Powers and duties.
D.0206. Authorized Practice Committee — Powers and duties.
D.0207. Counsel — Powers and duties.
D.0208. Suing for injunctive relief.

Section .0300. Disaster Response Plan

D.0301. The disaster response team.
D.0302. General policy and objectives.

Section
D.0303. Report on results.

Section .0400. Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases Repealed

Section .0500. Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases Repealed

Section .0600. Rules Governing the Lawyer Assistance Program

D.0601. Purpose.
D.0602. Authority.
D.0603. Operational responsibility.
D.0604. Size of board.
D.0605. Appointment of members; When; Removal.
D.0606. Term of office and succession.
D.0607. Appointment of chairperson.
D.0608. Appointment of vice-chairperson.
D.0609. Source of funds.
D.0610. Meetings.
D.0611. Annual report.
D.0612. Powers and duties of the board.
D.0613. Confidentiality.
D.0614. Reserved.
D.0615. Regional chapters.
D.0616. Suspension for impairment, reinstatement.
D.0617. Consensual suspension.
D.0618. Agents of the State Bar.
D.0619. Judicial Committee.
D.0620. Rehabilitation contracts for lawyers impaired by substance abuse.
D.0621. Evaluations for substance abuse, alcoholism and/or other chemical addictions.
D.0622. Grounds for compelling an evaluation.
D.0623. Failure to comply with an order compelling an evaluation.

Section .0700. Procedures for Fee Dispute Resolution

D.0701. Purpose and implementation.
D.0702. Jurisdiction.
D.0703. Coordinator of fee dispute resolution.
D.0704. Reserved.
D.0705. Selection of mediators.
D.0706. Processing requests for fee dispute resolution.
D.0707. Mediation proceedings.
D.0708. Finalizing the agreement.
D.0709. Record keeping.
D.0710. District bar fee dispute resolution.

Section .0800. Reserved

Section .0900. Procedures for the Administrative Committee

D.0901. Transfer to inactive status.
D.0902. Reinstatement from inactive status.
D.0903. Suspension for failure to fulfill obligations of membership.
D.0904. Compliance after suspension for failure to pay fees or assessed costs, or to file certificate of insurance coverage or *pro hac vice* registration statement

Section
D.0905. Pro Bono Practice by Out of State Lawyers.

Section .1000. Rules Governing Reinstatement Hearings Before the Administrative Committee

D.1001. Reinstatement hearings.
D.1002. Review and order of council.
D.1003. Referral from the board.
D.1004. Time of hearing.
D.1005. Notice of hearing.
D.1006. The hearing.
D.1007. The panel.
D.1008. Suspension hearing: Process for determining a matter involving the question of suspension.
D.1009. Reinstatement hearing: Process for determining a matter involving the question of reinstatement.
D.1010. Report by the panel to the committee.
D.1011. Report by the committee to the council.

Section .1100. Reserved

Section .1200. Reserved

Section .1300. Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

D.1301. Purpose.
D.1302. Jurisdiction: Authority.
D.1303. Operational responsibility.
D.1304. Size of board.
D.1305. Lay participation.
D.1306. Appointment of members; When; Removal.
D.1307. Term of office.
D.1308. Staggered terms.
D.1309. Succession.
D.1310. Appointment of chairperson.
D.1311. Appointment of vice-chairperson.
D.1312. Source of funds.
D.1313. Fiscal responsibility.
D.1314. Meetings.
D.1315. Annual report.
D.1316. IOLTA Accounts.
D.1317. Confidentiality.
D.1318. Certification.
D.1319. Noncompliance.
D.1320. Severability.

Section .1400. Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar

D.1401. Purpose; Definitions.
D.1402. Jurisdiction: Authority.
D.1403. Operational responsibility.
D.1404. Size of board.
D.1405. Lay participation.
D.1406. Appointment of Members; When; Removal.
D.1407. Term of office.
D.1408. Staggered terms.
D.1409. Succession.
D.1410. Appointment of chairperson.
D.1411. Appointment of vice-chairperson.
D.1412. Source of funds.
D.1413. Fiscal responsibility.
D.1414. Meetings.
D.1415. Annual report.

Section
D.1416. Appropriate uses of the client security fund.
D.1417. Applications for reimbursement.
D.1418. Processing applications.
D.1419. Subrogation for reimbursement.
D.1420. Authority reserved by the Supreme Court.

Section .1500. Rules Governing the Administration of the Continuing Legal Education Program

D.1501. Scope, purpose and definitions.
D.1502. Jurisdiction: Authority.
D.1503. Operational responsibility.
D.1504. Size of board.
D.1505. Lay participation.
D.1506. Appointment of members; When; Removal.
D.1507. Term of office.
D.1508. Staggered terms.
D.1509. Succession.
D.1510. Appointment of chairperson.
D.1511. Appointment of vice-chairperson.
D.1512. Source of funds.
D.1513. Fiscal responsibility.
D.1514. Meetings.
D.1515. Annual report.
D.1516. Powers and duties of the board.
D.1517. Exemptions.
D.1518. Continuing legal education program.
D.1519. Accreditation standards.
D.1520. Accreditation of sponsors and programs.
D.1521. Credit hours.
D.1522. Annual report and Compliance Period.
D.1523. Noncompliance.
D.1524. Reinstatement.
D.1525. Reserved.
D.1526. Effective date.
D.1527. Regulations.

Section .1600. Regulations Governing the Administration of the Continuing Legal Education Program

D.1601. General Requirements for Course Approval.
D.1602. General course requirements.
D.1603. Accredited sponsors.
D.1604. Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs.
D.1605. Computation of credit.
D.1606. Fees.
D.1607. Special cases and exemptions.
D.1608. General compliance procedures.
D.1609. Noncompliance procedures.
D.1610. Authority for appeals.
D.1611. Accreditation of Computer-Based CLE.

Section .1700. The Plan of Legal Specialization

D.1701. Purpose.
D.1702. Jurisdiction: Authority.
D.1703. Operational responsibility.
D.1704. Size of board.
D.1705. Lay participation.
D.1706. Appointment of members; When; Removal.
D.1707. Term of office.
D.1708. Staggered terms.
D.1709. Succession.
Section
D.1710. Appointment of chairperson.
D.1711. Appointment of vice-chairperson.
D.1712. Source of funds.
D.1713. Fiscal responsibility.
D.1714. Meetings.
D.1715. Annual report.
D.1716. Powers and duties of the board.
D.1717. Retained jurisdiction of the council.
D.1718. Privileges conferred and limitations imposed.
D.1719. Specialty committees.
D.1720. Minimum standards for certification of specialists.
D.1721. Minimum standards for continued certification of specialists.
D.1722. Establishment of additional standards.
D.1723. Revocation or suspension of certification as a specialist.
D.1724. Right to hearing and appeal to council.
D.1725. Areas of specialty.
D.1726. Certification standards of the specialties of bankruptcy law, estate planning and probate law, real property law, family law, and criminal law.

Section .1800. Hearing and Appeal Rules of the Board of Legal Specialization

D.1801. Reconsideration of applications, failure of written examinations, and appeals.
D.1802. Denial, Revocation or Suspension of continued certification as a specialist.
D.1803. Reserved.
D.1804. Appeal to the council.
D.1805. Judicial review.
D.1806. Additional rules pertaining to hearings and appeals.

Section .1900. Rules Concerning the Accreditation of Continuing Legal Education for the Purposes of the Board of Legal Specialization

D.1901. General provisions.
D.1902. Definitions.
D.1903. Accreditation standards for lecture-type CLE activities.
D.1904. Computation of hours of instruction.
D.1905. Alternatives to lecture-type CLE course instruction.
D.1906. Accreditation of courses.
D.1907. Accreditation of sponsor.
D.1908. Showing by applicants.

Section .2000. Rules of the Board of Legal Specialization for Approval of Independent Certifying Organizations

D.2001. Policy statement.
D.2002. General procedure.
D.2003. Factors to be considered in reviewing certifying organizations.
D.2004. Standards for approval of certifying organizations.
D.2005. Application procedure.
D.2006. Effect of approval of a certifying organization by the board of legal specialization.

Section .2100. Certification Standards for the Real Property Law Specialty

Section
D.2101. Establishment of specialty field.
D.2102. Definition of specialty.
D.2103. Recognition as a specialist in real property law.
D.2104. Applicability of provisions of the North Carolina plan of legal specialization.
D.2105. Standards for certification as a specialist in real property law.
D.2106. Standards for continued certification as a specialist.
D.2107. Applicability of other requirements.

Section .2200. Certification Standards for the Bankruptcy Law Specialty

D.2201. Establishment of specialty field.
D.2202. Definition of specialty.
D.2203. Recognition as a specialist in bankruptcy law.
D.2204. Applicability of provisions of the North Carolina plan of legal specialization.
D.2205. Standards for certification as a specialist in bankruptcy law.
D.2206. Standards for continued certification as a specialist.
D.2207. Applicability of other requirements.

Section .2300. Certification Standards for the Estate Planning and Probate Law Specialty

D.2301. Establishment of specialty field.
D.2302. Definition of specialty.
D.2303. Recognition as a specialist in estate planning and probate law.
D.2304. Applicability of provisions of the North Carolina plan of legal specialization.
D.2305. Standards for certification as a specialist in estate planning and probate law.
D.2306. Standards for continued certification as a specialist.
D.2307. Applicability of other requirements.

Section .2400. Certification Standards for the Family Law Specialty

D.2401. Establishment of specialty field.
D.2402. Definition of specialty.
D.2403. Recognition as a specialist in family law.
D.2404. Applicability of provisions of the North Carolina plan of legal specialization.
D.2405. Standards for certification as a specialist in family law.
D.2406. Standards for continued certification as a specialist.
D.2407. Applicability of other requirements.

Section .2500. Certification Standards for the Criminal Law Specialty

D.2501. Establishment of specialty field.
D.2502. Definition of specialty.
D.2503. Recognition as a specialist in criminal law.
D.2504. Applicability of provisions of the North Carolina plan of legal specialization.
D.2505. Standards for certification as a specialist.
D.2506. Standards for continued certification as a specialist.
D.2507. Applicability of other requirements.

Section .2600. Certification Standards for the Immigration Law Specialty

Section
D.2601. Establishment of specialty field.
D.2602. Definition of specialty.
D.2603. Recognition as a specialist in immigration law.
D.2604. Applicability of provisions of the North Carolina Plan of Legal Specialization.
D.2605. Standards for certification as a specialist in immigration law.
D.2606. Standards for Continued Certification as a Specialist.
D.2607. Applicability of Other Requirements.

Section .2700. Certification Standards for the Workers' Compensation Law Specialty

D.2701. Establishment of specialty field.
D.2702. Definition of specialty.
D.2703. Recognition as a specialist in workers' compensation law.
D.2704. Applicability of provisions of the North Carolina Plan of Legal Specialization.
D.2705. Standards for certification as a specialist in workers' compensation law.
D.2706. Standards for continued certification as a specialist.
D.2707. Applicability of other requirements.

Section .2800. Certification Standards for the Social Security Disability Law Specialty

D.2801. Establishment of specialty field.
D.2802. Definition of Specialty.
D.2803. Recognition as a Specialist in Social Security Disability Law.
D.2804. Applicability of provisions of the North Carolina Plan of Legal Specialization.
D.2805. Standards for certification as a Specialist in Social Security Disability Law.
D.2806. Standards for continued certification as a specialist.
D.2807. Applicability of other requirements.

Subchapter 1E. Regulations for Organizations Practicing Law

Section .0100. Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law

E.0101. Authority, scope, and definitions.
E.0102. Name of professional corporation or professional limited liability company.
E.0103. Registration with the North Carolina State Bar.
E.0104. Management and financial matters.
E.0105. General and administrative provisions.
E.0106. Forms.

Section .0200. Registration of Interstate and International Law Firms

E.0201. Registration requirement.
E.0202. Conditions of registration.
E.0203. Registration fee.
E.0204. Certificate of registration.
E.0205. Effect of registration.
E.0206. Non-renewal of registration.

Section .0300. Rules Concerning Prepaid Legal Services Plans

Section
E.0301. Bar may not approve or disapprove plans.
E.0302. Registration requirement.
E.0303. Definition of prepaid plan.
E.0304. Registration procedures.
E.0305. Registration.
E.0306. Requirement to file amendments.
E.0307. Annual registration.
E.0308. Registration fee.
E.0309. Index of registered plans.
E.0310. Advertising of state bar approval prohibited.
E.0311. State Bar jurisdiction.
E.0312. Revocation of registration.
E.0313. Hearing before the authorized practice committee.
E.0314. Action by the Council.

Section .0400. Rules for Arbitration of Internal Law Firm Disputes

E.0401. Purpose.
E.0402. Submission to arbitration.
E.0403. Jurisdiction.
E.0404. Administration.
E.0405. Uniform Arbitration Act.
E.0406. List of arbitrators.
E.0407. Selection of arbitrators.
E.0408. Fees and expenses.
E.0409. Confidentiality.
E.0410. Authority to adopt amendments and regulations.

Subchapter 1F. Foreign Legal Consultants

Section .0100. Foreign Legal Consultants

F.0101. Applications.
F.0102. Application form.
F.0103. Requirements for applicants.
F.0104. Burden of proving moral character and general fitness.
F.0105. Failure to disclose.
F.0106. Investigation by counsel.
F.0107. Recommendation of Administrative Committee.
F.0108. Appeal from committee decision.
F.0109. Hearing procedure.
F.0110. Review and order of council.
F.0111. Application fees; Refunds; Returns checks.

Section
F.0112. Permanent record.
F.0113. Denial; Re-application.

Subchapter 1G. The Plan for Certification of Paralegals

Section .0100. The Plan for Certification of Paralegals

G.0101. Purpose.
G.0102. Jurisdiction; Authority.
G.0103. Operational Responsibility.
G.0104. Size and Composition of Board.
G.0105. Appointment of Members; When; Removal.
G.0106. Term of Office.
G.0107. Staggered Terms.
G.0108. Succession.
G.0109. Appointment of Chairperson.
G.0110. Appointment of Vice-Chairperson.
G.0111. Source of Funds.
G.0112. Fiscal Responsibility.
G.0113. Meetings.
G.0114. Annual Report.
G.0115. Powers and Duties of the Board.
G.0116. Retained Jurisdiction of the Council.
G.0117. Privileges Conferred and Limitations Imposed.
G.0118. Certification Committee.
G.0119. Standards for Certification of Paralegals.
G.0120. Standards for Continued Certification of Paralegals.
G.0121. Lapse, Suspension or Revocation of Certification.
G.0122. Right to Review and Appeal to Council.

Section .0200. Rules Governing Continuing Paralegal Education.

G.0201. Continuing Paralegal Education (CPE).
G.0202. Accreditation Standards.
G.0203. General Course Approval.
G.0204. Fees.
G.0205. Computation of Hours of Instruction.

Subchapter 1H. Registration of Attorneys Appearing

Section .0100. Registration Procedure

H.0100. Registration.

Index follows Rules.

Editor's note. — See North Carolina State Bar website at www.ncbar.com.

SUBCHAPTER 1A. ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0100. FUNCTIONS

A.0101. Purpose.

The North Carolina State Bar shall foster the following purposes, namely:

(1) to cultivate and advance the science of jurisprudence;
(2) to promote reform in the law and in judicial procedure;
(3) to facilitate the administration of justice;

(4) to uphold and elevate the standards of honor, integrity and courtesy in the legal profession;

(5) to encourage higher and better education for membership in the profession;

(6) to promote a spirit of cordiality and unity among the members of the Bar;

(7) to perform all duties imposed by law.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

Editor's note. — For North Carolina court system website, see www.aoc.state.nc.us. For the North Carolina State Bar website, see www.ncbar.com.

A.0102. Division of work.

(a) To facilitate the work for the accomplishment of the above enumerated purposes, the council may, from time to time, classify such work under appropriate sections and committees, either standing or special, of the North Carolina State Bar.

(b) The council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee.

(c) Any committee may, at the discretion of the appointing or electing authority, be composed of council members or members of the North Carolina State Bar who are not members of the council or of lay persons or of any combination.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

A.0103. Cooperation with local bar association committees.

The sections and committees so appointed may secure the cooperation of like sections and committees of the North Carolina Bar Association and all local bar associations of the state.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0104. Organization of local bar associations.

The council shall encourage and foster the organization of local bar associations.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0105. Annual program.

The council shall provide a suitable program for each annual meeting of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0106. Reports made to annual meeting.

The annual reports of the several committees and boards shall be delivered to the secretary of the North Carolina State Bar before the annual meeting.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; amendment effective February 3, 2000.

SECTION .0200. MEMBERSHIP — ANNUAL MEMBERSHIP FEES

A.0201. Classes of membership.

(a) *Two classes of membership.*

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

(b) *Active members.*

The active members shall be all persons who have obtained a license entitling them to practice law in North Carolina, including persons serving as a justice or judge of any state or federal court in this state, unless classified as an inactive member by the council. All active members must pay the annual membership fee.

(c) *Inactive members.*

(1) The inactive members shall include:

(A) all persons who have been admitted to the practice of law in North Carolina but who the council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law, and

(B) those persons granted emeritus pro bono status by the council and allowed to represent indigent clients on a pro bono basis under the supervision of active members working for nonprofit corporations organized pursuant to Chapter 55A of the General Statutes of North Carolina for the sole purpose of rendering legal services to indigents.

(2) Inactive members of the North Carolina State Bar may not practice law, except as provided in this rule for persons granted emeritus pro bono status, and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(A) *Retired / nonpracticing.*

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(B) *Disability inactive status.*

This subcategory includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance or competence of an attorney, as determined by the courts, the council or the Disciplinary Hearing Commission.

(C) *Disciplinary suspensions / disbarments.*

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the council or the Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

(D) *Administrative suspensions.*

This subcategory includes those members who have been suspended from the practice of law, pursuant to the procedure set forth in Rule .0903 of subchapter 1D, for failure to fulfill the obligations of membership.

(E) *Emeritus pro bono status.*

This subcategory includes those members who are permitted by the council to represent indigent persons under the supervision of active members who are employed by nonprofit corporations duly authorized to provide legal services to such persons. This status may be withdrawn by the council for good cause shown pursuant to the procedure set forth in Rule .0903 of subchapter 1D.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23, Readopted Effective December 8, 1994; Amended March 6, 2008.

A.0202. Register of members.

(a) *Initial registration with State Bar.*

Every member shall register by completing and returning to the North Carolina State Bar a signed registration card containing the following information:

(1) name and address;
(2) date;
(3) date passed examination to practice in North Carolina;
(4) date and place sworn in as an attorney in North Carolina;
(5) date and place of birth;

(6) list of all other jurisdictions where the member has been admitted to the practice of law and date of admission;

(7) whether suspended or disbarred from the practice of law in any jurisdiction or court, and if so, when and where, and when readmitted.

(b) *Membership records of State Bar.*

The secretary shall keep a permanent register for the enrollment of members of the North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the council may from time to time require.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994.

A.0203. Annual membership fees; When due.

(a) *Amount and due date.*

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid before July 1 of each year.

(b) *Late fee.*

Any attorney who fails to pay the entire annual membership fee in the amount provided by law and the annual Client Security Fund assessment approved by the N.C. Supreme Court before July 1 of each year shall also pay a late fee of $30.00.

(c) *Waiver of all or part of dues.*

No part of the annual membership fee or Client Security Fund assessment shall be prorated or apportioned to fractional parts of the year, and no part of the membership fee or Client Security Fund assessment shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be liable for dues or the Client Security Fund assessment during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues and Client Security Fund assessment for any year in which the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be liable for the membership fee or the Client Security Fund assessment for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994, Amended July 21, 1995, Amended effective December 7, 1995.

A.0204. Certificate of insurance coverage.

(a) Before July 1 of each year, each active member shall submit a certificate to the secretary of the North Carolina State Bar on a form provided by the secretary stating whether the member is engaged in the private practice of law and, if so, whether the member is covered by a policy of professional liability insurance issued by an insurer legally permitted to provide coverage in North Carolina. The certificate may be submitted in electronic form or in an original document. If, after having most recently submitted a certificate of insurance coverage asserting that the member is covered by a policy of professional liability insurance coverage, a member for any reason ceases to be insured, the member shall immediately advise the North Carolina State Bar of the changed circumstances in writing.

(b) Any active member who fails to submit the certificate of insurance coverage required above in a timely fashion may be suspended from active membership in the North Carolina State Bar in accordance with the procedures set forth in Rule .0903 of subchapter D.

(c) Any member failing to submit a certificate of insurance coverage in a timely fashion shall pay a late fee of $30 to defray the administrative cost of enforcing compliance with this rule; provided, however, that no late fee associated with such failure shall be charged if the member is also liable for a late fee in regard to failure to pay the annual membership fee or Client Security Fund assessment for the same year in a timely fashion.

(d) Notwithstanding the foregoing:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be required to file a certificate of insurance coverage during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, in a legal or nonlegal capacity, shall not be required to file a certificate of insurance coverage for any year in which the member is on active duty in military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be required to file a certificate of insurance coverage for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

History Note: Statutory Authority G.S. 84-23; Adopted October 1, 2003.

SECTION .0300. ELECTION AND SUCCESSION OF OFFICERS

A.0301. Officers.

(a) The officers of the North Carolina State Bar and the council shall consist of a president, a president-elect, a vice-president, and an immediate past president. These officers shall be deemed members of the council in all respects.

(b) There shall be a secretary who shall also have the title of executive director. The secretary shall not be a member of the council.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

A.0302. Eligibility for office.

The president, president-elect, and vice-president need not be members of the council at the time of their election.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

A.0303. Term of office.

(a) The term of each office shall be one year beginning at the conclusion of the annual meeting. Each officer will hold office until a successor is elected and qualified.

(b) The president shall assume the office of immediate past president at the conclusion of the term as president. The president-elect shall assume the office of president at the conclusion of the annual meeting following the term as president-elect.

History Note: Statutory Authority G.S. 84-21; G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

A.0304. Elections.

(a) A president-elect, vice-president and secretary shall be elected annually by the council at an election to take place at the council meeting held during the annual meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

(b) If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

A.0305. Nominating committee.

(a) There shall be a Nominating Committee appointed to nominate one or more candidates for each of the offices. The Nominating Committee shall be composed of the immediate past president and the five most recent living past presidents who are in good standing with the North Carolina State Bar. The Nominating Committee shall meet prior to the council meeting at which the election of officers will be held. The Nominating Committee shall submit its nominations in writing to the secretary at least 45 days prior to the election, and the secretary shall transmit the report by mail to the members of the council at least 30 days prior to the election.

(b) At the council meeting at which elections are held, the floor shall be open for additional nominations for each office at the time of the election.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

A.0306. Vacancies and succession.

(a) If the office of president becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the president-elect shall become president for the unexpired term and the next term. If the office of the president-elect becomes vacant because the president-elect must assume the presidency under the foregoing provision of this section, then the vice-president shall become the president-elect for the unexpired term and at the end of the unexpired term to which the vice-president ascended the office will become vacant and an election held in accordance with Rule .0304 of this subchapter; if the office of president-elect becomes vacant for any other reason, the vice-president shall become the president-elect for the unexpired term following which said officer shall assume the presidency as if elected president-elect. If the office of vice-president or secretary becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of president or president-elect becomes vacant without an available successor under these provisions then the office will be filled by election by the council at a special meeting of the council with such notice as required by Rule .0602 of this subchapter or at the next regularly scheduled meeting of the council.

(b) If the president is absent or unable to preside at any meeting of the North Carolina State Bar or the council, the president-elect shall preside, or if the president-elect is unavailable, then the vice-president shall preside. If none are available, then the council shall elect a member to preside during the meeting.

(c) If the president is absent from the state or for any reason is temporarily unable to perform the duties of office, the president-elect shall assume those duties until the president returns or becomes able to resume the duties. If the president-elect is unable to perform the duties, then the council may select one of its members to assume the duties for the period of inability.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0307. Removal from office.

The council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the council to have a disability or to have engaged in misconduct including misconduct not related to the office.

History Note: Statutory Authority G.S. 84-21; 84-23, Readopted effective December 8, 1994; amendment effective February 3, 2000.

SECTION .0400. DUTIES OF OFFICERS

A.0401. Compensation of officers.

The secretary shall receive a salary fixed by the council. All other officers shall serve without compensation except the per diem allowances fixed by statute for members of the council.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

A.0402. President.

The president shall preside over meetings of the North Carolina State Bar and the council. The president shall sign all resolutions and orders of the council in the capacity of president. The president shall execute, along with the secretary, all contracts ordered by the council. The president will perform all other duties prescribed for the office by the council.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

A.0403. President-elect, vice-president, and immediate past president.

The president-elect, vice-president, and immediate past president will perform all duties prescribed for the office by the council.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

A.0404. Secretary.

The secretary shall attend all meetings of the council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. The secretary shall, with the president, president-elect or vice-president, execute all contracts ordered by the council. He or she shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the council or certified as emanating from the council. The secretary shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the council; he or she shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the council, the secretary shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31 of each year and the secretary shall publish same in the annual reports as referred to above. He or she shall perform such other duties as may be imposed upon him or her, and shall give bond for the faithful performance of his or her duties in an amount to be fixed by the council with surety to be approved by the council.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .0500. MEETINGS OF THE NORTH CAROLINA STATE BAR

A.0501. Annual meetings.

The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina, after such notice (but not less than 30 days) as the council may determine.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

A.0502. Special meetings.

(a) Special meetings of the North Carolina State Bar may be called upon 30 days' notice, as follows:

(1) by the secretary, upon direction of the council.

(2) by the secretary, upon the call addressed to the council, of not less than 25% of the active members of the North Carolina State Bar.

(b) At special meetings no subjects shall be dealt with other than those specified in the notice.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33, Readopted Effective December 8, 1994.

A.0503. Notice of meetings.

Notice of all meetings shall be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33, Readopted Effective December 8, 1994.

A.0504. Quorum.

At all annual and special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum, and there shall be no voting by proxy.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33, Readopted Effective December 8, 1994.

A.0505. Parliamentary rules.

Proceedings at any meeting of the North Carolina State Bar shall be governed by *Roberts' Rules of Order*.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .0600. MEETINGS OF THE COUNCIL

A.0601. Regular meetings.

Regular meetings of the council shall be held in each of the months of January, April, and July, at such time and place after such notice (but not less than 30 days) as the council may determine; and on the day before the annual meeting of the North Carolina State Bar, at the location of said annual meeting. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended Effective June 1, 1995.

A.0602. Special meetings.

The president in his or her discretion may call special meetings of the council. Upon written request of eight councilors, filed with the secretary requesting the president to call a special meeting of the council, the secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than 10 days from the date of such call.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0603. Notice of called special meetings.

Notice of called special meetings shall be signed by the secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each councilor unless waived by him or her. A written waiver signed by any councilor shall be equivalent to notice as herein provided. Notice to councilors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said councilors at his or her law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0604. Quorum at meeting of council.

At meetings of the council the presence of 10 councilors shall constitute a quorum.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .0700. STANDING COMMITTEES OF THE COUNCIL

A.0701. Standing committees and boards.

(a) *Standing Committees.* Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) *Executive Committee.* It shall be the duty of the Executive Committee to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

(2) *Ethics Committee.* It shall be the duty of the Ethics Committee to study the rules of professional responsibility currently in effect; to make recommendations to the council for such amendment to the rules as the committee deems necessary or appropriate; to study and respond to questions that arise concerning the meaning and application of the rules of professional conduct; to issue opinions in response to questions of legal ethics in accordance with the provisions of Section .0100 of Subchapter 1D of these rules; to consider issues concerning the regulation of lawyers' trust accounts; and to perform such other duties and consider such other matters as the council or the president may designate.

(3) *Grievance Committee.* It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilites set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in panels as assigned by the president. Each panel shall have at least ten members. Two members of each panel shall be non-lawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each panel shall be councilors of the North Carolina State Bar. A quorum of a panel shall be five members serving at a particular time. Each panel shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances and other matters referred to it by the chairperson of the Grievance Committee. Each panel member shall be furnished a brief description of all matters referred to other panels (and such other available information as he or she

may request) and be given a reasonable opportunity to provide comments to such other panels. Each panel's decision respecting the grievances and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a panel decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another panel. The president shall designate a vice-chairperson to preside over, and oversee the functions of, each panel. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) *Authorized Practice Committee.* It shall be the duty of the Authorized Practice Committee to respond to or investigate inquiries and complaints about conduct that may constitute the unauthorized practice of law in accordance with the provisions of Section .0200 of Subchapter 1D of these rules; to study and advise the council on the appropriate and lawful use and regulation of legal assistants, paralegals and other lay person in connection with the provision of law-related services; to the study and advise the council on the regulation of professional organizations; and to perform such other duties and consider such other matters as the council or the president may designate.

(5) *Administrative Committee.* It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, publications, and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the the council or the president may designate. The committee may establish a Publications Board to oversee the regular publications of the State Bar.

(6) *Justice System Committee.* It shall be the duty of the Justice System Committee to assist the council in identifying and advancing the appropriate role of the State Bar in connection with initiatives, programs, legislation and other actions intended to improve access to justice, simplify the law and judicial procedures, and enhance the justice system and the public's confidence in that system; to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of the lawyers of this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(7) *Attorney Client Assistance Committee.* It shall be the duty of the Attorney Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate.

(8) *Legal Assistance for Military Personnel (LAMP) Committee.* It shall be the duty of the LAMP Committee to serve as liaison for lawyers in the military service in this State; to improve legal services to military personnel and dependents stationed in this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(9) *Finance and Audit Committee.* It shall be the duty of the Finance and Audit Committee to superintend annually the preparation of the State Bar's operational budget and to make recommendations to the Executive Committee concerning that budget and the budgets for the boards listed in subsection (b) below; to make recommendations to the Executive Committee regarding the State Bar's financial policies; to examine the financial records of the State Bar at each regular meeting of the council and report its findings to the Executive Committee; to recommend to the Executive Committee annually the retention of an independent auditor; to direct the work of the independent auditor in accordance with the policies and procedures adopted by the council and the state auditor; and to review the results of the annual audit and make recommendations concerning the audit to the Executive Committee.

(b) *Boards.* The council of the State Bar shall make appointments to the following boards upon the recommendation of the Executive Committee. The boards are constituents of the North Carolina State Bar and, as standing committees of the State Bar, are subject to the authority of the council.

(1) *Interest on Lawyers' Trust Accounts (IOLTA) Board of Trustees.* The IOLTA Board shall be constituted in accordance with and shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts set forth in Section .1300 of Subchapter 1D of these rules.

(2) *Board of Legal Specialization.* The Board of Legal Specialization shall be constituted in accordance with and shall carry out the provisions of the Plan of Legal Specialization set forth in Section .1700 of Subchapter 1D of these rules.

(3) *Client Security Fund Board of Trustees.* The Client Security Fund Board of Trustees shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar set forth in Section .1400 of Subchapter 1D of these rules.

(4) *Board of Continuing Legal Education (CLE).* The Board of Continuing Legal Education shall be constituted in accordance with and shall carry out the provisions of the Continuing Legal Education Rules and Regulations of the North Carolina State Bar set forth in Sections .1500 and .1600 of Subchapter 1D of these rules.

(5) *Lawyer Assistance Program Board.* The Lawyer Assistance Program Board shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Lawyer Assistance Program of the North Carolina State Bar set forth in Section .0600 of Subchapter 1D of these rules.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective June 12, 1996; Amended effective February 3, 2000; Amended effective October 6, 2004; Amended effective November 16, 2006; Amended effective March 8, 2007.

Cross References. — As to preservation of identity of clients' funds and property, record keeping and accounting therefor, and interest on lawyers' trust accounts, see Rules 10.1 to 10.3 of the Rules of Professional Conduct.

CASE NOTES

Constitutionality. — The order of the North Carolina Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the Fund is an essential corollary to the Court's function, was required for the proper administration of justice, and did not violate the North Carolina Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

The availability of prompt postsuspension review, along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), aff'd, 341 N.C. 196, 458 S.E.2d 921 (1995).

The procedure contained in this rule provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension and this procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution. In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), aff'd 341 N.C. 196, 458 S.E.2d 921 (1995).

SECTION .0800. ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

A.0801. Purpose.

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of councilors.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

A.0802. Election — When held; Notice; Nominations.

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held at a meeting during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States mail, postage prepaid, at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, mail these notices.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, and advise that all elections must be by a majority of the votes cast. If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself. In judicial districts that permit elections by mail, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

History Note: Statutory Authority G.S. 84-18;
G.S. 84-23, Readopted Effective December 8, 1994;
Amended November 5, 1999.

A.0803. Same — Voting procedures.

(a) All nominations made either before or at the meeting shall be voted on by secret ballot.

(b) Cumulative voting shall not be permitted.

(c) Nominees receiving a majority of the votes cast shall be declared elected.

History Note: Statutory Authority G.S. 84-18;
G.S. 84-23, Readopted Effective December 8, 1994;
Amended November 5, 1999.

A.0804. Procedures Governing Elections by Mail.

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by mail.

(c) In districts which permit elections by mail, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by mail.

(d) The judicial district bar shall mail a ballot to each active member of the judicial district bar at the member's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions and shall state when and where the ballot should be returned.

(e) Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The judicial district bar shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election, as well as how many ballots are returned.

(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted. Voting by computer or electronic mail will not be permitted.

History Note: Adopted November 5, 1999.

A.0805. Vacancies.

The unexpired term of any councilor whose office has become vacant because of resignation, death, or any cause other than the expiration of a term, shall be filled within 90 days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

History Note: Statutory Authority G.S. 84-18; 84-23, Readopted Effective December 8, 1994; Amended November 5, 1999.

A.0806. By-laws providing for geographical rotation or division of representation.

Nothing contained herein shall prohibit the district bar of any judicial district from adopting by-laws providing for the geographical rotation or division of its councilor representation.

History Note: Statutory Authority G.S. 84-18; 84-23, Readopted Effective December 8, 1994; Amended November 5, 1999.

SECTION .0900. ORGANIZATION OF THE JUDICIAL DISTRICT BARS

A.0901. Bylaws.

(a) Each judicial district bar shall adopt bylaws for its governance subject to the approval of the council.

(b) Each judicial district bar shall submit its current bylaws to the secretary of the North Carolina State Bar for review by the council on or before June 1, 1996.

(c) Pending review by the council, any bylaws submitted to the secretary on behalf of a judicial district bar or which already exist in the files of the secretary shall be deemed official and authoritative.

(d) All amendments to the bylaws of any judicial district bar must be filed with the secretary within 30 days of adoption and shall have no force and effect until approved by the council.

(e) The secretary shall maintain an official record for each judicial district bar containing bylaws which have bee approved by the council or for which approval is pending.

History Note: Adopted March 7, 1996.

Rule A.0902. Annual Membership Fee.

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. A784-18.1(b), the following procedures shall apply:

(a) *Notice to State Bar.* The judicial district bar shall notify the North Carolina State Bar of its election to assess an annual membership fee each year at least thirty days prior to mailing to its members the first invoice therefore, specifying the amount of the annual membership fee, the date after which payment will be delinquent, and the amount of any late fee for delinquent payment.

(b) *Accounting to State Bar.* No later than thirty days after the end of the judicial district bar's fiscal year, the judicial district bar shall provide the North Carolina State Bar with an accounting of the annual membership fees it collected during such judicial district bar's fiscal year.

(c) *Delinquency Date.* The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) *Late Fee.* Each judicial district bar may impose, but shall not be required, to impose a late fee of any amount not to exceed fifteen dollars ($15.00) for non-payment of the annual membership fee on or before the stated delinquency date.

(e) *Members Subject to Assessment.* Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) month or more, with the fiscal year of the lawyer's new judicial district bar.

(f) *Hardship Waivers.* A judicial district bar may not grant any waiver from the obligation to pay the judicial district bar's annual membership fee. A judicial district bar may waive the late fee upon a showing of good cause.

(g) *Reporting Delinquent Members to State Bar.* Twelve months after the date of the first invoice for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

History Note: Adopted December 20, 2000; Amended effective March 6, 2008.

A.0903. Fiscal Period.

To avoid conflict with the assessment of the membership fees for the North Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year.

History Note: Adopted December 20, 2000.

SECTION .1000. MODEL BYLAWS FOR USE BY JUDICIAL DISTRICT BARS

A.1001. Name.

The name of this District Bar shall be THE DISTRICT BAR OF THE ______________________ JUDICIAL DISTRICT, and shall be hereinafter referred to as the "District Bar."

History Note: Adopted March 7, 1996.

A.1002. Authority and purpose.

The District Bar is formed pursuant to the provisions of Chapter 84 of the North Carolina General Statutes to promote the purposes therein set forth and to comply with the duties and obligations therein or thereunder imposed upon the Bar of this judicial district.

History Note: Adopted March 7, 1996.

A.1003. Membership.

The members of the District Bar shall consist of two classes: active and inactive.

(a) *Active members.* The active members shall be all persons who, at the time of the adoption of these bylaws or any time thereafter

(1) are active members in good standing with the North Carolina State Bar and

(2) reside in the judicial district or

(3) practice in the judicial district and elect to belong to the District Bar as provided in G.S. 84-16.

(b) *Inactive members.* The inactive members shall be all persons, who, at the time of the adoption of these bylaws or at any time thereafter

(1) have been granted voluntary inactive status by the North Carolina State Bar and

(2) reside in the judicial district and

(3) elect to participate, but not vote or hold office, in the District Bar by giving written notice to the Secretary of the District Bar.

History Note: Adopted March 7, 1996.

A.1004. Officers.

The officers of the District Bar shall be a President, a Vice President, and Secretary and/or Treasurer who shall be selected and shall serve for the terms set out herein.

(a) *President.* The President serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws. The President for the following term shall be the then current Vice President. Thereafter, the duly elected Vice President shall automatically succeed to the office of the President for a term of one, two, or three years.

(b) *Vice president.* The Vice President serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws, at which time said Vice President shall succeed to the office of the President. Thereafter, the Vice President shall be elected at the annual meeting as hereinafter provided for a term of one, two, or three years.

(c) *Secretary and/or treasurer.* The Secretary and/or the Treasurer serving at the time these bylaws are effective shall each continue to serve in their respective offices until the expiration of the term of that office or until successors are appointed by the President (or be elected by the active members of the District Bar), whichever occurs later. In all other years, the Secretary and/or Treasurer shall be appointed by the President (or be elected by the active members of the District Bar) to serve for a term of one, two, or three years.

(d) *Election.* Before (or at) the annual meeting at which officers are to be elected, the Nominating Committee shall submit the names of its nominees for the office of Vice President to the Secretary. Nominations from the floor shall be permitted. If no candidate receives a majority of the votes cast, the candidate with the lowest number of votes shall be eliminated and a run-off election shall immediately be held among the remaining candidates. This procedure shall be repeated until a candidate receives a majority of the votes.[1]

(e) *Duties.* The duties of the officers shall be those usual and customary for such officers, including such duties as may be from time to time designated by resolution of the District Bar, the North Carolina State Bar Council or the laws of the State of North Carolina.

(f) *Vacancies.* If a vacancy in the office of the Vice President, Secretary- Treasurer occurs, the vacancy will be filled by the Board of Directors, if any, and if there is no Board of Directors, then by the vote of the active members at a special meeting of such members. The successor shall serve until the next annual meeting of the District Bar. If the office of the President becomes vacant, the Vice President shall succeed to the office of the President and the Board of Directors, if any, and if there is no Board of Directors, then by the vote of the active members at a special meeting of such members, will select a new Vice resident, who shall serve until the next annual meeting.

(g) *Notification.* Within 10 days following the annual meeting, or the filling of a vacancy in any office, the President shall notify the Executive Director of the North Carolina State Bar of the names, addresses and telephone numbers of all officers of the District Bar.

(h) *Record of bylaws.* The President shall ensure that a current copy of these bylaws is filed with the office of the Senior Resident Superior Court Judge with the ______________________ Judicial District and with the Executive Director of the North Carolina State Bar.

---

[1] The procedure for voting for, and election of, councilors is set by statute and rules of the N.C. State Bar. District Bar voting procedure with regard to matters relating to District Bar dues is now statutorily prescribed in North Carolina General Statutes Section 84-18.1. The procedure, but not the manner or method of conducting the vote, to submit nominations to the Governor to fill vacancies on the District Court beach is set forth in North Carolina General Statutes Section 7A-142. It is suggested that, for voting upon, and elections for, other District Bar matters and issues, the District Bars be permitted to adopt bylaws providing for procedures as may seem appropriate for each District Bar. Such rules might address notice provisions, including how much notice is given and permissible methods of giving notice, what shall constitute a quorum (see footnote 2), and how any such election shall be conducted (including whether or not members must be present to vote, whether proxies will be permitted, whether or not absentee or some other form of mail ballot will be allowed and whether or not cumulative voting should be permitted when elections for multiple candidates or positions are being conducted).

(i) *Removal from office.* The District Bar, by a two-thirds vote of its active members present at a duly called meeting, may, after due notice and an opportunity to be heard, remove from office any officer who has engaged in conduct which renders the officer unfit to serve, or who has become disabled, or for other good cause. The office of any officer who, during his or her term of office ceases to be an active member of the North Carolina State Bar shall immediately be deemed vacant and shall be filled as provided in Rule .1004(f) above.

History Note: Adopted March 7, 1996.

A.1005. Councilor.

The District Bar shall be represented in the State Bar Council by one or more duly elected councilors, the number of councilors being determined pursuant to G.S. 84-17. Any councilor serving at the time of the adoption of these bylaws shall complete the term of office to which he or she was previously elected. Thereafter, elections shall be held as necessary. Nominations shall be made and the election held as provided in G.S. 84-18 and in Section .0800 et seq. of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0800 et seq.). If more than one council seat is to be filled, separate elections shall be held for each vacant seat. A vacancy in the office of councilor shall be filled as provided by Rule .0804 of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0804).

History Note: Adopted March 7, 1996; Amended November 5, 1999.

A.1006. Annual membership fee.

(a) Each active member of the District Bar shall:

(1) Pay such annual membership fee, if any, as is prescribed by a majority vote of the active members of the District Bar present and voting at a duly called meeting of the District Bar, provided, however, that such fee may never exceed the amount annual membership fee currently imposed by the North Carolina State Bar. Each member shall pay the annual District Bar membership fee at the time and place set forth in the notice thereof mailed to the member by the Secretary-Treasurer; and

(2) Keep the Secretary-Treasurer notified of the member's current mailing address and telephone number.

(b) The annual membership fee shall be used to promote and maintain the administration, activities and programs of the District Bar.

History Note: Adopted March 7, 1996.

A.1007. Meetings.

(a) *Annual meetings.* The District Bar shall meet each ________________ at a time and place designated by the President. The President, Secretary or other Officer shall mail or deliver written notice of the annual meeting to each active member of the District Bar at the member's last known mailing address on file with the District Bar at least ten days before the date of the annual meeting and shall so certify in the official minutes of the meeting. Notice of the meeting mailed by the Executive Director of the North Carolina State Bar shall also satisfy the notice requirement. Failure to mail or deliver the notice as herein provided shall invalidate any action at the annual meeting.

(b) *Special meetings.* Special meetings, if any, may be called at any time by the President or the Vice President. The President, Secretary or other Officer shall mail or deliver written notice of the special meeting to each active member of the District Bar at the member's last known mailing address on file with the District Bar at least ten days before the date of any special meeting. Such notice shall set forth the time and place for the special meeting and the purpose(s) thereof. Failure to mail or deliver the notice shall invalidate any action taken at a special meeting.

(c) *Quorum.* Twenty percent of the active members of the District Bar shall constitute a quorum, and a quorum shall be required to take official action on behalf of the District Bar.[2]

History Note: Adopted March 7, 1996.

A.1008. District bar finances.

(a) *Fiscal year.* The District Bar's fiscal year shall begin on __________ and shall end on __________.

(b) *Duties of treasurer.* The Treasurer shall maintain the funds of the District Bar on deposit, initiate any necessary disbursements and keep appropriate financial records.

(c) *Annual financial report.* Each ______________ before the annual meeting, the Treasurer shall prepare the District Bar's annual financial report for review by the Board of Directors, if any, and submission to the District Bar's annual meeting and the North Carolina State Bar.

(d) *District bar checks.* All checks written on District Bar accounts (arising from the collection of mandatory dues) that exceed $500 must be signed by two (2) of the following: (1) the Treasurer, (2) any other officer, (3) another member of the Board of Directors, or (4) the Executive Secretary/Director, if any.

(e) *Fidelity bond.* If it is anticipated that receipts from membership fees will exceed $20,000 for any fiscal year, the District Bar shall purchase a fidelity bond at least equal in amount to the anticipated annual receipts to indemnify the District Bar for losses attributable to the malfeasance of the Treasurer or any other member having access to District Bar funds.

(f) *Taxpayer identification number.* The Treasurer shall be responsible for obtaining a federal taxpayer identification number for the District Bar.

History Note: Adopted March 7, 1996; Amended effective April 23, 1999.

A.1009. Prohibited activities.

(a) *Prohibited expenditures.* Mandatory District Bar dues, if any, shall not be used for the purchase of alcoholic beverages, gifts to public officials, including judges, charitable contributions, recreational activities or expenses of spouses of District Bar members or officers. However, such expenditures may be made from funds derived entirely from the voluntary contributions of District Bar members.

(b) *Political expenditures.* The District Bar shall not make any expenditures to fund political and ideological activities.

(c) *Political activities.* The District Bar shall not engage in any political or ideological conduct or activity, including the endorsement of candidates and the taking or advocation of positions on political issues, referendums, bond elections, and the like, however, the District Bar, and persons speaking on its behalf, may take positions on, or comment upon, issues relating to the regulation of the legal profession and issues or matters relating to the improvement of the quality and availability of legal services to the general public.

History Note: Adopted March 7, 1996.

A.1010. Committees.

(a) *Standing committee(s):* The standing committees shall be the Nominating Committee, Pro Bono Committee, Fee Dispute Resolution Committee, Grievance Committee, and Professionalism Committee provided that, with respect to the Fee Dispute Resolution Committee and the Grievance Committee, the District meets the State Bar guidelines relating thereto.

---

[2] Consistent with the comment contained in Footnote 1, each District Bar should be permitted to adopt bylaws providing for what shall constitute a quorum based upon each District Bar's particular situation and circumstances. The above provision regarding quorum should be considered only as a suggestion and individual District Bars may wish to provide that a different percentage of the membership shall constitute a quorum. Other methods of defining a quorum should also be permitted. For example, in certain of the larger District Bars, any quorum based on a percentage of the membership, except for a very nominal percentage, may be difficult to attain. One alternate quorum provision might read as follows: A quorum shall be those present at any membership meeting for which proper notice was given.

(b) *Fee Dispute Resolution Committee:*

(1) The Fee Dispute Resolution Committee shall consist of at least six but not more than eighteen persons appointed by the President to staggered three-year terms as provided in the District Bar's Fee Dispute Resolution Plan.

(2) The Fee Dispute Resolution Committee shall be responsible for implementing a Fee Dispute Resolution Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.

(c) *Grievance committee:*

(1) The Grievance Committee shall consist of at lease five but not more than thirteen persons appointed by the President to staggered three-year terms as provided by the Rules and Regulations of the North Carolina State Bar governing Judicial District Grievance Committees.

(2) The Grievance Committee shall assist the Grievance Committee of the North Carolina State Bar by receiving grievances, investigating grievances, evaluating grievances, informally mediating disputes, facilitating communication between lawyers and clients and referring members of the public to other appropriate committees or agencies for assistance.

(3) The Grievance Committee shall operate in strict accordance with the rules and policies of the North Carolina State Bar with respect to District Bar Grievance Committees.

(d) *Special committees:* Special committees may be created and appointed by the President.

(e) *Nominating committee.*

(1) The Nominating Committee shall be appointed by the officers (or the Board of Directors) of the District Bar and shall consist of at least three active members of the District Bar who are not officers or directors of the District Bar.[3]

(2) The Nominating Committee shall meet as necessary for the purpose of nominating active members of the District Bar as candidates for officers and councilor(s) and the Board of Directors, if any.

(3) The Nominating Committee members shall serve one-year terms beginning on ____________ and ending on ____________.

(4) Any active member whose name is submitted for consideration for nomination to any office or as a councilor must have indicated his or her willingness to serve if selected.

(f) *Pro bono committee:*

(1) The Pro Bono Committee shall consist of at least five active members of the District Bar appointed by the President.

(2) The Pro Bono Committee shall meet at least once each quarter and shall have the duty of encouraging members of the District Bar to provide pro bono legal services. The Committee shall also develop programs whereby attorneys not involved in other volunteer legal service programs may provide pro bono legal service in their areas of concentration and practice.

(3) The members of the Pro Bono Committee shall serve one-year terms commencing on ________________.

(g) *Professionalism Committee:*

(1) The Professionalism Committee shall consist of the three immediate past presidents of the district bar or such other members of the district bar as shall be appointed by the president.

(2) The purpose of the Professionalism Committee shall be the promotion of professionalism and thereby the bolstering of public confidence in the legal profession. The committee may further enhance professionalism through CLE programs and, when appropriate, through confidential peer intervention in association with the Professionalism Support Initiative (PSI) which is sponsored and supported by the Chief Justice's Commission on Professionalism. The PSI effort is to investigate and informally assist with client-lawyer, lawyer-lawyer, and lawyer-judge relationships to ameliorate disputes, improve communications, and repair relationships. The Profes-

---

[3] The composition of the Nominating Committee set forth above is a suggestion only. The District Bars may choose to constitute their nominating committees in a different manner, as for example, letting the committee consist of the three most immediate past presidents of the District Bar who are still active members of the District Bar as defined herein. Smaller District Bars may choose to have no Nominating Committee and nominate and elect officers from the floor at the annual meeting of the District Bar.

sionalism Committee shall have no authority to discipline any lawyer or judge, or to force any lawyer or judge to take any action. The committee shall not investigate or attempt to resolve complaints of professional misconduct cognizable under the Rules of Professional Conduct and shall act in accordance with Rules 1.6(c) and 8.3 of the Rules of Professional Conduct. The committee shall consult and work with the Chief Justice's Commission on Professionalism when appropriate.

History Note: Adopted March 7, 1996; Amended effective March 6, 2002; Amended effective March 6, 2008.

A.1011. Board of directors or executive committee.

(a) *Membership of board.* A Board of Directors consisting of at least ________ active members of the District Bar shall be elected. At all times, the Board of Directors shall include at least one director from each county in the Judicial District. The Board of Directors serving when these bylaws become effective shall continue to serve until the following annual meeting. Beginning on ________________ immediately after the effective date of these bylaws, the President shall appoint an initial Board of Directors who shall serve three-year terms commencing on ________________, except that the terms of the initial members of the Board shall be staggered at one-year intervals to ensure continuity and experience. To effect the staggered initial terms, the President will determine which of the initial members shall serve terms of less than three years.

The State Bar Councilor (or Councilors) from the judicial district shall be an ex officio member (or members) of the District Bar Board of Directors or Executive Committee.

(b) *Terms of directors.* After the initial staggered terms of the Board of Directors expire, successors shall be elected by the active members at the annual District Bar meeting, as set out in Rule .1004(d) above, and Rule .1011(c) and (d) below. Following the completion of the initial staggered terms, the directors shall serve three-year terms beginning on ________________ following their election.

(c) *Designated and at-large seats in multi-county districts.* In multi-county districts, one seat on the Board of Directors shall be set aside and designated for each county in the district. Only active members of the District Bar who reside or work in the designated county may be elected to a designated county seat. All other seats on the Board of Directors shall be at-large seats which may be filled by any active member of the District Bar.

(d) *Elections.* When one or more seats on the Board of Directors become vacant, an election shall be held at the annual meeting of the District Bar. Except as otherwise provided herein, the election shall be conducted as provided for in Rule .1004(d) above. The candidates receiving the highest number of votes cast will be elected, regardless of whether any of the candidates received a majority of the votes cast, provided that designated seats will be filled by the candidates receiving the highest number of votes who live or work in the designated county, regardless of whether any of the candidates received a majority of the votes cast.

(e) *Vacancies.* If a vacancy occurs on the Board of Directors, the President (or the Board of Directors) shall appoint a successor who shall serve until the next annual meeting of the District Bar. If the vacancy occurs in a designated seat for a particular county within the district, the successor will be selected from among the active members of the District Bar who live or work in the designated county.

(f) *Duties of board of directors.* The Board of Directors shall have the responsibilities described [in] Rules .1004(f) and .1007(c) above. The Board of Directors shall also consult with the officers regarding any matters of District Bar business or policy arising between meetings and may act for the District Bar on an emergency basis if necessary, provided that any such action shall be provisional pending its consideration by the District Bar at its next duly called meeting. The Board of Directors may not impose on its own authority any sort of fee upon the membership.

History Note: Adopted March 7, 1996.

A.1012. Amendment of the bylaws.

The membership of the District Bar, by a ________________ (majority, two-thirds, etc.) vote of the active members present at any duly called meeting at which there is a quorum present and voting throughout, may amend these bylaws in ways not inconsistent with the constitution of the United States, the policies and rules of the North Carolina State Bar and the laws of the United States and North Carolina.

History Note: Adopted March 7, 1996.

A.1013. Selection of nominees for district court judge.

Unless otherwise required by law, the following procedures shall be used to determine the nominees to be recommended to the Governor pursuant to N.C. Gen. Stat. § 7A-142 for vacant district court judgeships in the judicial district.

(a) *Meeting for nominations.* The nominees shall be selected by secret, written ballot of those members present at a meeting of the district bar called for this purpose. Fifteen (15) days notice of the meeting shall be given, by mail, to the last known address of each district bar member. Alternatively, if a bylaw permitting elections by mail is adopted by the district bar, the procedures set forth in the bylaw and in Rule .0804 of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. .0804), shall be followed.

(b) *Candidates.* Persons who want to be considered for the vacancy shall notify the President in writing five (5) days prior to the meeting at which the election will be conducted or, if the election is by mail, five (5) days prior to the mailing of the ballots.

(c) *Voting.* Each district bar member may vote for three candidates. Cumulative voting is prohibited.

(d) *Submission to governor.* The three candidates receiving the highest number of votes shall be the nominees to fill the vacancy on the district court and their names, and vote totals, shall be transmitted to the Governor. In the event of a tie for third place, the names of those candidates involved in the tie shall be transmitted to the Governor together with the names of the two candidates receiving the highest number of votes.

History Note: Adopted February 27, 2003.

SECTION .1100. OFFICE OF THE NORTH CAROLINA STATE BAR

A.1101. Office.

Until otherwise ordered by the council, the office of the North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the council.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .1200. FILING PAPERS WITH AND SERVING THE NORTH CAROLINA STATE BAR

A.1201. When papers are filed under these rules and regulations.

Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on the North Carolina State Bar, or the council, the same shall be filed with or served on the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .1300. SEAL

A.1301. Form and custody of seal.

The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the secretary at the office of the North Carolina State Bar, unless otherwise ordered by the council.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .1400. RULEMAKING PROCEDURES

A.1401. Publication for Comment.

(a) As a condition precedent to adoption, a proposed rule or amendment to a rule must be published for comment as provided in subsection (c).

(b) A proposed rule or amendment to a rule must be presented to the Executive Committee and the council prior to publication for comment, and specifically approved for publication by both.

(c) A proposed rule or amendment to a rule must be published for comment in an official printed publication of the North Carolina State Bar that is mailed to the membership at least 30 days in advance of its final consideration by the council. The publication of any such proposal must be accompanied by a prominent statement inviting all interested parties to submit comment to the North Carolina State Bar at a specified postal or e-mail address prior to the next meeting of the Executive Committee, the date of which shall be set forth.

History Note: Statutory Authority G.S. 84-23,
Adopted August 23, 2007.

A.1402. Review by the Executive Committee.

At its next meeting following the publication or republication of any proposed rule or amendment to a rule, the Executive Committee shall review the proposal and any comment that has been received concerning the proposal. The Executive Committee shall then:

(a) recommend the proposal's adoption by the council;

(b) recommend the proposal's adoption by the council with nonsubstantive modification;

(c) recommend to the council that the proposal be republished with substantive modification;

(d) defer consideration of the matter to its next regular business meeting;

(e) table the matter; or

(f) reject the proposal.

History Note: Statutory Authority G.S. 84-23,
Adopted August 23, 2007.

A.1403. Action by the Council and Review by the North Carolina Supreme Court.

(a) Whenever the Executive Committee recommends adoption of any proposed rule or amendment to a rule in accordance with the procedure set forth in Rule .1402 above, the council at its next regular business meeting shall consider the proposal, the Executive Committee's recommendation, and any comment received from interested parties, and:

(1) decide whether to adopt the proposed rule or amendment, subject to the approval of the North Carolina Supreme Court as described in G.S. 84-21;

(2) reject the proposed rule or amendment; or

(3) refer the matter back to the Executive Committee for reconsideration.

(b) Any proposed rule or amendment to a rule adopted by the council shall be transmitted by the secretary to the North Carolina Supreme Court for its review on a schedule approved by the Court, but in no event later than 120 days following the council's adoption of the proposed rule or amendment.

(c) No proposed rule or amendment to a rule adopted by the council shall take effect unless and until it is approved by order of the North Carolina Supreme Court.

(d) The secretary shall promptly transmit the official text of any proposed rule or amendment to a rule adopted by the council and approved by the North Carolina Supreme Court to the Office of Administrative Hearings for publication in the North Carolina Administrative Code.

(e) Any action taken by the council or the North Carolina Supreme Court in regard to any proposed rule or amendment to a rule shall be reported in the next issue of the printed publication referenced in Rule .1401 above.

History Note: Statutory Authority G.S. 84-23,
Adopted August 23, 2007.

SUBCHAPTER 1B. DISCIPLINE AND DISABILITY RULES

SECTION .0100. DISCIPLINE AND DISABILITY OF ATTORNEYS

B.0101. General provisions.

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times, or that it has not been made the subject of earlier disciplinary proceedings, will not be a defense to any charge of misconduct by a member.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983).

B.0102. Procedure for discipline.

(a) The procedure to discipline members of the bar of this state will be in accordance with the provisions hereinafter set forth.

(b) District bars will not conduct separate proceedings to discipline members of the bar but will assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of its members.

(c) Concurrent Jurisdiction of State Bar and Courts

(1) The Council of the North Carolina State Bar is vested, as an agency of the state, with the control of the discipline, disbarment, and restoration of attorneys practicing law in this state.

(2) The courts of this state have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the court exercising disciplinary authority.

(3) The authority of the North Carolina State Bar and the courts to discipline attorneys is separate and distinct, the North Carolina State Bar having derived its jurisdiction by legislative act and the courts from the inherent power of the courts themselves.

(4) Neither the North Carolina State Bar nor the courts are authorized or empowered to act for or in the name of the other, and the disciplinary action taken by either entity should be clearly delineated as to the source or basis for the action being taken.

(5) It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding pending before the North Carolina State Bar.

(6) Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court's inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court's inquiry or proceeding.

(7) If the North Carolina State Bar finds probable cause and institutes disciplinary proceedings against an attorney for conduct which subsequently becomes an issue in a criminal or civil proceeding, the court may, in its discretion, defer its inquiry pending the completion of the North Carolina State Bar's proceedings.

(8) Upon the filing of a complaint by the North Carolina State Bar, the North Carolina State Bar will send a copy of the complaint to the chief resident superior court judge and to all superior court judges regularly assigned to the district in which the attorney maintains his or her law office. The North Carolina State Bar will send a copy of the complaint to the district attorney in the district in which the attorney maintains a law office if the complaint alleges criminal activity by the attorney.

(9) The North Carolina State Bar will encourage judges to contact the North Carolina State Bar to determine the status of any relevant complaints filed against an attorney before the court takes disciplinary action against the attorney.

History Note: Statutory Authority G.S. 84-23; G.S. 84-36, Readopted Effective December 8, 1994.

B.0103. Definitions.

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) *Admonition.* A written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

(2) *Appellate division.* The appellate division of the general court of justice.

(3) *Board.* The Board of Continuing Legal Education.

(4) *Board of Continuing Legal Education.* A standing committee of the council responsible for the administration of a program of mandatory continuing legal education and law practice assistance.

(5) *Censure.* A written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the attorney's license.

(6) *Certificate of conviction.* A certified copy of any judgment wherein a member of the North Carolina State Bar is convicted of a criminal offense.

(7) *Chairperson of the Grievance Committee.* Councilor appointed to serve as chairperson of the Grievance Committee of the North Carolina State Bar.

(8) *Commission.* The Disciplinary Hearing Commission of the North Carolina State Bar.

(9) *Commission chairperson.* The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar.

(10) *Complainant or complaining witness.* Any person who has complained of the conduct of any member of the North Carolina State Bar to the North Carolina State Bar.

(11) *Complaint.* A formal pleading filed in the name of the North Carolina State Bar with the commission against a member of the North Carolina State Bar after a finding of probable cause.

(12) *Consolidation of cases.* A hearing by a hearing committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

(13) *Council.* The Council of the North Carolina State Bar.

(14) *Councilor.* A member of the Council of the North Carolina State Bar.

(15) *Counsel.* The counsel of the North Carolina State Bar appointed by the council.

(16) *Court or courts of this state.* A court authorized and established by the constitution or laws of the state of North Carolina.

(17) *Criminal offense showing professional unfitness.* The commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery,

embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

(18) *Defendant.* A member of the North Carolina State Bar against whom a finding of probable cause has been made.

(19) *Disabled or disability.* A mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney.

(20) *Grievance.* Alleged misconduct.

(21) *Grievance Committee.* The Grievance Committee of the North Carolina State Bar or any of its panels acting as the Grievance Committee respecting the grievances and other matter referred to it by the chairperson of the Grievance Committee.

(22) *Hearing committee.* A hearing committee designated under Rule .0108(a)(2), .0114(d), .0114(x), .0118(b)(2), .0125(a)(6), .0125(b)(7) or .0125(c)(2) of this subchapter.

(23) *Illicit drug.* Any controlled substance as defined in the North Carolina Controlled Substances Act, section 5, chapter 90, of the North Carolina General Statutes, or its successor, which is used or possessed without a prescription or in violation of the laws of this state or the United States.

(24) *Incapacity or incapacitated.* Condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(25) *Investigation.* The gathering of information with respect to alleged misconduct, alleged disability, or a petition for reinstatement.

(26) *Investigator.* Any person designated to assist in the investigation of alleged misconduct or facts pertinent to a petition for reinstatement.

(27) *Lawyer Assistance Program Board.* The Lawyer Assistance Program Board of the North Carolina State Bar.

(28) *Letter of notice.* A communication to a respondent setting forth the substance of a grievance.

(29) *Letter of warning.* Written communication from the Grievance Committee or the commission to an attorney stating that past conduct of the attorney, while not the basis for discipline, is an unintentional, minor, or technical violation of the Rules of Professional Conduct and may be the basis for discipline if continued or repeated.

(30) *Member.* A member of the North Carolina State Bar.

(31) *Office of the Counsel.* The office and staff maintained by the counsel of the North Carolina State Bar.

(32) *Office of the Secretary.* The office and staff maintained by the secretary-treasurer of the North Carolina State Bar.

(33) *Party.* After a complaint has been filed, the North Carolina State Bar as plaintiff or the member as defendant.

(34) *Plaintiff.* After a complaint has been filed, the North Carolina State Bar.

(35) *Preliminary hearing.* Hearing by the Grievance Committee to determine whether probable cause exists.

(36) *Probable cause.* A finding by the Grievance Committee that there is reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(37) *Reprimand.* A written form of discipline more serious than an admonition issued in cases in which a defendant has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

(38) *Respondent.* A member of the North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(39) *Revised Rules of Professional Conduct.* The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court effective July 24, 1997.

(40) *Rules of Professional Conduct.* The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court and which were in effect from Oct. 7, 1985 through July 23, 1997.

(41) *Secretary.* The secretary-treasurer of the North Carolina State Bar.
(42) *Supreme Court.* The Supreme Court of North Carolina.
(43) *Will.* When used in these rules, means a direction or order which is mandatory or obligatory.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective December 30, 1998; Amended effective February 3, 2000.

B.0104. State bar council: Powers and duties in discipline and disability matters.

The Council of the North Carolina State Bar will have the power and duty
(1) to supervise and conduct disciplinary proceedings in accordance with the provisions hereinafter set forth;
(2) to appoint members of the commission as provided by statute;
(3) to appoint a counsel. The counsel will serve at the pleasure of the council. The counsel will be a member of the North Carolina State Bar but will not be permitted to engage in the private practice of law;
(4) to order the transfer of a member to disability inactive status when such member has been judicially declared incompetent or has been involuntarily committed to institutional care because of incompetence or disability;
(5) to accept or reject the surrender of the license to practice law of any member of the North Carolina State Bar;
(6) to order the disbarment of any member whose resignation is accepted;
(7) to review the report of any hearing committee upon a petition for reinstatement of a disbarred attorney and to make final determination as to whether the license will be restored.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended July 21, 1995.

CASE NOTES

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

B.0105. Chairperson of the Grievance Committee: Powers and duties.

(a) The chairperson of the Grievance Committee will have the power and duty
(1) to supervise the activities of the counsel;
(2) to recommend to the Grievance Committee that an investigation be initiated;
(3) to recommend to the Grievance Committee that a grievance be dismissed;
(4) to direct a letter of notice to a respondent or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;
(5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;
(6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule .0121 of this subchapter;
(7) to call meetings of the Grievance Committee;
(8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;
(9) to administer or direct the administration of oaths or affirmations to witnesses;
(10) to sign complaints and petitions in the name of the North Carolina State Bar;
(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;
(12) to enter orders of reciprocal discipline in the name of the Grievance Committee;
(13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;
(14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;

(15) to tax costs of the disciplinary procedures against any defendant against whom the Grievance Committee imposes discipline, including a minimum administrative cost of $50;

(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar and to so notify the complainant;

(17) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(18) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule .0111(e);

(19) to dismiss a grievance where it appears that the complaint, even if true, fails to state a violation of the Rules of Professional Conduct and where counsel consents to the dismissal;

(20) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel and a member of the Grievance Committee designated by the Committee consent to the dismissal.

(21) to appoint a subcommittee to make recommendations to the council for such amendments to the Discipline and Disability Rules as the subcommittee deems necessary or appropriate.

(b) The president, vice-chairperson, or a member of the Grievance Committee designated by the president or the chairperson or vice-chairperson of the committee may perform the functions, exercise the power, and discharge the duties of the chairperson or any vice-chairperson when the chairperson or a vice-chairperson is absent or disqualified.

(c) The chairperson may delegate his or her authority to the president, the vice chairperson of the committee, or a member of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective October 2, 1997; Amended effective March 3, 1999; Amended effective February 3, 2000.

B.0106. Grievance committee — Powers and duties.

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

(2) to hold preliminary hearings, find probable cause and direct that complaints be filed;

(3) to dismiss grievances upon a finding of no probable cause;

(4) to issue a letter of caution to a respondent in cases wherein misconduct is not established but the activities of the respondent are unprofessional or not in accord with accepted professional practice. The letter of caution will recommend that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified;

(5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule .0129 of this subchapter;

(6) to issue an admonition in cases wherein the defendant has committed a minor violation of the Rules of Professional Conduct;

(7) to issue a reprimand wherein the defendant has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;

(8) to issue a censure in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or

potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license;

(9) to direct that a petition be filed seeking a determination whether a member of the North Carolina State Bar is disabled;

(10) to include in any order of admonition, reprimand, or censure a provision requiring the defendant to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar in accordance with Rule .0112(i) of this subchapter.

(12) in its discretion, to refer grievances primarily attributable to the respondent's substance abuse or mental health problem to the Lawyer Assistance Program in accordance with Rule .0112(j) of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective March 3, 1999; Amended effective December 20, 2000.

B.0107. Counsel: Powers and duties.

The counsel will have the power and duty

(1) to initiate an investigation concerning alleged misconduct of a member;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Grievance Committee;

(3) to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise;

(4) to recommend to the chairperson of the Grievance Committee that a matter be dismissed, that a letter of caution, or a letter of warning be issued, or that the Grievance Committee hold a preliminary hearing;

(5) to prosecute all disciplinary proceedings before the Grievance Committee, hearing committees, and the courts;

(6) to represent the North Carolina State Bar in any trial, hearing, or other proceeding concerning the alleged disability of a member;

(7) to appear on behalf of the North Carolina State Bar at hearings conducted by the Grievance Committee, hearing committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding;

(8) to appear at hearings conducted with respect to petitions for reinstatement of license by suspended or disbarred attorneys or by attorneys transferred to disability inactive status, to cross-examine witnesses testifying in support of such petitions, and to present evidence, if any, in opposition to such petitions;

(9) to employ such deputy counsel, investigators, and other administrative personnel in such numbers as the council may authorize;

(10) to maintain permanent records of all matters processed and of the disposition of such matters;

(11) to perform such other duties as the council may direct;

(12) after a finding of probable cause by the Grievance Committee, to designate the particular violations of the Rules of Professional Conduct to be alleged in a formal complaint filed with the commission;

(13) to file amendments to complaints and petitions arising out of the same transactions or occurrences as the allegations in the original complaints or petitions, in the name of the North Carolina State Bar, with the prior approval of the chairperson of the Grievance Committee;

(14) after a complaint is filed with the commission, to dismiss any or all claims in the complaint or to negotiate and recommend consent orders of discipline to the hearing committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-31, Readopted Effective December 8, 1994; Amended effective March 3, 1999.

CASE NOTES

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

B.0108. Chairperson of the hearing commission: Powers and duties.

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment;

(2) to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer to hear complaints, petitions, motions, and posthearing motions pursuant to Rule .0114(z)(2) of this subchapter. The chairperson will designate one of the attorney members as chairperson of the hearing committee. No committee member who hears a disciplinary matter may serve on the committee which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing committee and will be chairperson of any hearing committee on which he or she serves. Posthearing motions filed pursuant to Rule .0114(z)(2) of this subchapter will be considered by the same hearing committee assigned to the original trial proceeding. Hearing committee members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson;

(3) to set the time and place for the hearing on each complaint or petition;

(4) to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas;

(5) to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint;

(6) to enter orders disbarring members by consent.

(7) to enter an order suspending a member pending disposition of a disciplinary proceeding when the member has been convicted of a serious crime or has pled no contest to a serious crime and the court has accepted the plea.

(b) The vice-chairperson of the disciplinary hearing commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended July 21, 1995.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

B.0109. Hearing committee: Powers and duties.

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, or petitions seeking a determination of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed, and to conduct proceedings to determine if persons or corporations should be held in contempt pursuant to G.S. 84-28.1(b1);

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee will designate;

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any

hearing. Subpoenas will be issued by the chairperson of the hearing committee in the name of the commission. The chairperson may direct the secretary to issue such subpoenas;

(4) to administer or direct the administration of oaths or affirmations to witnesses at hearings;

(5) to make findings of fact and conclusions of law;

(6) to enter orders dismissing complaints in matters before the committee;

(7) to enter orders of discipline against or letters of warning to defendants in matters before the committee;

(8) to tax costs of the disciplinary proceedings against any defendant against whom discipline is imposed, provided, however, that such costs will not include the compensation of any member of the council, committees, or agencies of the North Carolina State Bar;

(9) to enter orders transferring a member to disability inactive status;

(10) to report to the council its findings of fact and recommendations after hearings on petitions for reinstatement of disbarred attorneys;

(11) to grant or deny petitions of attorneys seeking transfer from disability inactive status to active status;

(12) to enter orders reinstating suspended attorneys or denying reinstatement. An order denying reinstatement may include additional sanctions in the event violations of the petitioner's order of suspension are found;

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

(14) to enter orders holding persons and corporations in contempt pursuant to G.S. 84-28.1(b1) and imposing such sanctions allowed by law.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1, Readopted Effective December 8, 1994; Amended effective March 3, 1999.

B.0110. Secretary: Powers and duties in discipline and disability matters.

The secretary will have the following powers and duties in regard to discipline and disability procedures:

(1) to receive grievances for transmittal to the counsel, to receive complaints and petitions for transmittal to the commission chairperson, and to receive affidavits of surrender of license for transmittal to the council;

(2) to issue summonses and subpoenas when so directed by the president, the chairperson of the Grievance Committee, the chairperson of the commission, or the chairperson of any hearing committee;

(3) to maintain a record and file of all grievances not dismissed by the Grievance Committee;

(4) to perform all necessary ministerial acts normally performed by the clerk of the superior court in complaints filed before the commission;

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the counsel;

(6) to dismiss reinstatement petitions based on the petitioner's failure to comply with the rules governing the provision and transmittal of the record of reinstatement proceedings;

(7) to determine the amount of costs assessed in disciplinary proceedings by the commission.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-32(c), Readopted Effective December 8, 1994.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

B.0111. Grievances: Form and filing.

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose.

(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.

(c) The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the Grievance Committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of Rule .0130 of this subchapter.

(d) The North Carolina State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another attorney pursuant to Rule 1.3 of the Rules of Professional Conduct and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent attorney where such disclosure is required by law, or by considerations of due process or where identification of the reporting attorney or judge is essential to preparation of the attorney's defense to the grievance and/or a formal disciplinary complaint.

(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a District Bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later. Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.

(f) The counsel may decline to investigate the following allegations:

(i) that a member provided ineffective assistance of counsel in a criminal case, unless a court has granted a motion for appropriate relief based upon the member's conduct;

(ii) that a plea entered in a criminal case was not made voluntarily and knowingly, unless a court granted a motion for appropriate relief based upon the member's conduct;

(iii) that a member's advice or strategy in a civil or criminal matter was inadequate or ineffective.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective February 20, 1995; Amended effective December 30, 1998; Amended October 1, 2003.

CASE NOTES

Adoption of Rule. — North Carolina State Bar could not rely upon the felonious misconduct portion of N.C. St. Bar R. B.0111(e) to avoid dismissal of its claims for relief because that portion of the rule was not properly adopted under G.S. 84-21, the enabling statute governing the state bar's rulemaking authority; moreover, G.S. 84-21 did not contain a provision permitting only substantial compliance with its requirements, in contrast to G.S. 150B-18, and the more specific directions of G.S. 84-21 governed over the general rule-making provision of the North Carolina Administrative Procedures Act. N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

Limitations Period. — North Carolina State Bar's claims of fraud against a district attorney and an assistant district attorney were time barred under N.C. St. Bar R. B.0111(e) because the limitations period expired six years after the conclusion of a criminal defendant's trial. N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

B.0112. Investigations: Initial determination.

(a) Subject to the policy supervision of the council and the control of the chairperson of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chairperson of the Grievance Committee a report detailing the findings of the investigation.

(b) As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chairperson of the Grievance Committee may

(1) treat the report as a final report;

(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or

(3) send a letter of notice to the respondent.

(c) If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within 15 days of receipt of the letter of notice. Such response will be a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct. The counsel will provide the respondent with a copy of the grievance upon request, except where the complainant requests to remain anonymous pursuant to Rule .0111(d) of this subchapter.

(d) The counsel may provide a copy of the respondent's response(s) to the letter of notice to the complaining party unless the respondent objects thereto in writing.

(e) After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the Grievance Committee.

(f) For reasonable cause, the chairperson of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the Grievance Committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chairperson may examine any such witness under oath or otherwise.

(g) As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance, except as otherwise provided in these rules.

(h) The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement, or restitution. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of counsel where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct.

(i) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

(j) If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.

If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective December 20, 2000; Amended effective March 6, 2002.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

B.0113. Proceedings before the Grievance Committee.

(a) The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) The chairperson will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the defendant. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in

one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) A copy of the letter of warning will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the letter of warning to the respondent's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. Within 15 days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent for a hearing pursuant to Rule .0114 of this subchapter.

(k) Admonitions and Reprimands

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee may issue an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct. A record of such admonition or reprimand will be maintained in the office of the secretary.

(2) A copy of the admonition or reprimand will be served upon the defendant in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition or reprimand to the defendant's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the admonition or reprimand in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the defendant may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

(4) In cases in which the defendant refuses an admonition or reprimand, the counsel will prepare and file a complaint against the defendant pursuant to Rule .0114 of this subchapter. If a refusal and request are not served upon the secretary within 15 days after service upon the defendant of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the defendant. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(*l*) Censures

(1) If probable cause is found and the Grievance Committee determines that the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license, the committee will issue a notice of proposed censure and a proposed censure to the defendant.

(2) A copy of the notice and the proposed censure will be served upon the defendant in person or by certified mail. A defendant who cannot, with due diligence, be served

by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the defendant's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the Notice and proposed censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. The defendant must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

(3) The defendant's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the defendant, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.

(4) If the defendant does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.

(m) Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28, Readopted effective December 8, 1994; Amended effective March 3, 1999; Amended effective February 3, 2000.

B.0114. Formal hearing.

(a) Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

(b) Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(c) Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(d) Within 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the last complaint upon the defendant. By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.

(e) Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(f) Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(g) Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(h) The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

(i) At the discretion of the chairperson of the hearing committee, and upon five days' notice to the parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment the following:

(1) the simplification of the issues;

(2) the exchange of exhibits proposed to be offered in evidence;

(3) the stipulation of facts not remaining in dispute or the authenticity of documents;

(4) the limitation of the number of witnesses;

(5) the discovery or production of data;

(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

The Chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

(k) The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

(*l*) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

(u) If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order of discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

(v) The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

(A) prior disciplinary offenses;
(B) dishonest or selfish motive;
(C) a pattern of misconduct;
(D) multiple offenses;
(E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;
(F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(G) refusal to acknowledge wrongful nature of conduct;
(H) vulnerability of victim;
(I) substantial experience in the practice of law;

(J) indifference to making restitution;

(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:

(A) absence of a prior disciplinary record;

(B) absence of a dishonest or selfish motive;

(C) personal or emotional problems;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

(F) inexperience in the practice of law;

(G) character or reputation;

(H) physical or mental disability or impairment;

(I) delay in disciplinary proceedings through no fault of the defendant attorney;

(J) interim rehabilitation;

(K) imposition of other penalties or sanctions;

(L) remorse;

(M) remoteness of prior offenses.

(x) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(z) Posttrial Motions

(1) Consent Orders After Trial — At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to Rule .0114(y) above, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion — The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1; G.S. 84-29; G.S. 84-30; G.S. 84-32(a), Readopted Effective December 8, 1994; Amended effective October 2, 1997; Amended effective December 30, 1998; Amended effective March 2, 2006.

CASE NOTES

Whole Record Test. — The standard for judicial review of attorney discipline cases is the "whole record" test. Under the whole record test there must be substantial evidence to support the findings, conclusions and result. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 398, 354 S.E.2d 501 (1987).

Clear, Cogent and Convincing Evidence. — The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. It has been defined as evidence which should fully convince. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 398, 354 S.E.2d 501 (1987).

Where parties stipulated that defendant failed to file answer to the complaint served on him, and the record reflects that the defendant did not appear in person or through counsel at the hearing, the allegations of the complaint were deemed admitted. North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207, cert. denied and appeal dismissed, 299 N.C. 740, 267 S.E.2d 663 (1980).

Applied in North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985); North Carolina State Bar v. Shuping, 86 N.C. App. 496, 358 S.E.2d 534 (1987).

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

B.0115. Effect of a finding of guilt in any criminal case.

(a) Any member who has been found guilty of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.

(b) A certificate of a the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(c) Upon the receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member a criminal offense showing professional unfitness, or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. 84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d) Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension.

(e) Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of judgment against a member upon a plea of no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the Grievance Committee will take whatever action, including authorizing the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. 84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28, Readopted effective December 8, 1994; Amended effective November 7, 1996; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective February 3, 2000.

B.0116. Reciprocal discipline & disability proceedings.

(a) All members who have been disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court or who have been transferred to disability inactive status or its equivalent by any state or federal court will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline or transfer to disability inactive status. Failure to make the report required in this section may subject the member to professional discipline as set out in Rule 8.3 of the Revised Rules of Professional Conduct.

(b) Except as provided in subsection (c) below which applies to disciplinary proceedings in certain federal courts, reciprocal discipline and disability proceedings will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined or transferred to disability inactive status or its equivalent in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within 30 days from service of the notice of any claim by the member that the imposition of the identical discipline or an order transferring the member to disability inactive status in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure.

(2) If the discipline or transfer order imposed in the other jurisdiction has been stayed, any reciprocal discipline or transfer to disability inactive status imposed in this state will be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline or enter an order transferring the member to disability inactive status unless the Grievance Committee concludes

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(B) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(C) that the imposition of the same discipline would result in grave injustice; or

(D) that the misconduct established warrants substantially different discipline in this state; or

(E) that the reason for the original transfer to disability inactive status no longer exists.

(4) Where the Grievance Committee determines that any of the elements listed in Rule .0116(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) If the elements listed in Rule .0116(b)(3) above are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct or should be transferred to disability inactive status will establish the misconduct or disability for purposes of reciprocal discipline or disability proceedings in this state.

(c) Reciprocal discipline with certain federal courts will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals, or in the United States Supreme Court, the chairperson of the Grievance Committee will forthwith issue a notice directed to the member. The notice will contain a copy of the order from the court and an order directing the member to inform the committee within 10 days from service of the notice whether the member will accept reciprocal discipline which is substantially similar to that imposed by the federal court. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure. The member will have 30 days from service of the notice to file a written challenge with the committee on the grounds that the imposition of discipline by the North Carolina State Bar would be unwarranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. If the member notifies the North Carolina State Bar within 10 days after service of the notice that he or she accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline will be ordered as provided in Rule .0116(c)(2) below and will run concurrently with the discipline ordered by the federal court.

(2) If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in Rule .0116(c)(1) above the chairperson of the Grievance Committee will execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and will cause said order to be served upon the member.

(3) If the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the North Carolina State Bar will be deferred until such stay expires.

(4) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(c)(1) above, the chairperson of the Grievance Committee will enter an order of reciprocal discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the member requests a hearing before the Grievance Committee and at such hearing

(A) the member demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case will be dismissed; or

(B) the Grievance Committee determines that the discipline imposed by the federal court is not of a type described in Rule .0123(a) of this subchapter and, therefore, cannot be imposed by the North Carolina State Bar, in which event the Grievance Committee may dismiss the case or direct that a complaint be filed in the commission.

(5) All findings of fact in the federal disciplinary proceeding will be binding upon the North Carolina State Bar and the member.

(6) Discipline imposed by any other federal court will be administered as provided in Rule .0116(b) above.

(d) If the member fails to accept reciprocal discipline as provided in Rule .0116(c) above or if a hearing is held before the Grievance Committee under either Rule .0116(b) above or Rule .0116(c) above and the committee orders the imposition of reciprocal discipline, such discipline will run from the date of service of the final order of the chairperson of the Grievance Committee unless the committee expressly provides otherwise.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28, Readopted Effective December 8, 1994; Amended March 7, 1996; Amended effective December 30, 1998.

B.0117. Surrender of license while under investigation.

(a) A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary for transmittal to the council an affidavit stating that the member desires to resign and that

(1) the resignation is freely and voluntarily rendered, is not the result of coercion or duress, and the member is fully aware of the implications of submitting the resignation;

(2) the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

(3) the member acknowledges that the material facts upon which the grievance is predicated are true;

(4) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

(b) The council may accept a member's resignation only if the affidavit required under Rule .0117(a) above satisfies the requirements stated therein and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional Conduct and requested by the counsel. If the council accepts a member's resignation, it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

(c) The order disbarring the member and the affidavit required under Rule .0117(a) above are matters of public record.

(d) If a defendant against whom a formal complaint has been filed before the commission wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out in .0117(a)(1), (2), (3), and (4) above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective upon entry of the order with the secretary. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days of the tender or consent. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-32(b), Readopted Effective December 8, 1994; Amended effective March 2, 2006.

B.0118. Disability hearings.

(a) *Disability proceedings where member involuntarily committed or judicially declared incompetent.*

Where a member of the North Carolina State Bar has been judicially declared incapacitated or mentally ill under the provisions of Chapter 122C of the General Statutes or similar laws of any jurisdiction, the secretary, upon proper proof of the fact, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the commission. A copy of the order will be served upon the member, the member's guardian, or the director of the institution to which the member has been committed.

(b) *Disability proceedings initiated by the North Carolina State Bar.*

(1) When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in Rule .0113 of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(19) of this subchapter. If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the Grievance Committee.

(2) Whenever the counsel files a petition alleging the disability of a member, the chairperson of the commission will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter to determine whether such member is disabled. The hearing committee will conduct a hearing on the petition in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The hearing will be open to the public.

(3) The hearing committee may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected by the hearing committee.

(4) In any proceeding seeking a transfer to disability inactive status under this rule, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of Rule .0103(19) of this subchapter.

(5) The hearing committee may appoint an attorney to represent the member in a disability proceeding, if the hearing committee concludes that justice so requires.

(6) If the hearing committee finds that the member is disabled, the committee will enter an order transferring the member to disability inactive status. The order of transfer will become effective immediately. A copy of the order will be served upon the member or the member's guardian or attorney.

(c) *Disability proceedings where defendant alleges disability in disciplinary proceeding.*

(1) If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(19) of this subchapter, the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

(2) The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding. The hearing will be conducted pursuant to the procedures outlined in Rule .0118(b)(3) and (5)-(6) above.

(3) The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of Rule .0103(19) of this subchapter. If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

(4) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(d) *Disability hearings initiated by a hearing committee.*

(1) If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in Rules .0118(b)(2)-(6) above. The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of Rule .0103(19) of this subchapter.

(2) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(3) If the hearing committee determines that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If the defendant is returned to active status by the commission, the disciplinary proceeding will be rescheduled by the chairperson of the commission.

(e) *Fees and costs.*

The hearing committee may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any attorney appointed to represent the member.

(f) *Preservation of evidence.*

In any case in which disciplinary proceedings against a defendant have been stayed by reason of the defendant's disability, counsel may continue to investigate allegations of misconduct and may seek orders from the chairperson of the commission to preserve evidence of any alleged professional misconduct by the disabled defendant, including orders which permit the taking of depositions. The chairperson may order appointment of counsel to represent the disabled defendant when necessary to protect the interests of the disabled defendant.

(g) A member of the North Carolina State Bar may be transferred to disability inactive status with the consent of the member, the counsel and the Chairperson of the Grievance committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(g); G.S. 84-28.1; G.S. 84-29; G.S. 84-30, Readopted Effective December 8, 1994; Amended March 5, 1998; Amended effective March 6, 2002.

B.0119. Enforcement of powers.

In addition to the other powers contained herein, in proceedings before any committee or subcommittee of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i), Readopted Effective December 8, 1994.

B.0120. Notice to member of action and dismissal.

In every disciplinary case wherein the respondent has received a letter of notice and the grievance has been dismissed, the respondent will be notified of the dismissal by a letter by the chairperson of the Grievance Committee. The chairperson will have discretion to give similar notice to the respondent in cases wherein a letter of notice has not been issued but the chairperson deems such notice to be appropriate.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

B.0121. Notice to complainant.

(a) If the Grievance Committee finds probable cause and imposes discipline, the chairperson of the Grievance Committee will notify the complainant of the action of the committee.

(b) If the Grievance Committee finds probable cause and refers the matter to the commission, the chairperson of the Grievance Committee will advise the complainant that the grievance has been received and considered and has been referred to the commission for hearing.

(c) If the Grievance Committee finds that there is no probable cause to believe that misconduct occurred and votes to dismiss a grievance, the chairperson of the Grievance Committee will advise the complainant that the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

(d) If final action on a grievance is taken by the Grievance Committee in the form of a letter of caution or a letter of warning, the chairperson of the Grievance Committee will so advise the complainant. The communication to the complainant will explain that the letter of caution or letter of warning is not a form of discipline.

(e) If a grievance is referred to the Board of Continuing Legal Education, the chairperson of the Grievance Committee will advise the complainant of that fact and the reason for the referral. If the respondent successfully completes the prescribed training and the grievance is dismissed, the chairperson of the Grievance Committee will advise the complainant. If the respondent does not successfully complete the prescribed course of training, the chairperson of the Grievance Committee will advise the complainant that investigation of the original grievance has resumed.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 7, 1996.

B.0122. Appointment of counsel to protect clients' interests when attorney disappears, dies, or is transferred to disability inactive status.

(a) Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner or other member of the North Carolina State Bar capable of protecting the interests of the attorney's clients is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

(b) Any member so appointed will not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such files relate except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(j), Readopted Effective December 8, 1994.

B.0123. Imposition of discipline; Findings of incapacity or disability; Notice to courts.

(a) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken—

(1) *Admonition.* An admonition will be prepared by the chairperson of the Grievance Committee or the chairperson of the hearing committee depending upon the agency ordering the admonition. The admonition will be served upon the defendant. The admonition will not be recorded in the judgment docket of the North Carolina State Bar. Where the admonition is imposed by the Grievance Committee, the complainant will be notified that the defendant has been admonished, but will not be entitled to a copy of the admonition. An order of admonition imposed by the commission will be a public document.

(2) *Reprimand.* The chairperson of the Grievance Committee or chairperson of the hearing committee depending upon the body ordering the discipline, will file an order of reprimand with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant.

(3) *Censure, suspension, or disbarment.* The chairperson of the hearing committee will file the order of censure, order of suspension or disbarment with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address and of any county where the defendant maintains an office. A copy of the order of censure, order of suspension or disbarment will also be sent to the clerk of the superior court in any county where the defendant maintains an office, to the North Carolina Court of Appeals, to the North Carolina Supreme Court, to the United States District Courts in North Carolina, to the Fourth Circuit Court of Appeals, and to the United States Supreme Court. Orders of Censures imposed by the Grievance Committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as orders of censures imposed by the commission.

(b) Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and of any county where the disabled member maintains an office and will forward a copy of the order to the courts referred to in Rule .0123(a)(3) above.

History Note: Statutory Authority G.S. 84-23; G.S. 84-32(a), Readopted effective December 8, 1994; Amended effective November 7, 1996.

B.0124. Obligations of disbarred or suspended attorneys.

(a) A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere. The written notice must be received by the client before a disbarred or suspended attorney enters into any agreement with or on behalf of any client to settle, compromise or resolve any claim, dispute or lawsuit of the client. The disbarred or suspended attorney will take reasonable steps to avoid foreseeable prejudice to the rights of his or her clients, including promptly delivering all file materials and property to which the clients are entitled to the clients or the clients' substituted attorney. No disbarred or suspended attorney will transfer active client files containing confidential information or property to another attorney, nor may another attorney receive such files or property, without prior written permission from the client.

(b) The disbarred or suspended member will withdraw from all pending administrative or litigation matters before the effective date of the suspension or disbarment and will follow all applicable laws and disciplinary rules regarding the manner of withdrawal.

(c) In cases not governed by Rule .0117 of this subchapter, orders imposing suspension or disbarment will be effective 30 days after being served upon the defendant. In such cases, after entry of the disbarment or suspension order, the disbarred or suspended attorney will not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, between the entry date of the order and its effective date, the member may complete, on behalf of any client, matters which were pending on the entry date and which can be completed before the effective date of the order.

(d) Within 10 days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney will file with the secretary an affidavit showing that he or she has fully complied with the provisions of the order, with the provisions of this section, and with the provisions of all other state, federal, and administrative jurisdictions to which he or she is admitted to practice. The affidavit will also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(e) The disbarred or suspended member will keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section will be a condition precedent to consideration of any petition for reinstatement.

(f) A suspended or disbarred attorney who fails to comply with Rules .0124(a)-(e) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of Rule .0124(a) above will be grounds for appointment of counsel pursuant to Rule .0122 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

B.0125. Reinstatement.

(a) After disbarment

(1) No person who has been disbarred may have his or her license restored but upon order of the council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee as provided herein. No such hearing

will commence until security for the costs of such hearing has been deposited with the secretary in an amount not to exceed $500.00.

(2) No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) The petitioner will have the burden of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file notice of their opposition or concurrence with the secretary within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to raise objections or support the lawyer's petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony;

(F) the petitioner has complied with Rule .0124 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;

(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(N) the petitioner paid all dues, Client Security Fund assessments, and late fees owed to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of disbarment.

(4) Petitions filed less than seven years after disbarment

(A) If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

(B) Factors which may be considered in deciding the issue of competency include

(i) experience in the practice of law;

(ii) areas of expertise;

(iii) certification of expertise;

(iv) participation in continuing legal education programs in each of the three years immediately preceding the petition date;

(v) certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

(C) The factors listed in Rule .0125(a)(4)(B) above are provided by way of example only. The petitioner's satisfaction of one or all of these factors creates no presumption that the petitioner has met the burden of proof established by this section.

(D) The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) If seven years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement will be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

(6) Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission and serve a copy on the counsel. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(7) As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclusions, and recommendations with the secretary.

(8) A petitioner in whose case the hearing committee recommends that reinstatement be denied may file notice of appeal to the council. Appeal from the report of the hearing committee must be taken within 30 days after service of the committee report upon the petitioner and shall be filed with the secretary. If no appeal is timely filed, the recommendation of the hearing committee to deny reinstatement will be deemed final. All cases in which the hearing committee recommends reinstatement of a disbarred attorney's license shall be heard by the council and no notice of appeal need be filed by the N.C. State Bar.

(9) *Transcript of Hearing Committee Proceedings.* The petitioner will have 60 days following the filing of the notice of appeal in which to produce a transcript of the trial proceedings before the hearing committee. The chairperson of the hearing committee, may, for good cause shown, extend the time to produce the record.

(10) *Record to the Council.*

(A) *Composition of the Record.* The petitioner will provide a record of the proceedings before the hearing committee, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and counsel agree in writing to shorten the record. The petitioner will provide the proposed record to the counsel not later than 90 days after the hearing before the hearing committee, unless an extension of time is granted by the secretary for good cause shown. Any agreement or order regarding the record will be in writing and will be included in the record transmitted to the council.

(B) *Settlement of the Record.*

(i) By agreement — at any time following service of the proposed record upon the counsel, the parties may by agreement entered in the record settle the record to the council.

(ii) By counsel's failure to object to the proposed record — within 20 days after service of the proposed record, the counsel may serve a written objection or a proposed alternative record upon the petitioner. If the counsel fails to serve a notice of approval or an objection or a proposed alternative record, the petitioner's proposed record will constitute the record to the council.

(iii) By judicial settlement — If the counsel raises a timely objection to the proposed record or serves a proposed alternative record upon the petitioner, either party may request the chairperson of the hearing committee which heard the reinstatement petition to settle the record. Such request shall be filed in writing with the hearing committee chairperson no later than 15 days after the counsel files an objection or proposed alternative record. Each party shall promptly provide to the chairperson a reference copy of the proposed record, amendments and objections filed by that party in the case. The chairperson of the hearing committee shall settle the record on appeal by order not more than 20 days after service of the request for judicial settlement upon the chairperson. The chairperson may allow oral argument by the parties or may settle the record based upon written submissions by the parties.

(C) The petitioner will transmit a copy of the settled record to each member of the council and to the counsel no later than 30 days before the council meeting at which the petition is to be considered.

(D) The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

(E) If the petitioner fails to comply with any of the subsections of Rule .0125(a)(8) above, the counsel may petition the secretary to dismiss the petition.

(11) The council will review the report of the hearing committee and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

(12) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one year from the date of the last order denying reinstatement.

(b) After suspension

(1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended for a period of 120 days or less is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 10 days have elapsed from the date of filing the petition for reinstatement. No attorney whose license has been suspended for a period of more than 120 days is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of the filing of the petition for reinstatement.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner will have the burden of proving the following by clear, cogent and convincing evidence:

(A) compliance with Rule .0124 of this subchapter;

(B) compliance with all applicable orders of the commission and the council;

(C) abstention from the unauthorized practice of law during the period of suspension;

(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;

(E) abstention from conduct during the period of suspension constituting grounds for discipline under G.S. 84-28(b);

(F) reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(G) reimbursement of all sums which the Disciplinary Hearing Commission found in the order of suspension were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(H) satisfaction of the minimum continuing legal education requirements, as set forth in Rule .1517 of Subchapter 1D of these rules, for the two calendar years immediately preceding the year in which the petitioner was suspended, which shall include the satisfaction of any deficit recorded in the petitioner's State Bar CLE transcript for such period; provided that the petitioner may attend CLE programs after the effective date of the suspension to make up any unsatisfied requirement. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(I) *(Effective for petitioners suspended on or after January 1, 1997)* if two or more years have elapsed between the effective date of the suspension order and the date on which the reinstatement petition is filed with the secretary, the petitioner must, within one year prior to filing the petition, complete 15 hours of CLE approved by the Board of Continuing Legal Education pursuant to Subchapter 1D, Rule .1519 of these rules. Three hours of the 15 hours must be earned by attending courses of instruction devoted exclusively to professional responsibility and/or professionalism. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(J) payment of all membership fees, Client Security Fund assessments and late fees due and owing to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension.

(4) The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Rule .0125(b)(3) above, and the counsel may file a response to the petition with the secretary prior to the date the petitioner is first eligible for reinstatement. The counsel will serve a copy of any response filed upon the petitioner.

(5) If the counsel does not file a response to the petition before the date the petitioner is first eligible for reinstatement, then the secretary will issue an order of reinstatement.

(6) If the counsel files a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events at issue.

(7) The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(8) The hearing committee will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(c) After transfer to disability inactive status:

(1) No member of the North Carolina State Bar transferred to disability inactive status may resume active status until reinstated by order of the commission. Any member transferred to disability inactive status will be entitled to apply to the commission for reinstatement to active status once a year or at such shorter intervals as are stated in the order transferring the member to disability inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to disability inactive status will be filed with the secretary. Upon receipt of the petition the secretary will refer the petition to the commission chairperson. The chairperson will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter. A hearing will be conducted pursuant to the procedures set out in Rule .0114 of this subchapter.

(3) The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103(19) of this subchapter and that he or she is fit to resume the practice of law.

(4) Within 10 days of filing the petition for reinstatement, the member will provide the secretary with a list of the name and address of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the member has been examined or treated or sought treatment while disabled. At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability.

(5) Where a member has been transferred to disability inactive status based solely upon a judicial finding of incapacity, and thereafter a court of competent jurisdiction enters an order adjudicating that the member's incapacity has ended, the chairperson

of the commission will enter an order returning the member to active status upon receipt of a certified copy of the court's order. Entry of the order will not preclude the North Carolina State Bar from bringing an action pursuant to Rule .0118 of this subchapter to determine whether the member is disabled.

(6) The hearing committee may direct the member to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the committee.

(d) The hearing committee may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension or disability inactive status in any case in which the hearing committee concludes that such conditions are necessary for the protection of the public.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28.1; G.S. 84-29; G.S. 84-30, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective March 6, 1997; Amended effective October 2, 1997; Amended effective December 30, 1998; Amended effective January 15, 1999; Amended effective August 24, 2000; Amended effective March 6, 2002; Amended effective February 27, 2003.

CASE NOTES

Cited in Vann v. North Carolina State Bar, 79 N.C. App. 173, 339 S.E.2d 97 (1986).

B.0126. Address of record.

Except where otherwise specified, any provision herein for notice to a respondent, member, petitioner, or a defendant will be deemed satisfied by appropriate correspondence addressed to that attorney by mail to the last address maintained by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

B.0127. Disqualification due to interest.

No member of the council or hearing commission will participate in any disciplinary matter involving the member, any partner, or associate in the practice of law of the member, or in which the member has a personal interest.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

B.0128. Trust accounts; Audit.

(a) For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, circumstances that constitute reasonable cause, include, but are not limited to:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0128(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property;

(3) two or more grievances received by the North Carolina State Bar over a twelve month period alleging facts which, if true, would indicate misconduct for neglect of a client matter or failure to communicate with a client;

(4) any failure to respond to any notices issued by the North Carolina State Bar with regard to a grievance or a fee dispute;

(5) any information received by the North Carolina State Bar which, if true, would constitute a failure to file any federal, state, or local tax return or pay an federal, state, or local tax obligation; or

(6) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or any auditor appointed by the counsel to determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. The auditor may report any violation of the Rules of Professional Conduct discovered during random audit to the Grievance Committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee. The auditor shall have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) No subpoena issued pursuant to this rule may compel production within five days of service.

(d) The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended November 16, 2006.

B.0129. Confidentiality.

(a) Except as otherwise provided in this rule and G.S. 84-24(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice;

(5) the member files an affidavit of surrender of license; or

(6) a member is transferred to disability inactive status pursuant to Rule .0118(g). In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0118(c), unless provided otherwise in the order.

(b) The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing.

(d) This provision will not construed to prohibit the North Carolina State Bar from providing information or evidence to any law enforcement or regulatory agency.

(e) This provision will not be construed to prevent the North Carolina State Bar, approval of the chairperson of the Grievance Committee, from notifying the Chief

Justice's Commission on Professionalism of any allegation of unprofessional conduct by any member.

(f) This provision will not be construed to prevent the North Carolina State Bar from notifying the Lawyer Assistance Program of any circumstances that indicate a member may have a substance abuse or mental health issue.

(g) This provision will not be construed to prohibit the North Carolina State Bar, with the approval of the chairperson of the Grievance Committee, from providing relevant information concerning the existence of a letter of caution, letter of warning, or admonition to any agency that regulates the legal profession in any other jurisdiction so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as does the North Carolina State Bar.

(h) The secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association.

(i) The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective November 7, 1996; Amended effective March 6, 2002; Amended effective July 18, 2008; Amended effective October 9, 2008.

B.0130. Disciplinary amnesty in illicit drug use cases.

(a) The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs except as provided in Rules .0130(c), (d) and (e) below. The information will be provided to the director of the lawyer assistance program of the North Carolina State Bar.

(b) If the director of the lawyer assistance program concludes after investigation that a member has used or is using an illicit drug and the member participates and successfully complies with any course of treatment prescribed by the lawyer assistance program, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

(c) If a member under Rule .0130(b) above fails to cooperate with the Lawyer Assistance Program Board or fails to successfully complete any treatment prescribed for the member's illicit drug use, the director of the lawyer assistance program will report such failure to participate in or complete the prescribed treatment to the chairperson of the Grievance Committee. The chairperson of the Grievance Committee will then treat the information originally received as a grievance.

(d) A member charged with a crime relating to the use or possession of illicit drugs will not be entitled to amnesty from discipline by the North Carolina State Bar relating to the illicit drug use or possession.

(e) If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Revised Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the director of the lawyer assistance program pursuant to Rule .0130(a) above. The information regarding the member's alleged additional misconduct will be reported to the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

SECTION .0200. RULES GOVERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

B.0201. Organization of judicial district grievance committees.

(a) *Judicial districts eligible to form district Grievance Committees.*

(1) Any judicial district which has more than 100 licensed attorneys as determined by the North Carolina State Bar's records may establish a judicial district Grievance Committee (hereafter, "district Grievance Committee") pursuant to the rules and regulations set out herein. A judicial district with fewer than 100 licensed attorneys

may establish a district Grievance Committee with consent of the Council of the North Carolina State Bar.

(2) One or more judicial districts, including those with fewer than 100 licensed attorneys, may also establish a multi-district Grievance Committee, as set out in Rule .0201(b)(2) below. Such multi-district Grievance Committees shall be subject to all of the rules and regulations set out herein and all references to district Grievance Committees in these rules shall also apply to multi-district Grievance Committees.

(b) *Creation of district Grievance Committees.*

(1) A judicial district may establish a district Grievance Committee at a duly called meeting of the judicial district bar, at which a quorum is present, upon the affirmative vote of a majority of the active members present. Within 30 days of the election, the president of the judicial district bar shall certify in writing the establishment of the district Grievance Committee to the secretary of the North Carolina State Bar.

(2) A multi-district Grievance Committee may be established by affirmative vote of a majority of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. Within 30 days of the election, the chairperson of the multi-district Grievance Committee shall certify in writing the establishment of the district Grievance Committee to the secretary of the North Carolina State Bar. The active members of each participating judicial district may adopt a set of by-laws not inconsistent with these rules by majority vote of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. The chairperson of the multi-district Grievance Committee shall promptly provide a copy of any such bylaws to the secretary of the North Carolina State Bar.

(c) *Appointment of district Grievance Committee members.*

(1) Each district Grievance Committee shall be composed of not fewer than five nor more than 13 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district Grievance Committee may also include one to three public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district Grievance Committee.

(2) The chairperson of the district Grievance Committee shall be selected by the president of the judicial district and shall serve at his or her pleasure. Alternatively, the chairperson may be selected and removed as provided in the district bar bylaws.

(3) The attorney and public members of the district Grievance Committee shall be selected by and serve at the pleasure of the president of the judicial district bar and the chairperson of the district Grievance Committee. Alternatively, the district Grievance Committee members may be selected and removed as provided in the district bar bylaws.

(4) The members of the district Grievance Committee, including the chairperson, shall be appointed for staggered three-year terms, except that the president and chairperson shall appoint some of the initial committee members to terms of less than three years, to effectuate the staggered terms. No member shall serve more than one term, without first having rotated off the committee for a period of at least one year between three-year terms. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced by appointment by the president of the judicial district bar and the chairperson of the committee or as provided in the district bar bylaws as soon as practicable.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0202. Jurisdiction & authority of district grievance committees.

(a) *District Grievance Committees are subject to the rules of the North Carolina State Bar.* The district Grievance Committee shall be subject to the rules and regulations adopted by the Council of the North Carolina State Bar.

(b) *Grievances filed with district Grievance Committee.* A district Grievance Committee may investigate and consider grievances filed against attorneys who live or maintain offices within the judicial district and which are filed in the first instance with the chairperson of the district Grievance Committee. The chairperson of the district Grievance Committee will immediately refer to the State Bar any grievance filed locally in the first instance which

(1) alleges misconduct against a member of the district Grievance Committee;

(2) alleges that any attorney has embezzled or misapplied client funds; or

(3) alleges any other serious violation of the Rules of Professional Conduct which may be beyond the capacity of the district Grievance Committee to investigate.

(c) *Grievances referred to district grievance committee.* The district grievance committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

(d) *Grievances involving fee disputes.*

(1) *Notice to Complainant of Fee Dispute Resolution Program.* If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chairperson of the district grievance committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the complainant may elect to participate in the North Carolina State Bar Fee Dispute Resolution Program. If the grievance consists solely of a fee dispute, the letter to the complainant shall follow the format set out in Rule .0208 of this subchapter. If the grievance consists in part of matters other than a fee dispute, the letter to the complainant shall follow the format set out in Rule .0209 of this subchapter. A respondent attorney shall not have the right to elect to participate in fee arbitration.

(2) *Handling claims not involving fee dispute.* Where a grievance alleges multiple claims, the allegations not involving a fee dispute will be handled in the same manner as any other grievance filed with the district Grievance Committee.

(3) *Handling claims not submitted to fee dispute resolution by complainant.* If the complainant elects not to participate in the State Bar's Fee Dispute Resolution Program, or fails to notify the chairperson that he or she elects to participate within 20 days following mailing of the notice referred to in Rule .0202(d)(1) above, the grievance will be handled in the same manner as any other grievance filed with the district grievance committee.

(4) *Referral to Fee Dispute Resolution Program.* Where a complainant timely elects to participate in fee dispute resolution, and the judicial district in which the respondent attorney maintains his or her principal office has a fee dispute resolution committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee dispute resolution committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee dispute resolution committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Resolution Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in fee dispute resolution, no grievance file will be established.

(e) *Authority of District Grievance Committees.* The district grievance committee shall have authority to

(1) assist a complainant who requests assistance to reduce a grievance to writing;

(2) investigate complaints described in Rule .0202(b) and (c) above by interviewing the complainant, the attorney against whom the grievance was filed and any other persons who may have relevant information regarding the grievance and by requesting written materials from the complainant, respondent attorney, and other individuals;

(3) explain the procedures of the district Grievance Committee to complainants and respondent attorneys;

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the Revised Rules of Professional Conduct. The district Grievance Committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to the Lawyer Assistance Program pursuant to Rule .0112(j) or to a program of law office management training approved by the State Bar;

(5) draft a written report stating the grounds for the recommended disposition of a grievance assigned to the district Grievance Committee;

(6) notify the complainant and the respondent attorney where the district Grievance Committee recommends that the State Bar find that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct. Where the

district Grievance Committee recommends that the State Bar find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct, the committee shall notify the respondent attorney of its recommendation and shall notify the complainant that the district Grievance Committee has concluded its investigation and has referred the matter to the State Bar for final resolution. Where the district Grievance Committee recommends a finding of no probable cause, the letter of notification to the respondent attorney and to the complainant shall follow the format set out in Rule .0210 of this subchapter. Where the district Grievance Committee recommends a finding of probable cause, the letter of notification to the respondent attorney shall follow the format set out in Rule .0211 of this subchapter. The letter of notification to the complainant shall follow the format set out in Rule .0212 of this subchapter;

(7) maintain records of grievances investigated by the district Grievance Committee for at least one year from the date on which the district Grievance Committee makes its final recommendation regarding a grievance to the State Bar.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective March 3, 1999; Amended effective December 20, 2000; Amended effective August 23, 2007.

B.0203. Meetings of the district grievance committees.

(a) *Notice of meeting.* The district Grievance Committee shall meet at the call of the chairperson upon reasonable notice, as often as is necessary to dispatch its business and not less than once every 60 days, provided the committee has grievances pending.

(b) *Confidentiality.* The district Grievance Committee shall meet in private. Discussions of the committee, its records and its actions shall be confidential. The names of the members of the committee shall not be confidential.

(c) *Quorum.* A simple majority of the district Grievance Committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required for the motion to pass or the action to be taken.

(d) *Appearances by complainants and respondents.* No complainant nor any attorney against whom a grievance has been filed may appear before the district Grievance Committee, present argument to or be present at the committee's deliberations.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

B.0204. Procedure upon institution of a grievance.

(a) *Receipt of grievance.* A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance must be in writing and signed by the complaining person. A district Grievance Committee may, however, investigate matters which come to its attention during the investigation of a grievance, whether or not such matters are included in the original written grievance.

(b) *Acknowledgment of receipt of grievance from State Bar.* The chairperson of the district Grievance Committee shall send a letter to the complainant within 10 working days of receipt of the grievance from the State Bar, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district Grievance Committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter. A copy of the letter shall be sent contemporaneously to the office of counsel of the State Bar.

(c) *Notice to State Bar of locally filed grievances.*

(1) Where a grievance is filed in the first instance with the district Grievance Committee, the chairperson of the district Grievance Committee shall notify the office of counsel of the State Bar of the name of the complainant, respondent attorney, file number and nature of the grievance within 10 working days of receipt of the grievance.

(2) The chairperson of the district Grievance Committee shall send a letter to the complainant within 10 working days of receipt of the grievance, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter.

(3) Grievances filed initially with the district Grievance Committee shall be assigned a local file number which shall be used to refer to the grievance. The first two digits of the file number shall indicate the year in which the grievance was filed, followed by the number of the judicial district, the letters GR, and ending with the number of the file. File numbers shall be assigned sequentially during the calendar year, beginning with the number 1. For example, the first locally filed grievance set up in the 10th judicial district in 1994 would bear the following number: 9410GR001.

(d) *Assignment to investigating member.* Within 10 working days after receipt of a grievance, the chairperson shall appoint a member of the district Grievance Committee to investigate the grievance and shall forward the relevant materials to the investigating member. The letter to the investigating member shall follow the format set out in Rule .0214 of this subchapter.

(e) *Investigation of the grievance.*

(1) The investigating member shall attempt to contact the complainant as soon as possible but no later than 15 working days after receiving notice of the assignment. If the initial contact with the complainant is made in writing, the letter shall follow the format set out in Rule .0215 of this subchapter.

(2) The investigating member shall have the authority to contact other witnesses or individuals who may have information about the subject of the grievance, including the respondent.

(3) The failure of the complainant to cooperate shall not cause a grievance to be dismissed or abated. Once filed, grievances shall not be dismissed or abated upon the request of the complainant.

(f) *Letter of notice to respondent attorney and responses.*

(1) Within 10 working days after receipt of a grievance, the chairperson of the district Grievance Committee shall send a copy of the grievance and a letter of notice to the respondent attorney. The letter to the respondent attorney shall follow the form set out in Rule .0216 of this subchapter and shall be sent by U.S. Mail to the attorney's last known address on file with the State Bar. The letter of notice shall request the respondent to reply to the investigating attorney in writing within 15 days after receipt of the letter of notice.

(2) A substance of grievance will be provided to the district Grievance Committee by the State Bar at the time the file is assigned to the committee. The substance of grievance will summarize the nature of the complaint against the respondent attorney and cite the applicable provisions of the Rules of Professional Conduct, if any.

(3) The respondent attorney shall respond in writing to the letter of notice from the district Grievance Committee within 15 days of receipt of the letter. The chairperson of the district Grievance Committee may allow a longer period for response, for good cause shown.

(4) If the respondent attorney fails to respond in a timely manner to the letter of notice, the chairperson of the district Grievance Committee may seek the assistance of the State Bar to issue a subpoena or take other appropriate steps to ensure a proper and complete investigation of the grievance. District Grievance Committees do not have authority to issue a subpoena to a witness or respondent attorney.

(5) Unless necessary to complete its investigation, the district Grievance Committee should not release copies of the respondent attorney's response to the grievance to the complainant. The investigating attorney may summarize the response for the complainant orally or in writing.

(g) *District grievance committee deliberations.*

(1) Upon completion of the investigation, the investigating member shall promptly report his or her findings and recommendations to the district Grievance Committee in writing.

(2) The district Grievance Committee shall consider the submissions of the parties, the information gathered by the investigating attorney and such other material as it deems relevant in reaching a recommendation. The district Grievance Committee may also make further inquiry as it deems appropriate, including investigating other facts and possible violations of the Rules of Professional Conduct discovered during its investigation.

(3) The district Grievance Committee shall make a determination as to whether or not it finds that there is probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct.

(h) *Report of committee's decision.*

(1) Upon making a decision in a case, the district Grievance Committee shall submit a written report to the office of counsel, including its recommendation and the basis for its decision. The original file and grievance materials of the investigating attorney shall be sent to the State Bar along with the report. The letter from the district bar Grievance Committee enclosing the report shall follow the format set out in Rule .0217 of this subchapter.

(2) The district Grievance Committee shall submit its written report to the office of counsel no later than 180 days after the grievance is initiated or received by the district committee. The State Bar may recall any grievance file which has not been investigated and considered by a district Grievance Committee within 180 days after the matter is assigned to the committee. The State Bar may also recall any grievance file for any reason.

(3) Within 10 working days of submitting the written report and returning the file to the office of counsel, the chairperson of the district Grievance Committee shall notify the respondent attorney and the complainant in writing of the district Grievance Committee's recommendation, as provided in Rule .0202(d)(6) of this subchapter.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0205. Record keeping.

The district Grievance Committee shall maintain records of all grievances referred to it by the State Bar and all grievances initially filed with the district Grievance Committee for at least one year. The district Grievance Committee shall provide such reports and information as are requested of it from time to time by the State Bar.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0206. Miscellaneous.

(a) *Assistance and questions.* The office of counsel, including the staff attorneys and the grievance coordinator, are available to answer questions and provide assistance regarding any matters before the district Grievance Committee.

(b) *Missing attorneys.* Where a respondent attorney is missing or cannot be located, the district Grievance Committee shall promptly return the grievance file to the office of counsel for appropriate action.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0207. Conflicts of interest.

(a) No district Grievance Committee shall investigate or consider a grievance which alleges misconduct by any current member of the committee. If a file is referred to the committee by the State Bar or is initiated locally which alleges misconduct by a member of the district Grievance Committee, the file will be sent to the State Bar for investigation and handling within 10 working days after receipt of the grievance.

(b) A member of a district Grievance Committee shall not investigate or participate in deliberations concerning any of the following matters:

(1) alleged misconduct of an attorney who works in the same law firm or office with the committee member;

(2) alleged misconduct of a relative of the committee member;

(3) a grievance involving facts concerning which the committee member or a partner or associate in the committee member's law firm acted as an attorney.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0208. Letter to complainant where local grievance alleges fee dispute only.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district Grievance Committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Resolution Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee dispute resolution program, please complete and return the form to me within 20 days of the date of this letter. If you decide to participate, no grievance file will be opened and the [ ] district bar Grievance Committee will take no other action against the attorney.

If you do not wish to participate in fee dispute resolution program, you may elect to have your complaint investigated by the [ ] district Grievance Committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee dispute resolution, and we will handle your complaint like any other grievance. However, the [ ] district Grievance Committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective August 23, 2007.

B.0209. Letter to complainant where local grievance alleges fee dispute and other violations.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district Grievance Committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Resolution Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee dispute resolution program, please complete and return the form to me within 20 days of the date of this letter. If you decide to participate, the fee dispute resolution committee will handle those portions of your complaint which involve an apparent fee dispute.

If you do not wish to participate in fee dispute resolution program, you may elect to have your entire complaint investigated by the [ ] district Grievance Committee . If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee dispute resolution, and we will handle your entire complaint like any other grievance. However, the [ ] district Grievance Committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N. C. State Bar

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective August 23, 2007.

B.0210. Letter to complainant/respondent where district committee recommends finding of no probable cause.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

The [ ] district Grievance Committee has completed its investigation of your grievance. Based upon its investigation, the committee does not believe that there is probable cause to find that the attorney has violated any provisions of the Rules of Professional Conduct. The committee will forward a report with its recommendation to the North Carolina State Bar Grievance Committee . The final decision regarding your grievance will be made by the North Carolina State Bar Grievance Committee . You will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [ ] district Grievance Committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Respondent Attorney
PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

B.0211. Letter to respondent where district committee recommends finding of probable cause.

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No. [ ]

Dear Ms. Doe:

The [ ] district Grievance Committee has completed its investigation of Mr. Smith's grievance and has voted to recommend that the North Carolina State Bar Grievance Committee find probable cause to believe that you violated one or more provisions of the Rules of Professional Conduct. Specifically, the [ ] district Grievance Committee found that there is probable cause to believe that you may have violated [set out brief description of rule allegedly violated and pertinent facts].

The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision. The complainant has been notified that the [ ] district Grievance Committee has concluded its investigation and that the grievance has been sent to the North Carolina State Bar for final resolution, but has not been informed of the [ ] district committee's specific recommendation.

If you have any questions or wish to communicate further regarding this grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611
Tel. 919-828-4620

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0212. Letter to complainant where district committee recommends finding of probable cause.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

The [ ] district Grievance Committee has completed its investigation of your grievance and has forwarded its file to the North Carolina State Bar Grievance Committee in Raleigh for final resolution. The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [ ] district Grievance Committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Respondent Attorney
PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0213. Letter to complainant acknowledging grievance.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

I am the chairperson of the [ ] district Grievance Committee. Your grievance against [respondent attorney] [was received in my office]/[has been forwarded to my office by the North Carolina State Bar] on [date]. I have assigned [investigator's name], a member of the [ ] district Grievance Committee, to investigate your grievance. [ ]'s name, address and telephone number are as follows: [ ].

Please be sure that you have provided all information and materials which relate to or support your complaint to the [ ] district Grievance Committee. If you have other information which you would like our committee to consider, or if you wish to discuss your complaint, please contact the investigating attorney by telephone or in writing as soon as possible.

After [ ]'s investigation is complete, the [ ] district Grievance Committee will make a recommendation to the North Carolina State Bar Grievance Committee regarding whether or not there is probable cause to believe that [respondent attorney] violated one or more provisions of the Rules of Professional Conduct. Your complaint and the results of our investigation will be sent to the North Carolina State Bar at that time. The [ ] district Grievance Committee 's recommendation is not binding upon the North Carolina State Bar Grievance Committee, which will make the final determination. You will be notified in writing when the [ ] district Grievance Committee 's investigation is concluded.

Neither the investigating attorney nor any member of the [ ] district Grievance Committee can give you any legal advice or represent you regarding any underlying legal matter in which you may be involved. You may pursue any questions you have about your legal rights with an attorney of your own choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0214. Letter to investigating attorney assigning grievance.

James Roe
[ ] District Grievance Committee Member
Anywhere, N.C.

Re: Grievance of John Smith against Jane Doe
Our File No. [ ]

Dear Mr. Roe:

Enclosed you will find a copy of the grievance which I recently received regarding the above-captioned matter. Please investigate the complaint and provide a written report with your recommendations by [deadline].

Thank you very much.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0215. Letter to complainant from investigating attorney.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

I am the member of the [ ] district Grievance Committee assigned to investigate your grievance against [respondent attorney]. It is part of my job to ensure that you have had a chance to explain your complaint and that the [ ] district Grievance Committee has copies of all of the documents which you believe relate to your complaint.

If you have other information or materials which you would like the [ ] district Grievance Committee to consider, or if you would like to discuss this matter, please contact me as soon as possible.

If you have already fully explained your complaint, you do not need to take any additional action regarding your grievance. The [ ] district Grievance Committee will notify you in writing when its investigation is complete. At that time, the matter will be forwarded to the North Carolina State Bar Grievance Committee in Raleigh for its final decision. You will be notified in writing of the North Carolina State Bar's decision.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Investigating Member
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Chairperson, [ ] District Grievance Committee

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0216. Letter of notice to respondent attorney.

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No. [ ]

Dear Ms. Doe:

Enclosed you will find a copy of a grievance which has been filed against you by [complainant] and which was received in my office on [date]. As chairperson of the [ ] district Grievance Committee, I have asked [investigating attorney], a member of the committee, to investigate this grievance.

Please file a written response with [investigating attorney] within 15 days from receipt of this letter. Your response should provide a full and fair disclosure of all of the facts and circumstances relating to the matters set out in the grievance.

Thank you.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Investigating member
[ ] District Grievance Committee
PERSONAL AND CONFIDENTIAL
Director of Investigations
N.C. State Bar

PERSONAL AND CONFIDENTIAL
[ ] Complainant

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

B.0217. Letter transmitting completed file to North Carolina State Bar.

Director of Investigations
N.C. State Bar
P.O. Box 25908
Raleigh, N.C. 27611

Re: Grievance of John Smith File No. [ ]

Dear Director:

The [ ] district Grievance Committee has completed its investigation in the above-listed matter. Based upon our investigation, the committee determined in its opinion that there is/is not probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct for the reasons set out in the enclosed report.

We are forwarding this matter for final determination by the North Carolina State Bar Grievance Committee along with the following materials:

1. The original grievance of [complainant].
2. A copy of the file of the investigating attorney.
3. The investigating attorney's report, which includes a summary of the facts and the reason(s) for the committee's decision.

Please let me know if you have any questions or if you need any additional information.

Thank you.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SUBCHAPTER 1C. RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0100. BOARD OF LAW EXAMINERS

C.0101. Election.

(a) At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.

(b) No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.

History Note: Statutory Authority G.S. 84-24,
Readopted Effective December 8, 1994.

C.0102. Examination of applicants for license.

All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that board.

History Note: Statutory Authority G.S. 84-24,
Readopted Effective December 8, 1994.

C.0103. Admission to practice.

Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

History Note: Statutory Authority G.S. 84-24,
Readopted Effective December 8, 1994.

C.0104. Approval of rules and regulations of Board of Law Examiners.

The council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the council shall be the subject of further study and action, and for the purpose of study, the council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the council.

History Note: Statutory Authority G.S. 84-24,
Readopted Effective December 8, 1994.

C.0105. Approval of Law Schools.

Every applicant for admission to the N.C. State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

(1) The applicant holds an LL.B or J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred; or

(2) Prior to August 1995, the applicant received an LL.B., J.D., LL.M. or S.J.D. degree from a law school that was approved by the Council of the N.C. State Bar at the time the degree was conferred; or

(3) Prior to August 2005, the applicant received an LL.M or S.J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred.

History Note: Added effective March 3, 1999; Amended effective February 27, 2003.

SECTION .0200. RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

C.0201. Purpose.

The following rules are adopted to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education and to enable law students to obtain supervised practical training while serving as legal interns for government agencies.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective June 7, 2001; Amended effective March 6, 2008.

C.0202. Definitions.

The following definitions shall apply to the terms used in this section:

(1) *Eligible persons.* Persons who are unable financially to pay for the legal services of an attorney as determined by a standard established by a judge of the General Court of Justice, a legal services corporation, or a law school legal aid clinic providing representation. "Eligible persons" includes non-profit organizations serving low-income communities.

(2) *Government agencies.* The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defender's office or a district attorney's office.

(3) *Law school.* An ABA accredited law school or a law school actively seeking accreditation from the ABA and licensed by the Board of Governors of the University of North Carolina. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, legal interns may not practice, pursuant to these rules, with any legal aid clinic of the law school.

(4) *Legal aid clinic.* A department, division, program, or course in a law school that operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.

(5) *Legal intern.* A law student who is certified to provide supervised representation to clients under the provisions of the rules of this Subchapter.

(6) *Legal services corporation.* A nonprofit North Carolina corporation organized exclusively to provide representation to eligible persons.

(7) *Supervising attorney.* An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter and who supervises one or more legal interns.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001; Amended effective March 6, 2002; Amended effective March 6, 2008.

C.0203. Eligibility.

To engage in activities permitted by these rules, a law student must satisfy the following requirements;

(1) be enrolled in a law school approved by the Council of the North Carolina State Bar;

(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);

(3) be certified in writing by a representative of his or her law school authorized by the dean of the law school to provide such certification as being of good character with requisite legal ability and training to perform as a legal intern;
(4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;
(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal services corporation, law school, or government agency from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student;
(6) certify in writing that he or she has read and is familiar with the North Carolina Revised Rules of Professional Conduct and the opinions interpretive thereof.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001; Amended effective March 6, 2008.

C.0204. Certification as Legal Intern.

Upon receipt of the written materials required by Rule .0203(3) and (6) and Rule .0205(6), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:
(a) *Duration.* The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.
(b) *Withdrawal of Certification.* The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of
(1) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;
(2) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern is no longer in good standing at the law school;
(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or
(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

C.0205. Supervision.

(a) A supervising attorney shall
(1) be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;
(2) supervise no more than two legal interns concurrently, provided, however, there is no limit on the number of legal interns who may be supervised concurrently by an attorney who is a full-time member of a law school's faculty or staff whose primary responsibility is supervising legal interns in a legal aid clinic and, further provided, that an attorney who supervises legal interns through an externship or out-placement program of a law school legal aid clinic may supervise up to five legal interns;
(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;
(4) assist and counsel with a legal intern in the activities permitted by these rules and review such activities with the legal intern, all to the extent required for the proper practical training of the legal intern and the protection of the client;
(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern prior to the filing thereof, and read and approve any documents prepared by a legal intern for execution by a client or third party prior to the execution thereof;

(6) prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which [the] supervising attorney expects to supervise the activities of an identified legal intern, and acknowledging that the supervising attorney will adequately supervise the legal intern in accordance with these rules; and

(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001; Amended effective March 6, 2002; Amended effective March 6, 2008.

C.0206. Activities.

(a) A properly certified legal intern may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a legal intern may give advice to a client, including a government agency, on legal matters provided that the legal intern gives a clear prior explanation that the legal intern is not an attorney and the supervising attorney has given the legal intern permission to render legal advice in the subject area involved.

(c) A legal intern may represent an eligible person, or the state in criminal prosecutions, a criminal defendant who is represented by the public defender, or a government agency in any proceeding before a federal, state, or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the legal intern.

(d) In all cases under this rule in which a legal intern makes an appearance before a tribunal or agency on behalf of a client who is an individual, the legal intern shall have the written consent in advance of the client. The client shall be given a clear explanation, prior to the giving of his or her consent, that the legal intern is not an attorney. This consent shall be filed with the tribunal and made a part of the record in the case. In all cases in which a legal intern makes an appearance before a tribunal or agency on behalf a government agency, the consent of the government agency shall be presumed if the legal intern is participating in an internship program of the government agency. A statement advising the court of the legal intern's participation in an internship program of the government agency shall be filed with the tribunal and made a part of the record in the case.

(e) In all cases under this rule in which a legal intern is permitted to make an appearance before a tribunal or agency, subject to any limitations imposed by the tribunal, the legal intern may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001; Amended effective March 6, 2002; Amended effective March 6, 2008.

CASE NOTES

Presentation of Evidence by Law Student Without Written Consent. — Presentation of evidence by a law student, instead of the student's supervising attorney who was present at the hearing, did not rise to prejudicial error, although the written consents required by subdivision (g) were not made a part of the record. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

C.0207. Use of student's name.

(a) A legal intern's name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the legal intern has worked with or under the direction of the supervising attorney, provided the legal intern is clearly identified as a legal intern certified under these

rules, and provided further that the legal intern shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the letterhead of the supervising attorney, legal aid clinic, or government agency, provided there appears below the legal intern's signature a clear identification that the legal intern is certified under these rules. An appropriate designation is "Certified Legal Intern under the Supervision of [Supervising attorney.]

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney, legal aid clinic, or government agency;

(2) on a business card bearing the name of a supervising attorney, legal aid clinic, or government agency; or

(3) on a business card identifying the legal intern as certified under these rules.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective June 7, 2001; Amended effective March, 6, 2008.

SUBCHAPTER 1D. RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0100. PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

D.0101. Definitions.

(1) "Assistant executive director" shall mean the assistant executive director of the Bar.

(2) "Attorney" shall mean any active member of the Bar.

(3) "Bar" shall mean the North Carolina State Bar.

(4) "Chairperson" shall mean the chairperson, or in his or her absence, the vice-chairperson of the Ethics Committee of the Bar.

(5) "Committee" shall mean the Ethics Committee of the Bar.

(6) "Council" shall mean the council of the Bar.

(7) "Ethics advisory" shall mean a legal ethics opinion issued in writing by the executive director, the assistant executive director, or a designated member of the Bar's staff counsel. All ethics advisories shall be subsequently reviewed and approved, withdrawn or modified by the committee. Ethics advisories shall be designated by the letters "EA", numbered by year and order of issuance, and kept on file at the Bar.

(8) "Ethics decision" shall mean a written ethics opinion issued by the council in response to a request for an ethics opinion which, because of its special facts or for other reasons, does not warrant issuance of a formal ethics opinion. Ethics decisions shall be designated by the letters "ED", numbered by year and order of issuance, and kept on file at the Bar.

(9) "Executive director" shall mean the executive director of the Bar.

(10) "Formal ethics opinion" shall mean a published opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. A formal ethics opinion adopted under the Revised Rules of Professional Conduct (effective July 24, 1997, and as comprehensively revised in 2003) shall be designated as a "Formal Ethics Opinion" and numbered by year and order of issuance. Formal ethics opinions adopted under the repealed Rules of Professional Conduct (effective October 7, 1985 to July 23, 1997) are designated by the letters "RPC" and numbered serially. Formal ethics opinions adopted under the repealed Code of Professional Conduct (effective January 1, 1974 to October 6, 1985) are designated by the letters "CPR" and numbered serially. Formal ethics opinions adopted under the repealed Rules of Professional Conduct and the repealed Code of Professional Conduct are binding unless overruled by a provision of the Bar's current code of ethics, a revision of the rule of ethics upon which the opinion is based, or a subsequent formal ethics opinion on point.

(11) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(12) "Informal ethics advisory" shall mean an informal ethics opinion communicated orally or via electronic mail by the executive director, the assistant executive

director, or a designated member of the Bar's legal staff counsel. A written record documenting the name of the inquiring attorney, the date of the informal ethics advisory, and the substance of the advice given shall be kept on file at the Bar. An informal ethics advisory is not binding upon the Bar in a subsequent disciplinary proceeding.

(13) "President" shall mean the president of the Bar or, in his or her absence, the presiding officer of the council.

(14) "Published" shall mean published for comment in the North Carolina State Bar *Newsletter* (prior to fall 1996), the North Carolina State Bar *Journal* (fall 1996 and thereafter) or other appropriate publication of the North Carolina State Bar.

(15) "Revised Rules of Professional Conduct" shall mean the code of ethics of the Bar effective July 24, 1997 and comprehensively revised effective March 1, 2003.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998; Amended Effective February 5, 2004.

D.0102. General provisions.

(a) An attorney may ask the Bar to rule on actual or contemplated professional conduct of an attorney as provided in Section .0100 of this subchapter. In special circumstances, a ruling on the contemplated professional conduct of an attorney may be provided in response to the request of a person who is not a member of the Bar. The grant or denial of a request rests within the discretion of the executive director, assistant executive director, designated staff counsel, the chairperson, the committee, or the council as appropriate.

(b) An attorney may request an informal ethics advisory by letter, electronic mail, telephone, or personal meeting with an appropriate member of the Bar staff. The executive director, assistant executive director, or designated staff counsel may provide an informal ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertained from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest.

(c) An attorney may request an ethics advisory or formal ethics opinion by sending a written inquiry to the Bar. The executive director, assistant executive director, or designated staff counsel may issue an ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertained from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest. An inquiry requesting an opinion about the professional conduct of another attorney, past conduct, or that presents a matter of first impression or of general interest to the Bar shall be referred to the committee for response by ethics decision or formal ethics opinion.

(d) All ethics inquiries, whether written or oral, shall present in detail all operative facts upon which the request is based. Inquiries should not disclose client confidences or other sensitive information not necessary to the resolution of the ethical question presented.

(e) Any attorney, who requests an ethics opinion on the acts or contemplated professional conduct of another attorney, shall state, in the written inquiry, the name of the attorney and identify all persons whom the requesting attorney has reason to believe may be substantially affected by a response to the inquiry. The inquiry shall also provide evidence that the attorney whose conduct is at issue and all other identified interested persons have received copies of the inquiry from the requesting attorney.

(f) When a written ethics inquiry discloses conduct which may be actionable as a violation of the Revised Rules of Professional Conduct, the executive director, the assistant executive director, chairperson or the committee may refer the matter to the Grievance Committee for investigation.

(g) In general, no response shall be provided to an ethics inquiry that seeks an opinion on an issue of law.

(h) A decision not to issue a response to an ethics inquiry, whether by the executive director, assistant executive director, designated staff counsel, chairperson or the committee, shall not be appealable.

(i) Except as provided in Rule .0103(b) of this subchapter, the information contained in a request for an ethics opinion shall not be confidential.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

D.0103. Informal Ethics Advisories and Ethics advisories.

(a) The executive director, assistant executive director, or designated staff counsel may honor or deny a request for an informal ethics advisory. Except as provided in Rule.0102(b), an attorney requesting an opinion concerning another attorney's professional conduct, past conduct, or matters of first impression shall be asked to submit a written inquiry for referral to the committee. An attorney requesting an opinion involving matters of widespread interest to the Bar or particularly complex factual circumstances may also be asked to submit a written inquiry for referral to the committee.

(b) The Bar's program for providing informal ethics advisories to inquiring attorneys is a designated lawyers' assistance program approved by the Bar and information received by the executive director, assistant executive director, or designated staff counsel from an attorney seeking an informal ethics advisory shall be confidential information pursuant to Rule 1.6(c) of the Revised Rules of Professional Conduct (2003); provided, however, such confidential information may be disclosed as allowed by Rule 1.6(b) and as necessary to respond to a false or misleading statement made about an informal ethics advisory. Further, if an attorney's response to a grievance proceeding relies in whole or in part upon the receipt of an informal ethics advisory, confidential information may be disclosed to Bar counsel, the Grievance Committee or other appropriate disciplinary authority.

(c) An ethics advisory issued by the executive director, assistant executive director, or designated staff counsel shall be promulgated under the authority of the committee and in accordance with such guidelines as the committee may establish and prescribe from time to time.

(d) An ethics advisory shall sanction or disapprove only the matter in issue, shall not otherwise serve as precedent and shall not be published.

(e) Ethics advisories shall be reviewed periodically by the committee. If, upon review, a majority of the committee present and voting decides that an ethics advisory should be withdrawn or modified, the requesting attorney shall be notified in writing of the committee's decision by the executive director or assistant executive director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he or she acts pursuant to the ethics advisory which is later withdrawn or modified.

(f) If an inquiring attorney disagrees with the ethics advisory issued to him or her, the attorney may request reconsideration of the ethics advisory by writing to the committee prior to the next regularly scheduled meeting of the committee.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998; Amended Effective February 5, 2004.

D.0104. Formal ethics opinions and ethics decisions.

(a) Requests for formal ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that a request is in compliance with Rule .0102 of this subchapter, shall transmit the request to the chairperson of the committee.

(b) If a formal ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, that attorney shall be given an opportunity to be heard by the committee, along with the person who requested the opinion, under such guidelines as may be established by the committee. At the discretion of the chairperson and the committee, additional persons or groups shall be notified by the method deemed most appropriate by the chairperson and provide them an opportunity to be heard by the committee.

(c) Upon initial consideration of the request, by vote of a majority of the members of the committee present at the meeting, the committee shall prepare a written proposed response to the inquiry and shall determine whether to issue the response as a proposed ethics decision or a proposed formal ethics opinion. Prior to the next regularly scheduled meeting of the committee, all proposed formal ethics opinions shall be published and all proposed ethics decisions shall be circulated to the members of the council.

(d) Prior to the next regularly scheduled meeting of the committee, any interested person or group may submit a written request to reconsider a proposed formal ethics opinion or a proposed ethics decision and may ask to be heard by the committee. The committee, under such guidelines as it may adopt, may allow or deny such request.

(e) Upon reconsideration of a proposed formal ethics opinion or proposed ethics decision, the committee may, by vote of not less than a majority of the duly appointed members of the committee, revise the proposed formal ethics opinion or proposed ethics decision. Prior to the next regularly scheduled meeting of the committee, all revised proposed formal ethics opinions shall be published and all revised proposed ethics decisions shall be circulated to the members of the council.

(f) Upon completion of the process, the committee shall determine, by a vote of not less than a majority of the duly appointed members of the committee, whether to transmit a proposed formal ethics opinion or proposed ethics decision to the council with a recommendation to adopt.

(g) Any interested person or group may request to be heard by the council prior to a vote on the adoption of a proposed formal ethics opinion or ethics decision. Whether permitted to appear before the council or not, the person or group has the right to file a written brief with the council under such rules as may be established by the council.

(h) The council's action on the proposed formal ethics opinion or ethics decision shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to interested persons by the method deemed most appropriate by the chairperson.

(i) A formal ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time.

(j) To vote, a member of the committee must be physically present at a meeting.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998; Amended Effective February 5, 2004.

SECTION .0200. PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

D.0201. General provisions.

The purpose of the committee on the authorized practice of law is to protect the public from being unlawfully advised and represented in legal matters by unqualified persons.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0202. Procedure.

(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

History Note: Statutory Authority G.S. 84-37, Readopted Effective December 8, 1994.

D.0203. Definitions.

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this rule, unless the context clearly indicates otherwise.

(1) *Appellate division.* The appellate division of the General Court of Justice.

(2) *Chairperson of the Authorized Practice Committee.* The councilor appointed to serve as chairperson of the Authorized Practice Committee of the State Bar.

(3) *Complainant or the complaining witness.* Any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) *Complaint.* A formal pleading filed in the name of the North Carolina State Bar in the superior court against a person, firm or corporation after a finding of probable cause.

(5) *Council.* The Council of the North Carolina State Bar.

(6) *Councilor.* A member of the Council of the North Carolina State Bar.

(7) *Counsel.* The counsel of the North Carolina State Bar appointed by the council.

(8) *Court or courts of this state.* A court authorized and established by the Constitution or laws of the state of North Carolina.

(9) *Defendant.* Any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) *Investigation.* The gathering of information with respect to alleged unauthorized practice of law.

(11) *Investigator.* Any person designated to assist in investigation of alleged unauthorized practice of law.

(12) *Letter of notice.* A communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

(13) *Office of the counsel.* The office and staff maintained by the Counsel of the North Carolina State Bar.

(14) *Office of the secretary.* The office and staff maintained by the secretary of the North Carolina State Bar.

(15) *Party.* After a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(16) *Plaintiff.* After a complaint has been filed, the North Carolina State Bar.

(17) *Preliminary hearing.* Hearing by the Authorized Practice Committee to determine whether probable cause exists.

(18) *Probable Cause.* A finding by the Authorized Practice Committee that there is reasonable cause to believe that a person or corporation has engaged in the unauthorized practice of law justifying legal action against such person or corporation.

(19) *Secretary.* The secretary of the North Carolina State Bar.

(20) *Supreme Court.* The Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended October 6, 2004.

D.0204. State Bar Council — Powers and duties.

The Council of the North Carolina State Bar shall have the power and duty:

(1) to supervise the administration of the Authorized Practice Committee in accordance with the provisions of this subchapter;

(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0205. Chairperson of the Authorized Practice Committee — Powers and duties.

(a) The chairperson of the Authorized Practice Committee shall have the power and duty:

(1) to supervise the activities of the counsel;

(2) to recommend to the Authorized Practice Committee that an investigation be initiated;

(3) to recommend to the Authorized Practice Committee that a complaint be dismissed;

(4) to direct a letter of notice to an accused person or corporation or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;

(5) to notify the accused and any complainant that a complaint has been dismissed;

(6) to call meetings of the Authorized Practice Committee for the purpose of holding preliminary hearings;

(7) to issue subpoenas in the name of the North Carolina State Bar or direct to the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to file and verify complaints and petitions in the name of the North Carolina State Bar.

(b) The president, vice-chairperson or senior council member of the Authorized Practice Committee shall perform the functions of the chairperson of the committee in any matter when the chairperson or vice-chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0206. Authorized Practice Committee — Powers and duties.

The Authorized Practice Committee shall have the power and duty:

(1) to direct to the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in this State;

(2) to hold preliminary hearings, find probable cause, and recommend to the Executive Committee that a complaint for injunction be filed in the name of the State Bar against the respondent;

(3) to dismiss allegations of the unauthorized practice of law upon a finding of no probable cause;

(4) to issue letters of caution, which may include a demand to cease and desist, to respondents in cases where the Committee concludes either that:

a. there is probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) respondent has agreed to refrain from engaging in the conduct in the future;

(ii) respondent is unlikely to engage in the conduct again; or

(iii) either referral to a district attorney or complaint for injunction is not warranted under the circumstances; or

b. there is no probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) the conduct of the respondent may be improper and may become the basis for injunctive relief if continued or repeated; or

(ii) the Committee otherwise finds it appropriate to caution the respondent.

(5) to direct counsel to stop an investigation and take no action;

(6) to refer a matter to another agency, including the district attorney for criminal prosecution and to other committees of the North Carolina State Bar; and

(7) to issue advisory opinions in accordance with procedures adopted by the Council as to whether the actual or contemplated conduct of nonlawyers would constitute the unauthorized practice of law in North Carolina.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994, Amended effective February 20, 1995; Amended effective February 3, 2000; Amended effective October 6, 2004.

D.0207. Counsel — Powers and duties.

The counsel shall have the power and duty:

(1) to initiate an investigation concerning the alleged unauthorized practice of law;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Authorized Practice Committee;

(3) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise;

(4) to recommend to the chairperson of the Authorized Practice Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be considered by the Authorized Practice Committee to determine whether probable cause exists;

(5) to prosecute all unauthorized practice of law proceedings before the Authorized Practice Committee and the courts;

(6) to represent the State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;

(7) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;

(8) to maintain permanent records of all matters processed and the disposition of such matters;

(9) to perform such other duties as the council may from time to time direct.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0208. Suing for injunctive relief.

(a) Upon receiving a recommendation from the Authorized Practice Committee that a complaint seeking injunctive relief be filed, the Executive Committee shall review the matter at the same quarterly meeting and determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(b) If the Executive Committee decides to follow the Authorized Practice Committee's recommendation, it shall direct the counsel to prepare the necessary pleadings as soon as practical for signature by the chairperson and filing with the appropriate tribunal.

(c) If the Executive Committee decides not to follow the Authorized Practice Committee's recommendation, the matter shall go before the council at the same quarterly meeting to determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(d) If the council decides not to follow the Authorized Practice Committee's recommendation, the matter shall be referred back to the Authorized Practice Committee for alternative disposition.

(e) If probable cause exists to believe that a respondent is engaged in the unauthorized practice of law and action is needed to protect the public interest before the next quarterly meeting of the Authorized Practice Committee, the chairperson, with the approval of the president, may file and verify a complaint or petition in the name of the North Carolina State Bar.

History Note: Effective February 3, 2000.

SECTION .0300. DISASTER RESPONSE PLAN

D.0301. The disaster response team.

(a) The disaster response team should be composed of the following:

(1) the president of the State Bar, or if the president is unavailable, another officer of the State Bar;

(2) the counsel or his or her designee;

(3) the director of communications or his or her designee;

(4) the president of the Young Lawyers Division of the North Carolina Bar Association ("YLD") or his or her designee;

(5) the chairperson of the Client Assistance Committee; and

(6) other persons, such as the applicable local bar president(s), appointed by the president as necessary or appropriate for response in each individual situation.

(b) Implementation of the disaster response plan shall be the decision of the president or, if he or she is unavailable, the president-elect, vice-president or immediate past-president.

(c) The counsel, or his or her designee, shall be the coordinator of the disaster response team ("coordinator"). If the president or other officer is unavailable to decide whether to implement the disaster response plan for a particular event, then and only then shall the coordinator be authorized to make the decision to implement the disaster response plan.

(d) It shall be the responsibility of the coordinator to conduct periodic educational programs regarding the disaster response plan and to report regularly to the Client Assistance Committee.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0302. General policy and objectives.

(a) *Rapid response.*

(1) It is essential that the State Bar establish an awareness and sensitivity to disaster situations.

(2) The disaster response plan will be disseminated through the publications of the State Bar and continuing legal education programs.

(3) The disaster response team shall be properly trained to respond to initial inquiries and appear at the site.

(4) The disaster response team will provide victims and/or their families with written materials when requested.

(b) *Effective mobilization of resources.*

(1) An appropriate press release shall be prepared and disseminated.

(2) The coordinator shall confirm the individuals who will make up the disaster response team.

(3) Individual assignments of responsibilities shall be made to members of the team by the coordinator.

(4) The coordinator shall arrange for the State Bar to be represented at any victims' assistance center established at the disaster site. The coordinator will request the YLD to assist the State Bar by providing additional staffing.

(5) The coordinator shall contact the local district attorney(s) and request that he or she prosecute any persons engaging in the unauthorized practice of law (N.C.G.S. 84-2.1, 84-4, 84-7 and 84-8); improper solicitation (N.C.G.S. 84-38); division of fees (N.C.G.S. 84-38); and/or the common law crime of barratry (frequently stirring up suits and quarrels between persons).

(c) *Publicity.*

(1) It is important to focus on the fact that disaster response is a public service effort.

(2) The disaster response team shall ensure approval and dissemination of an even-handed press release.

(3) The director of communications will be utilized for press contacts.

(4) It is important to ensure that the press release indicates that the State Bar is a resource designed to assist victims, if requested.

(d) *On-site representation.*

(1) It is normally desirable for the disaster response team to arrive at the site of the disaster as soon as possible.

(2) Only the president or president-elect or their designee will conduct press interviews on behalf of the State Bar.

(3) The availability of the State Bar at the site of the disaster should be made known to victims.

(4) The disaster response team shall establish a liaison with the State Emergency Management Division, Red Cross, Salvation Army, and other such organizations to provide assistance to victims and furnish written materials to these organizations.

(5) It is crucial that the State Bar not become identified with either side of any potential controversy.

(6) All members of the disaster response team must avoid making comments on the merits of claims that may arise from the disaster.

(e) *Dissemination of information to affected individuals.*

(1) The team shall emphasize in all public statements that the State Bar's major and only legitimate concern is for those persons affected by the disaster and the public interest.

(2) The State Bar's role is limited to monitoring compliance with its disciplinary rules, to requesting reports of any violation needing investigation, and to informing victims of rules concerning client solicitation.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.0303. Report on results.

(a) The coordinator will promptly convene a meeting of groups involved in the disaster to review the effectiveness of the plan in that particular disaster.

(b) The coordinator shall prepare a written report concerning significant matters relating to the disaster.

(c) The written report shall be submitted to the Client Assistance Committee as well as other involved organizations.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

SECTION .0400. RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

Repealed effective October 6, 2004.

Editor's note. — The "Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases" and the "Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases" were repealed effective October 6, 2004. For present similar provisions, see the separate rules set for Indigent Defense Services, adopted July 1, 2001, and the appendix thereto containing Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level, adopted November 12, 2004.

SECTION .0500. MODEL PLAN FOR APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

Repealed effective October 6, 2004.

Editor's note. — The "Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases" and the "Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases" were repealed effective October 6, 2004. For present similar provisions, see the separate rules set for Indigent Defense Services, adopted July 1, 2001, and the appendix thereto containing Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level, adopted November 12, 2004.

SECTION .0600. RULES GOVERNING THE LAWYER ASSISTANCE PROGRAM

D.0601. Purpose.

The purpose of the lawyer assistance program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994; Amended effective February 3, 2000.

D.0602. Authority.

The council of the North Carolina State Bar hereby establishes the Lawyer Assistance Program Board (the board) as a standing committee of the council. The board has the authority to establish policies governing the State Bar's lawyer assistance program as needed to implement the purposes of this program. The authority conveyed is not limited by, but is fully coextensive with, the authority previously vested in State Bar's predecessor program, the Positive Action for Lawyers (PALS) program.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0603. Operational responsibility.

The board shall be responsible for operating the lawyer assistance program subject to the statutes governing the practice of law, the authority of the council, and the rules of the board.

History Note: Adopted February 3, 2000.

D.0604. Size of board.

The board shall have nine members. Three of the members shall be councilors of the North Carolina State Bar at the time of appointment; three of the members shall be non-lawyers or lawyers with experience and training in the fields of mental health, substance abuse or addiction; and three of the members shall be lawyers who are currently volunteers to the lawyer assistance program. In addition, the board may have the dean of a law school in North Carolina, or the dean's designee, appointed by the council as an ex officio member. No member of the Grievance Committee shall be a member of the board.

History Note: Adopted February 3, 2000; Amended November 16, 2006.

D.0605. Appointment of members; When; Removal.

The initial members of the board shall be appointed at the next meeting of the council following the creation of the board. Thereafter, members shall be appointed or reappointed, as the case may be, at the first quarterly meeting of the council each calendar year, provided that a vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Adopted February 3, 2000.

D.0606. Term of office and succession.

The members of the board shall be divided into three classes of equal size to serve in the first instance for terms expiring one, two and three years, respectively, after the first quarterly meeting of the council following creation of the board. Of the initial board, three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer to the lawyer assistance program) shall be appointed to terms of one year; three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of two years; and three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of two years; and three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of three years. Thereafter, the successors in each class of board members shall be appointed to serve for terms of three years. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years. Members of the board serving ex officio shall serve one-year terms and may serve up to three consecutive terms.

History Note: Adopted February 3, 2000; Amended November 16, 2006.

D.0607. Appointment of chairperson.

The chairperson of the board shall be appointed by the council annually at he time of its appointment of board members. The chairperson may be re-appointed for an unlimited number of one-year terms. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and shall represent the board in its dealings with the public. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Adopted February 3, 2000.

D.0608. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed by the council annually at the time of its appointment of board members. The vice-chairperson may be reappointed for an unlimited number of one-year terms. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Adopted February 3, 2000.

D.0609. Source of funds.

Funding for the program shall be provided from the general and appropriate special funds of the North Carolina State Bar and such other funds as may become available by grant or otherwise.

History Note: Adopted February 3, 2000.

D.0610. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, electronic mail or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: Adopted February 3, 2000.

D.0611. Annual report.

The board shall prepare at least annually a report of its activities and shall present the same at the annual meeting of the council.

History Note: Adopted February 3, 2000.

D.0612. Powers and duties of the board.

In addition to the powers and duties set forth elsewhere in these rules, the board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of the lawyer assistance program consistent with these rules;

(2) to implement programs to investigate and evaluate reports that a lawyer's ability to practice law is impaired because of substance abuse, depression, or other debilitating mental condition; to confer with any lawyer who is the subject of such a report; and, if the report is verified, to provide referrals and assistance to the impaired lawyer;

(3) to adopt and amend regulations consistent with these rules with the approval of the council;

(4) to delegate authority to the staff of the lawyer assistance program subject to the review of the council;

(5) to delegate authority to investigate, evaluate, and intervene with impaired lawyers to committees composed of qualified volunteer lawyers and non-lawyers;

(6) to submit an annual budget for the lawyer assistance program to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(7) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the lawyer assistance program;

(8) to implement programs to investigate, evaluate, and intervene in cases referred to it by a disciplinary body, and to report the results of the investigation and evaluation to the referring body;

(9) to promote programs of education and awareness for lawyers, law students, and judges about the causes and remedies of lawyer impairment;

(10) to train volunteer lawyers to provide peer support, assistance and monitoring for impaired lawyers; and

(11) to administer the PALS revolving loan fund or other similar fund that may be established for the board's program to assist lawyers who are impaired because of a debilitating mental condition.

History Note: Adopted February 3, 2000.

D.0613. Confidentiality.

The lawyer assistance program is an approved lawyers' assistance program in accordance with the requirements of Rule 1.6(b) of the Revised Rules of Professional Conduct. Except as noted herein and otherwise required by law, information received during the course of investigating, evaluating, and assisting an impaired lawyer shall be privileged and held in the strictest confidence by the staff of the lawyer assistance program, the members of the board and the members of any committee of the board. If a report of impaired condition is made by members of a lawyers's family, and there is good cause shown, the board may, in its discretion, release information to appropriate members of the lawyer's family if the board or its duly authorized committee determines that such disclosure is in the best interest of the impaired lawyer.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0614. Reserved.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-28, Readopted effective December 8, 1994; Amended effective February 3, 2000; Repealed and reserved November 16, 2006.

D.0615. Regional chapters.

A committee may, under appropriate rules and regulations promulgated by the board, establish regional chapters, composed of qualified volunteer lawyers and non-lawyers. A regional chapter may perform any or all of the duties and functions set forth in Section .0600 of this subchapter to the extent provided by the rules of the board.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0616. Suspension for impairment, reinstatement.

If it appears that a lawyer's ability to practice law is impaired by substance abuse and/or chemical addiction, the board, or its duly authorized committee, may petition any superior court judge to issue an order pursuant to the court's inherent authority, suspending the lawyer's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the lawyer's impairment.

(b) The petition shall be signed by the executive director of the lawyer assistance program and the executive director of the State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear in not less than 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the lawyer's ability to practice law is impaired.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from the filing of the petition, unless the suspended lawyer agrees to a continuance. At the hearing, the suspended lawyer will have the burden of establishing by clear, cogent, and convincing evidence the following: (1) the lawyer's ability to practice law is no longer impaired; (2) the lawyer's debilitating condition is being treated and/or managed; (3) it is unlikely that the inability to practice law due to the impairment will recur; and (4) it is unlikely that the interest of the public will be unduly threatened by the reinstatement of the lawyer.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order entered hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

(l) The North Carolina State Bar shall not be required to provide security for payment of costs or damages prior to entry of a suspension order with or without notice to the respondent attorney.

(m) No damages shall be awarded against the State Bar in the event that a restraining order entered with or without notice and a hearing is dissolved.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i), Readopted effective December 8, 1994; Amended July 21, 1995; Amended effective February 3, 2000.

D.0617. Consensual suspension.

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order suspending a lawyer's license if the lawyer consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i), Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0618. Agents of the State Bar.

All members of the board and its duly appointed committees shall be deemed to be acting as agents of the State Bar when performing the functions and duties set forth in this subchapter.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0619. Judicial Committee.

The Judicial Committee of the Lawyer Assistance Program Board shall implement a program of intervention for members of the judiciary with substance abuse problems affecting their professional conduct. The committee shall consist of at least two members of the state's judiciary. The committee will be governed by the rules of the Lawyers Assistance Program Board where applicable. Rules .0616 and .0617 of this subchapter are not applicable to the committee.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

D.0620. Rehabilitation contracts for lawyers impaired by substance abuse.

The board, or its duly authorized committee has the authority to enter into rehabilitation contracts with lawyers suffering from substance abuse including contracts that provide for alcohol and/or drug testing. Such contracts may include the following conditions among others:

(a) that upon receipt of a report of a positive alcohol or drug test for a substance prohibited under the contract, the contract may be amended to include additional provisions considered to be in the best rehabilitative interest of the lawyer and the public; and

(b) that the lawyer stipulates to the admission of any alcohol and/or drug-testing results into evidence in any in camera proceeding brought under this section without the necessity of further authentication.

History Note: Adopted March 7, 1996; Amended effective February 3, 2000.

D.0621. Evaluations for substance abuse, alcoholism and/or other chemical addictions.

(a) *Notice of Need for Evaluation.* The Lawyer Assistance Program Board, or its duly authorized committee, may demand that a lawyer obtain a comprehensive evaluation of his or her condition by an approved addiction specialist if the lawyer's ability to practice law is apparently being impaired by substance abuse, alcoholism and/or other chemical addictions. This authority may be exercised upon recommendation of the director of the lawyer assistance program and the approval of at least three members of the board or appropriate committee, which shall include at least one person with professional expertise in chemical addiction. Written notice shall be provided to the lawyer informing the lawyer that the board has determined that an evaluation is necessary and demanding that the lawyer obtain the evaluation by a date set forth in the written notice.

(b) *Failure to Comply.* If the lawyer does not obtain an evaluation, the director of the lawyer assistance program shall obtain the approval of the chairperson of the board, or the chairperson of the appropriate committee of the board, to file a motion to compel an evaluation pursuant to the authority set forth in G.S. 84-28(i) and (j) and in accordance with the procedure set forth in Rule 35 of the North Carolina Rules of Civil Procedure. All pleadings in such a proceeding shall be filed under seal and all hearings shall be held in camera. Written notice of a motion to compel an examination shall be served upon the lawyer in accordance with the North Carolina Rules of Civil Procedure at least ten days before the hearing on the matter.

History Note: Adopted February 3, 2000.

D.0622. Grounds for compelling an evaluation.

An order compelling the lawyer to obtain a comprehensive evaluation by an addiction specialist may be issued if the board established that the evaluation will assist the lawyer and the lawyer assistance program to assess the lawyer's condition and any risk that the condition may present to the public, and to determine an appropriate treatment for the lawyer.

History Note: Adopted February 3, 2000.

D.0623. Failure to comply with an order compelling an evaluation.

If a lawyer fails to comply with an order compelling a comprehensive evaluation by an addiction specialist, the board, or its duly authorized committee, may file a contempt proceeding to be held in camera. If the lawyer fails to comply with a contempt order, the lawyer shall be deemed to have waived confidentiality respecting communications made by the lawyer to the board or its committee. The board, or its duly authorized committee, may seek further relief and may file motions or proceedings in open court.

History Note: Adopted February 3, 2000.

SECTION .0700. PROCEDURES FOR FEE DISPUTE RESOLUTION

D.0701. Purpose and implementation.

The purpose of the Fee Dispute Resolution Program shall be to assist lawyers and clients to settle disputes over fees. In doing so, the Fee Dispute Resolution Program shall assist the lawyers and clients in determining the appropriate fee for legal services rendered. The State Bar shall implement the Fee Dispute Resolution Program under the auspices of the Attorney Client Assistance Committee (the committee), which shall be offered to clients and their lawyers at no cost.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000; Amended effective March 8, 2007.

D.0702. Jurisdiction.

The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.

The committee shall not have jurisdiction over the following:

(1) disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;

(2) disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;

(3) fee disputes that are or were the subject of litigation;

(4) fee disputes between lawyers and service providers, such as court reporters and expert witnesses;

(5) fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those case where the fee has been paid by a person other than the client; and

(6) disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.

The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000.

D.0703. Coordinator of fee dispute resolution.

The secretary-treasurer of the North Carolina State Bar shall designate a member of the staff to serve as coordinator of the Fee Dispute Resolution Program. The coordinator shall develop forms, maintain records, and provide statistics on the Fee Dispute Resolution Program. The coordinator shall also develop an annual report to the council.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000; Amended effective March 8, 2008.

D.0704. Reserved.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000.

D.0705. Selection of mediators.

The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000.

D.0706. Processing requests for fee dispute resolution.

(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes last.

(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If it is determined that the matter is not suitable for fee dispute resolution, the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:

(1) the request is frivolous or moot;

(2) the absence of jurisdiction; or

(3) the facts as stated support the conclusion that the fee was earned and is not excessive.

The report shall be forwarded to the chairperson of the committee. If the chairperson of the Attorney Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.

(c) If the chairperson disagrees with the recommendation for dismissal, an attempt to resolve the dispute will be made pursuant to Rule .0707 below or the chair may recommend review by the full committee.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000; Amended effective February 5, 2002; Amended effective March 8, 2007.

D.0707. Mediation proceedings.

(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.

(b) The attorney against whom a request for fee dispute resolution is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.

(c) The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference. Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:

(1) the process of mediation;

(2) the differences between mediation and other forms of conflict resolution;

(3) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(6) The duties and responsibilities of the mediator and the participants; and

(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.

The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000; Amended effective March 8, 2007.

D.0708. Finalizing the agreement.

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, if any, prior to leaving the conference.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000.

D.0709. Record keeping.

The coordinator of fee dispute resolution shall keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the client's name;
(2) date of the request;
(3) the lawyer's name;
(4) the district in which the lawyer resides or maintains a place of business;
(5) how the dispute was resolved (dismissed for non-merit, mediated agreement, arbitration, etc.); and
(6) the time necessary to resolve the dispute.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000.

D.0710. District bar fee dispute resolution.

For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000.

SECTION .0800. RESERVED

Editor's note. — Former Section .0800, Model Plan for District Bar Fee Arbitration, was replaced by, present Section .0700, Procedures for Fee Dispute Resolution, effective May 4, 2000.

SECTION .0900. PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

D.0901. Transfer to inactive status.

(a) *Petition for transfer to inactive status.*

Any member who desires to be transferred to inactive status shall file a petition with the secretary addressed to the council setting forth fully

(1) the member's name and current address;
(2) the date of the member's admission to the North Carolina State Bar;
(3) the reasons why the member desires transfer to inactive status;
(4) that at the time of filing the petition the member is in good standing having paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education and without any grievances or disciplinary complaints pending against him or her;
(5) any other matters pertinent to the petition.

(b) *Conditions upon transfer.*

No member may be voluntarily transferred to disability-inactive status, retired/nonpracticing status, or emeritus pro bono status until:

(1) the member has paid all membership fees, surcharges, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar or the

Disciplinary Hearing Commission, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

(2) the member acknowledges that the member continues to be subject to the Rules of Professional Conduct and to the disciplinary jurisdiction of the State Bar including jurisdiction in any pending matter before the Grievance Committee or the Disciplinary Hearing Commission; and,

(3) in the case of a member seeking emeritus pro bono status, it is determined by the Administrative Committee that the member is in good standing, is not the subject of any matter pending before the Grievance Committee or the Disciplinary Hearing Commission, and will be supervised by an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

(c) *Order transferring member to inactive status.*

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status and, where appropriate, granting emeritus pro bono status. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the member.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23, Readopted effective December 8, 1994; Amended March 7, 1996; Amended effective February 3, 2000; Amended March 6, 2008.

D.0902. Reinstatement from inactive status.

(a) *Eligibility to apply for reinstatement.*

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) *Contents of reinstatement petition.*

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter, that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was transferred to inactive status, (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that within one year prior to filing the petition, the member completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519. of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and

(5) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee and Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above;

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained; however, the State Bar and district bar membership fees assessed for the year in which the application is filed shall be refunded if the petition is denied.

(c) *Service of reinstatement petition.*

The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to the members of the Administrative Committee and to the counsel.

(d) *Investigation by counsel.*

The counsel may conduct any necessary investigation regarding the petition and shall advise the members of the Administrative Committee of any findings from such investigation.

(e) *Response by Administrative Committee.*

After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(1) *Conditions Precedent to Reinstatement.* Upon a determination that the petitioner has failed to demonstrate competence to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(b)(2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) *Conditions Subsequent to Reinstatement.* Upon a determination that the petitioner is fit to return to the practice of law pursuant to the reasonable management of his or her substance abuse, addiction, or debilitating mental condition, the committee may recommend to the council that the reinstatement petition be granted with reasonable conditions to which the petitioner consents. Such conditions may include, but are not limited to, an evaluation by a mental health professional approved by the Lawyer Assistance Program (LAP), compliance with the treatment recommendations of the mental health professional, periodic submission of progress reports by the mental health professional to LAP, and waiver of confidentiality relative to diagnosis and treatment by the mental health professional.

(3) *Failure of Conditions Subsequent to Reinstatement.* In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(f) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(f) *Hearing upon denial of petition for reinstatement.*

(1) Notice of Council Action and Request for Hearing

If the council denies a petition for reinstatement, the petitioner shall be notified in writing within 14 days after such action. The notice shall be served upon the petitioner pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The petitioner shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure

The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23, Readopted effective December 8, 1994; Amended July 21, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective March 3, 1999; Amended effective February 3, 2000; Amended effective March 6, 2002; Amended effective February 27, 2003; March 3, 2005.

D.0903. Suspension for failure to fulfill obligations of membership.

(a) *Procedure for enforcement of obligations of membership.*

Whenever a member of the North Carolina State Bar fails to fulfill an obligation of membership in the State Bar, whether established by the administrative rules of the

State Bar or by statute, the member shall be subject to administrative suspension from membership pursuant to the procedure set forth in this rule; provided, however, that the procedures for the investigation of and action upon alleged violations of the Rules of Professional Conduct by a member are set forth in subchapter 1B of these rules and that no aspect of any procedure set forth in this rule shall be applicable to the State Bar's investigation of or action upon alleged violations of the Rules of Professional Conduct by a member.

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A) Payment of the annual membership fee, including any associated late fee and the surcharge as set forth in G.S. 84-34;

(B) Payment of the annual Client Security Fund assessment;

(C) Payment of the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the State Bar as ordered by the chair of the Grievance Committee, the Disciplinary Hearing Commission, the secretary, or the council;

(D) Filing of the certificate of insurance coverage as required in Rule .0204 of subchapter 1A of these rules;

(E) Filing of a pro hac vice registration statement as required in Rule .0101 of subchapter 1H of these rules; and

(F) Filing of an annual report form and attending continuing legal education activities as required by Sections .1500 and .1600 of subchapter 1D of these rules.

(b) *Notice.*

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) *Service of the Notice.* The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) *Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause.*

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) *Procedure upon submission of a timely response to a notice to show cause.*

(1) *Consideration by Administrative Committee.*

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to fulfill an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute.

(2) *Recommendation of Administrative Committee.*

The Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall recommend to the council that the member be suspended.

(3) *Order of suspension.*

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(f) *Late compliance.*

If a member fulfills the obligation of membership before a suspension order is entered by the council, no order of suspension will be entered.

(g) *Administrative Suspension Pursuant to Statute.*

The provisions of this rule notwithstanding, if any section of the North Carolina General Statutes requires suspension of an occupational license, the procedure for suspension pursuant to such statute shall be as established by the statute. If no procedure is established by said statute, then the procedures specified in this rule shall be followed.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34, Readopted effective December 8, 1994; Amended December 7, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective February 3, 2000; Amended October 1, 2003; Amended March 2, 2006; Amended November 16, 2006; Amended March 6, 2008.

D.0904. Compliance after suspension for failure to pay fees or assessed costs, or to file certificate of insurance coverage or *pro hac vice* registration statement.

(a) *Reinstatement within 30 days of service of suspension order.*

A member who receives an order of suspension for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of subchapter A, may preclude the order from becoming effective by submitting a written request and satisfactory showing within 30 days after service of the suspension order of certification of insurance coverage, registration of *pro hac vice* admission, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) *Reinstatement more than 30 days after service of suspension order.*

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or failure to file a certificate of insurance coverage, and/or file a *pro hac vice* registration statement, may petition the council for an order of reinstatement.

(c) *Contents of reinstatement petition.*

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter, that the member satisfied the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year and if two or more years have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, that within one year prior to filing the petition, the member completed 15 hours of CLE accredited pursuant to Rule .1519 of this subchapter, including at least 3 hours of instruction in the areas of professional responsibility and/or professionalism;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity

and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) all membership fees, Client Security Fund assessments, and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and, attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;

(E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement; and

(5) that the member has filed a certificate of insurance coverage for the current year; and

(6) that the member has filed any overdue *pro hac vice* registration statement for which the member was responsible.

(d) *Procedure for review of reinstatement petition.*

The Procedure for review of reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994; Amended July 21, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective February 27, 2003; Amended October 1, 2003; Amended March 2, 2006; Amended November 16, 2006.

D.0905. Pro Bono Practice by Out of State Lawyers.

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth:

(1) the petitioner's name and address;

(2) the state(s) in which the petitioner is or has been licensed and the date(s) when the petitioner was licensed;

(3) the name of a member who is employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and has agreed to supervise the petitioner; and

(4) any other matters pertinent to the petition as determined by the council.

(b) Along with the petition, the petitioner shall provide in writing:

(1) a certificate of good standing from each jurisdiction in which the petitioner has been licensed;

(2) a record of any professional discipline ever imposed against the petitioner;

(3) a statement from the petitioner that the petitioner is submitting to the disciplinary jurisdiction of the North Carolina State Bar, and will be governed by the North Carolina Rules of Professional Conduct in regard to any law practice authorized by the council in consequence of the petition; and

(4) a statement from the member identified in the petition agreeing to supervise the petitioner in the provision of pro bono legal services exclusively for indigent persons.

(c) The petition shall be referred to the Administrative Committee for review. After reviewing the petition and other pertinent information, the committee shall make a recommendation to the council regarding whether the petition should be granted.

(d) Upon receipt of a petition and other information satisfying the provisions this rule, the council may, in its discretion, enter an order permitting the petitioner to provide legal services to indigent persons on a pro bono basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1. The order shall become effective immediately upon entry by the council. A copy or the order shall be mailed to the petitioner and to the supervising member. No person permitted to practice pursuant to such an order shall pay any membership fee to the North Carolina State Bar or any district bar or any other charge ordinarily imposed upon active members, nor shall any such person be required to attend continuing legal education courses.

(e) Permission to practice under this rule may be withdrawn by the council for good cause shown pursuant to the procedure set forth in Rule .0903 of this subchapter.

History Note: Adopted Effective March 6, 2008.

SECTION .1000. RULES GOVERNING REINSTATEMENT HEARINGS BEFORE THE ADMINISTRATIVE COMMITTEE

D.1001. Reinstatement hearings.

(a) *Notice; Time and place of hearing.*

(1) *Time and place of hearing.*

The chairperson of the Administrative Committee (the committee) shall fix the time and place of the hearing within 30 days after the member's request for hearing is filed with the secretary. The hearing shall be held as soon as practicable after the request for hearing is filed but in no event more than 90 days after such request is filed unless otherwise agreed by the member and the chairperson of the committee.

(2) *Notice to member.*

The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the member at least 10 days before the hearing date.

(b) *Hearing panel.*

(1) *Appointment.*

The chairperson of the committee shall appoint a hearing panel consisting of three members of the committee to consider the petition and make a recommendation to the council.

(2) *Presiding panel member.*

The chairperson shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure that may arise in the hearing; preside at the deliberations of the panel; sign the written determination of the panel; and report the panel's determination to the council.

(3) *Quorum.*

A majority of the panel members is necessary to decide the matter.

(4) *Panel recommendation.*

Following the hearing on a contested reinstatement petition, the panel will make a written recommendation to the council on behalf of the committee regarding whether the member's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law.

(c) *Burden of proof.*

(1) *Reinstatement from inactive status.*

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0902(b) of this subchapter.

(2) *Reinstatement from suspension for nonpayment of membership fees, late fee, client security fund assessment, district bar membership fees, or assessed costs.*

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter.

(3) *Reinstatement from suspension for failure to comply with the rules governing the administration of the continuing legal education program.*

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has

(A) satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter,

(B) cured any continuing legal education deficiency for which the member was suspended, and

(C) paid the reinstatement fee required by Rule .1512 and Rule .1609(a) of this subchapter.

(d) *Conduct of hearing.*

(1) *Member's rights.*

The member shall have these rights at the hearing:

(A) to appear personally and be heard;
(B) to be represented by counsel;
(C) to call and examine witnesses;
(D) to offer exhibits; and
(E) to cross-examine witnesses.

(2) *State Bar appears through counsel.*

The counsel shall appear at the hearing on behalf of the State Bar and shall have the right

(A) to be heard;
(B) to call and examine witnesses;
(C) to offer exhibits; and
(D) to cross-examine witnesses.

(3) *Rules of procedure and evidence.*

The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree to other rules.

(4) *Report of hearing; Costs.*

The hearing shall be reported by a certified court reporter. The member shall pay the costs associated with obtaining the court reporter's services for the hearing. The member shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The member shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the hearing panel.

(e) *Hearing panel recommendation.*

The written recommendation of the hearing panel shall be served upon the member within seven days of the date of the hearing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Readopted March 7, 1996; Amended March 5, 1998; Amended effective February 3, 2000.

D.1002. Review and order of council.

(a) *Review by council of recommendation of hearing panel.*

(1) *Record to council.*

(A) *Compilation of record.*

The member will compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the member and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the council.

(B) *Transmission of record to council.*

The member shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the president of the State Bar for good cause shown. The member will transmit a copy of the record to each member of the council no later than 30 days before the council meeting at which the petition is to be considered.

(C) *Costs.*

The member shall bear all of the costs of transcribing, copying and transmitting the record to the members of the council.

(D) *Dismissal for failure to comply.*

If the member fails to comply fully with any of the provisions of this rule, the counsel may file a motion the secretary to dismiss the petition.

(2) *Oral or written argument.*

In his or her discretion, the president of the State Bar may permit counsel for the State Bar and the member to present oral or written argument, but the council will not consider additional evidence not in the record transmitted from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(b) *Order by council.*

The council will review the recommendation of the hearing panel and the record and will determine whether and upon what conditions the member will be reinstated.

(c) *Costs.*
The council may tax the costs attributable to the proceeding against the member.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711; Readopted Effective December 8, 1994; Readopted March 7, 1996.

D.1003. Referral from the board.

When the board refers a matter to the council for determination after a hearing by the committee, the board shall transmit to the committee

(1) a notice of referral from the board to the committee, clearly identifying the member whose license is in question and the nature of the matter being referred;

(2) copies of all relevant written materials accumulated or created by the board;

(3) copies of all written materials submitted to the board by the member whose license is in question;

(4) a written statement of the board's findings and determinations in the matter that is being referred.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1004. Time of hearing.

A matter referred to the committee for hearing shall be heard not less than 30 days and not more than 90 days after the date the notice of referral is received from the board by the committee.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1005. Notice of hearing.

(a) *Time of notice to member.* A member with respect to whom a matter has been referred for hearing shall receive notice of the hearing at least 20 days prior to the hearing.

(b) *Service of notice on member.* The notice of hearing shall be served on the member by registered mail.

(c) *Content of notice to member.* The notice of the hearing shall include

(1) notice of the date, time, and place of the hearing;

(2) notice to the member that he or she may submit for consideration written materials, including a written statement of explanation, at any time prior to or during the hearing;

(3) notice to the member that he or she may personally appear and be heard during the hearing;

(4) notice to the member that he or she may be represented by counsel at the hearing.

(d) *Notice to the board.* Notice shall be transmitted to the board at least 20 days prior to the hearing of the date, time, and place of the hearing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1006. The hearing.

(a) *Nature of inquiry: Suspension.* When the matter being heard involves the question of whether a member's license shall be suspended for noncompliance, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the member was in compliance with the requirements of the rules at the time the board made its determination;

(2) if the member was not in compliance, whether there is good cause why his or her license should not be suspended.

(b) *Nature of inquiry: Reinstatement.* When the matter being heard involves the question of whether the license of a suspended member shall be reinstated, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the continuing legal education deficiency which gave rise to the member's suspension had been cured at the time the board made its determination that it had not been cured;

(2) if the deficiency had been cured at the time the board made its determination, whether the suspended member had paid the required reinstatement fee at the time the board made its determination.

(c) *The forum.* A matter before the committee for a hearing shall be heard by a panel of three members of the committee, one of whom shall serve as the presiding member, designated as provided in Rule .1007 of this subchapter.

(d) *Member's right to be heard.* A member whose license is the subject of a hearing shall have the right to

(1) to appear personally at the hearing;

(2) to speak and be heard at the hearing on any aspect of the matter being heard;

(3) submit for consideration relevant written materials, including a written statement of explanation, at any time prior to or during the hearing;

(4) be represented by counsel at the hearing.

(e) *Information from the board.*

(1) The panel shall consider the written materials described in Rule .1003 of this subchapter transmitted by the board to the committee.

(2) A member of the board, or other person authorized by the board, may attend the hearing and may present oral or written information and argument on any aspect of the matter being heard.

(f) *Effect of board's findings on issues of accreditation and approval.* When the board has determined that a member has failed to comply with the requirements of the rules or that a suspended member has failed to cure a deficiency, upon its finding that credits essential to compliance or reinstatement were acquired in a course or program that was not properly accredited or approved,

(1) the board's finding that the course or program was not properly accredited or approved shall be presumed by the panel to be correct; and

(2) the member may rebut the presumption of correctness by satisfying the panel that the course or program had in fact been properly accredited or approved; or

(3) the member may rebut the presumption of correctness by satisfying the panel that the board acted contrary to its rules in failing to accredit or approve the course or program.

(g) *Deliberations of the panel.* The panel shall conduct its deliberations, make its determinations, and adopt its recommendations in private.

(h) *Decision of the panel.* The panel shall consider a matter in accord with the process described in Rules .1008 and .1009 of this subchapter and shall put its determinations and recommendations in writing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1007. The panel.

(a) *Assignment of matter to panel.* A matter referred by the board for hearing and determination shall be assigned to a panel for hearing.

(b) *Members of the panel.* A hearing panel shall consist of three members of the committee.

(c) *Designation of members.* The members of a hearing panel shall be designated by the chairperson of the committee.

(d) *Designation of presiding member.* The chairperson of the committee shall designate one of the three members of a panel to serve as the presiding member.

(e) *Duties of presiding member.* The presiding member shall

(1) timely schedule the hearing;

(2) assure that proper and timely notice of hearing is given to the member and the board;

(3) preside at the hearing and rule on any question of procedure that may arise;

(4) preside at the deliberations of the panel;

(5) sign the written determinations and recommendations of the panel;

(6) report the panel's determinations and recommendations to the committee.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1008. Suspension hearing: Process for determining a matter involving the question of suspension.

When the matter before the panel is one involving the question of whether a member shall be suspended for failing to comply with the requirements of the rules, the panel shall proceed as follows:

(a) *Examination for basis for noncompliance determination.* The panel first shall examine the written information transmitted by the board to the committee, and shall determine whether that information provides a basis for the board's determination that the member had failed to comply with the requirements of the rules at the time the board made its determination.

(b) *When there is no basis for noncompliance determination.* If the written information from the board provides no basis for a determination of noncompliance, the panel shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(c) *When there is some basis for noncompliance determination.* If the written information from the board provides some basis for a determination of noncompliance, the panel then shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the member was in compliance with the requirements of the rules at the time the board made its determination.

(d) *Assessing the information on the issue of compliance.*

(1) Based on all the information before it, the panel shall determine whether it is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination.

(2) In assessing the information on compliance, when the board's determination of noncompliance is based upon its finding that credits essential to compliance were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) *When the panel makes a determination of compliance.* If the panel is not persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination it shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(f) *When the panel makes a determination of noncompliance.* If the panel is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination, the panel then shall consider all information submitted to the panel or to the board by the member and submitted by the board to the panel bearing on the issue of whether there is good cause why the member's license should not be suspended.

(g) *When the panel determines that there is good cause.* If the panel is satisfied that there is good cause that the member's license should not be suspended, it shall determine that there is good cause and shall report to the committee a recommendation that the member's license not be suspended.

(h) *When the panel determines that there is not good cause.* If the panel is not satisfied that there is good cause why the member's license should not be suspended, it shall determine that there is not good cause and shall report to the committee a recommendation that the member's license be suspended.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1009. Reinstatement hearing: Process for determining a matter involving the question of reinstatement.

When the matter before the panel is one involving the question of whether a suspended member shall be reinstated following a suspension for noncompliance with the rules, the panel shall proceed as follows:

(a) *Examination of the basis for determination that deficiency not cured.* The panel first shall examine the written information transmitted by the board to the committee and shall determine whether that information provides a basis for the board's determination that the deficiency for which the member's license was suspended had not been cured at the time the board made its determination.

(b) *When there is no basis for determination that deficiency not cured.* If the written information from the board provides no basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall determine that the deficiency had been cured and shall report to the committee a recommendation that the suspended member be reinstated.

(c) *When there is some basis for determination that deficiency not cured.* If the written information from the board provides some basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the deficiency had been cured at the time the board made its determination.

(d) *Assessing the information on the issue of cure.*

(1) Based upon all the information before it, the panel shall determine whether it is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination.

(2) In assessing the information on cure, when the board's determination that the deficiency had not been cured is based upon its finding that credits essential to cure were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) *When the panel determines that the deficiency had not been cured.* If the panel is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination, it shall determine that the deficiency had not been cured and shall report to the committee a recommendation that the suspended member not be reinstated.

(f) *When the panel determines that the deficiency had been cured.* If the panel is persuaded that the suspended member's deficiency had been cured at the time the board made its determination, it shall determine that the deficiency had been cured and then shall consider all information submitted to the panel or to the board by the member and all information submitted by the board to the panel bearing on the issue of whether the reinstatement fee had been paid at the time the board made its determination.

(g) *When the panel determines that reinstatement fee had been paid.* If the panel is not persuaded that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had been paid and shall report to the committee a recommendation that the member be reinstated.

(h) *When the panel determines that Reinstatement fee had not been paid.* If the panel has determined that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had not been paid and shall report to the committee a recommendation that the member not be reinstated.

(i) *When the member submits information indicating remedial intervening events.* When a suspended member submits information indicating that, after the board's determination and prior to the hearing before the panel, the suspended member cured the deficiency (if failure to cure was a basis for the denial), the panel shall remand the matter to the board with a request that it reconsider the matter in light of the new information.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1010. Report by the panel to the committee.

(a) *Report by the panel.* At the first meeting of the committee following a panel's hearing a matter, the panel shall report to the committee its determinations and recommendations.

(b) *When report recommends reinstatement or no suspension.* If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member not be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member be reinstated, the committee shall accept the report, and the panel's recommendation shall be the recommendation of the committee.

(c) *When report recommends suspension or no reinstatement.* If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member not be reinstated, the committee shall consider the information reported by the panel and shall determine whether there is any basis for the panel's recommendation.

(d) *When information contains no basis for panel's recommendation.* If the information reported by the panel contains no basis for the panel's recommendation of suspension or its recommendation of no reinstatement, the committee shall reject the panel's recommendation and shall recommend, in a suspension matter, that the member not be suspended or, in a reinstatement matter, that the member be reinstated.

(e) *When information contains some basis for panel's recommendation.* If the information reported by the panel contains some basis for the panel's recommendation of suspension, or its recommendation of no reinstatement, the committee shall accept the panel's recommendation and shall recommend, in a suspension matter, that the member be suspended or, in a reinstatement matter, that the member not be reinstated.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1011. Report by the committee to the council.

At the first meeting of the council following the committee's receiving the report of a panel on a matter, the committee shall report to the council for final action the committee's recommendation in the matter.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

SECTION .1100. RESERVED

SECTION .1200. RESERVED

SECTION .1300. RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

D.1301. Purpose.

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Interest on Lawyers' Trust Accounts and administer the IOLTA program (NC IOLTA). Any funds remitted to the North Carolina State Bar from banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds earned on or with respect to these funds, net of banking charges described in section .1316(e)(1), shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the NC IOLTA Board. The board will award grants or non-interest bearing loans under the four categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds. The programs for which the funds may be awarded are:

(1) providing civil legal services for indigents;

(2) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(3) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education who would not otherwise have adequate funds for this purpose;

(4) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended April 3, 1996; Amended effective March 6, 1997; Amended effective March 6, 2008.

D.1302. Jurisdiction: Authority.

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective March 8, 2007.

D.1303. Operational responsibility.

The responsibility for operating the program of the board rests with the governing body of the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.1304. Size of board.

The board shall have nine members, at least six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.1305. Lay participation.

The board may have no more than three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.1306. Appointment of members; When; Removal.

The members of the board shall be appointed by the Council of the North Carolina State Bar. The July quarterly meeting is when the appointments are made. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.1307. Term of office.

Each member who is appointed to the board shall serve for a term of three years beginning on September 1.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1308. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1309. Succession.

Each member of the board shall be entitled to serve for two full three-year terms. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1310. Appointment of chairperson.

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be for one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1311. Appointment of vice-chairperson.

The vice chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1312. Source of funds.

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct, voluntary contributions from lawyers, and interest, dividends or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994; Amended
effective March 8, 2007.

D.1313. Fiscal responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina

Supreme Court. The funds shall be used to pay the administrative costs of the IOLTA program and to fund grants approved by the board under the six categories approved by the North Carolina Supreme Court as outlined above.

(a) *Maintenance of accounts: Audit.* The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than March 31 of the year following the year for which the audit is to be conducted.

(b) *Investment criteria.* The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursements.* Disbursement of funds of the board in the nature of grants to qualified applicants in the public interest, less administrative costs, shall be made by the board in accordance with policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The board shall adopt an annual operational budget and disbursements shall be made in accordance with the budget as adopted. The board shall determine the signatories on the IOLTA accounts.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1314. Meetings.

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be a majority of the total membership of the board.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1315. Annual report.

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1316. IOLTA Accounts.

(a) Pursuant to order of the North Carolina Supreme Court, every general trust account as defined in the Rules of Professional Conduct maintained by a lawyer or law firm must be an interest-bearing account. Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay. For the purposes of these rules, these general, interest-bearing trust accounts shall be known as "IOLTA accounts."

(b) Every lawyer must insure that all general trust accounts maintained by the lawyer or law firm are interest bearing.

(c) Every lawyer must comply with all the administrative requirements of this rule, including the certification required in Rule .1318 below.

(d) Every lawyer or law firm maintaining IOLTA accounts shall advise NC IOLTA of the establishment or closing of each IOLTA account. Such notice shall include the name of the bank where the account is established; the name of the account; the bank account number; and the name and bar number of the lawyer(s) in the firm. The North Carolina State Bar shall furnish to each lawyer or law firm maintaining IOLTA accounts a suitable plaque or scroll explaining the program, which plaque or scroll shall be exhibited in the office of the lawyer or law firm.

(e) Every lawyer or law firm maintaining IOLTA accounts shall direct the bank in which an IOLTA account is maintained to:

(1) remit interest or dividends, less any deduction for bank service charges, fees, and taxes collected with respect to the deposited funds, at least quarterly to NC IOLTA at the North Carolina State Bar. If the bank does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed, but only against accrued interest and funds belonging to the law firm or lawyer maintaining the account. Fees for wire transfer, insufficient funds, bad checks, stop payment orders, account reconciliation, negative collected balances, and check printing are business costs or costs billable to others and may not be charged against the interest earned by an IOLTA account.

(2) transmit with each remittance to NC IOLTA at the North Carolina State Bar a statement showing the name of the law firm or lawyer maintaining the account with respect to which the remittance is sent, the earnings period, and the rate of interest applied in computing the remittance; and

(3) transmit to the law firm or lawyer maintaining the account at the same time a report showing the amount remitted to NC IOLTA at the North Carolina State Bar, the earnings period, and the rate of interest applied in computing the remittance.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994; Amended
effective March 6, 2008.

D.1317. Confidentiality.

(a) As used in this rule, "confidential information" means all information regarding IOLTA account(s) other than (1) a lawyer's or law firm's status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the grievance committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer or law firm; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

History Note: Adopted Effective March 6, 2008.

D.1318. Certification.

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm in North Carolina are established and maintained as IOLTA accounts or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) in North Carolina.

History Note: Adopted Effective March 6, 2008.

D.1319. Noncompliance.

A lawyer's failure to comply with the mandatory provisions of this subchapter shall be reported to the Administrative Committee which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law pursuant to Rule .0903 of this subchapter.

History Note: Adopted Effective March 6, 2008.

D.1320. Severability.

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

History Note: Adopted Effective March 6, 2008.

SECTION .1400. RULES GOVERNING THE ADMINISTRATION OF THE CLIENT SECURITY FUND OF THE NORTH CAROLINA STATE BAR

D.1401. Purpose; Definitions.

(a) The Client Security Fund of the North Carolina State Bar was established by the Supreme Court of North Carolina pursuant to an order dated August 29, 1984. The fund is a standing committee of the North Carolina State Bar Council pursuant to an order of the Supreme Court dated October 10, 1984, as amended. Its purpose is to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court's orders and these rules, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina, which conduct occurred on or after January 1, 1985.

(b) As used herein the following terms have the meaning indicated.

(1) "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.

(2) "Attorney" shall mean an attorney who, at the time of alleged dishonest conduct, was licensed to practice law by the North Carolina State Bar. The fact that the alleged dishonest conduct took place outside the state of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.

(3) "Board" shall mean the Board of Trustees of the Client Security Fund.

(4) "Council" shall mean the North Carolina State Bar Council.

(5) "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the nature of embezzlement from the applicant or the wrongful taking or conversion of monies or other property of the applicant, which monies or other property were entrusted to the attorney by the applicant by reason of an attorney-client relationship between the attorney and the applicant or by reason of a fiduciary relationship between the attorney and the applicant customary to the practice of law.

(6) "Fund" shall mean the Client Security Fund of the North Carolina State Bar.

(7) "Reimbursable losses" shall mean only those losses of money or other property which meet all of the following tests:

(A) the dishonest conduct which occasioned the loss occurred on or after January 1, 1985;

(B) the loss was caused by the dishonest conduct of an attorney acting either as an attorney for the applicant or in a fiduciary capacity for the benefit of the applicant customary to the private practice of law in the matter in which the loss arose;

(C) the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

(8) The following shall not be deemed "reimbursable losses":

(A) losses of spouses, parents, grandparents, children and siblings (including foster and half relationships), partners, associates or employees of the attorney(s) causing the losses;

(B) losses covered by any bond, security agreement or insurance contract, to the extent covered thereby;

(C) losses incurred by any business entity with which the attorney or any person described in Rule .1401(b)(8)(A) above is an officer, director, shareholder, partner, joint venturer, promoter or employee;

(D) losses, reimbursement for which has been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct;

(E) losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the attorney and the applicant nor a contemporaneous fiduciary relationship between the attorney and the applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this rule (Rule .1401(b)(8)(E)), an attorney authorized or permitted by a person or entity other than the applicant as escrow or similar agent to hold funds deposited by the applicant for investment purposes shall not be deemed to have a fiduciary relationship with the applicant customary to the practice of law.

(9) "State Bar" shall mean the North Carolina State Bar.

(10) "Supreme Court" shall mean the North Carolina Supreme Court.

(11) "Supreme Court orders" shall mean the orders of the Supreme Court dated August 29, 1984, and October 10, 1984, as amended, authorizing the establishment of the Client Security Fund of the North Carolina State Bar and approving the rules of procedure of the Fund.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1402. Jurisdiction: Authority.

(a) Chapter 84 of the General Statutes vests in the State Bar authority to control the discipline, disbarment, and restoration of licenses of attorneys; to formulate and adopt rules of professional ethics and conduct; and to do all such things necessary in the furtherance of the purposes of the statutes governing the practice of the law as are not themselves prohibited by law. G.S. 84-22 authorizes the State Bar to establish such committees, standing or special, as from time to time the council deems appropriate for the proper discharge of its duties; and to determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to such committees. The rules of the State Bar, as adopted and amended from time to time, are subject to approval by the Supreme Court under G.S. 84-21.

(b) The Supreme Court orders, entered in the exercise of the Supreme Court's inherent power to supervise and regulate attorney conduct, authorized the establishment of the Fund, as a standing committee of the council, to be administered by the State Bar under rules and regulations approved by the Supreme Court.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1403. Operational responsibility.

The responsibility for operating the Fund and the program of the board rests with the board, subject to the Supreme Court orders, the statutes governing the practice of law, the authority of the council, and the rules of the board.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1404. Size of board.

The board shall have five members, four of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1405. Lay participation.

The board shall have one member who is not a licensed attorney.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1406. Appointment of Members; When; Removal.

The members of the board shall be appointed by the council. Any member of the board may be removed at any time by the affirmative vote of a majority of the members of the council at a regularly called meeting. Vacancies occurring by reason of death, disability, resignation, or removal of a member shall be filled by appointment of the president of the State Bar with the approval of the council at its next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1407. Term of office.

Each member who is appointed to the board, other than a member appointed to fill a vacancy created by the death, disability, removal or resignation of a member, shall serve for a term of five years beginning as of the first day of the month following the date upon which the appointment is made by the council. A member appointed to fill a vacancy shall serve the remainder of the vacated term.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1408. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that one member is appointed in each year.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1409. Succession.

Each member of the board shall be entitled to serve for one full five-year term. A member appointed to fill a vacated term may be appointed to serve one full five-year term immediately following the expiration of the vacated term but shall not be entitled as of right to such appointment. No person shall be reappointed to the board until the expiration of three years following the last day of the previous term of such person on the board.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1410. Appointment of chairperson.

The chairperson of the board shall be appointed from the members of the board annually by the council. The term of the chairperson shall be one year. The chairperson may be reappointed by the council thereafter during tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1411. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed from the members of the board annually by the council. The term of the vice-chairperson shall be one year. The vice-chairperson may be reappointed by the council thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him by the chairperson or by the board.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1412. Source of funds.

Funds for the program carried out by the board shall come from assessments of members of the State Bar as ordered by the Supreme Court, from voluntary contributions, and as may otherwise be received by the Fund.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

Editor's note. — By order of the North Carolina Supreme Court (November 4, 1999), a $20.00 fee shall be assessed to active members of the North Carolina State Bar to support the Client Security Fund in the year 2000 and in each year thereafter until further order of the court.

D.1413. Fiscal responsibility.

All funds of the board shall be considered funds of the State Bar and shall be maintained, invested, and disbursed as follows:

(a) *Maintenance of accounts; Audit.* The State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited annually in connection with the audits of the State Bar.

(b) *Investment criteria.* The funds of the board shall be kept, invested, and reinvested in accordance with investment policies adopted by the council for dues, rents, and other revenues received by the State Bar in carrying out its official duties. In no case shall the funds be invested or reinvested in investments other than such as are permitted to fiduciaries under the General Statutes of North Carolina.

(c) *Disbursement.* Disbursement of funds of the board shall be made by or under the direction of the secretary of the State Bar.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1414. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the State Bar. The board by resolution may set other regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time. Written minutes of all meetings shall be prepared and maintained.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1415. Annual report.

The board shall prepare at least annually a report of its activities and shall present the same to the council at the annual meeting of the State Bar.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1416. Appropriate uses of the client security fund.

(a) The board may use or employ the Fund for any of the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) The board with the authorization of the council shall, in the name of the North Carolina State Bar, enforce any claims which the board may have for restitution, subrogation, or otherwise, and may employ and compensate consultants, agents, legal counsel, and such other employees as it deems necessary and appropriate.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1417. Applications for reimbursement.

(a) The board shall prepare a form of application for reimbursement which shall require the following minimum information, and such other information as the board may from time to time specify:

(1) the name and address of the applicant;

(2) the name and address of the attorney who is alleged to have engaged in dishonest conduct;

(3) the amount of the alleged loss for which application is made;

(4) the date on or period of time during which the alleged loss occurred;

(5) a general statement of facts relative to the application;

(6) a description of any relationship between the applicant and the attorney of the kinds described in Rules .1401 (b)(8)(A) and (C) of this subchapter;

(7) verification by the applicant;

(8) all supporting documents, including

(A) copies of any court proceedings against the attorney;

(B) copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

(b) The application shall contain the following statement in boldface type:

“IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE OR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE.”

(c) The application shall be filed in the office of the State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and a copy shall be transmitted by such office to the chairperson of the board.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1418. Processing applications.

(a) The board shall cause an investigation of all applications filed with the State Bar to determine whether the application is for a reimbursable loss and the extent, if any, to which the application should be paid from the Fund.

(b) The chairperson of the board shall assign each application to a member of the board for review and report. Wherever possible, the member to whom such application is referred shall practice in the county wherein the attorney practices or practiced.

(c) A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is alleged committed an act of dishonest conduct.

(d) After considering a report of investigation as to an application, any board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his or her representative will be given an opportunity to be heard by the board if the attorney so requests.

(e) The board shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately $1,000,000 is maintained. Subject to the foregoing, the board shall, in its discretion, determine the amount of loss, if any, for which each applicant should be reimbursed from the Fund. In making such determination, the board shall consider, inter alia, the following:

(1) the negligence, if any, of the applicant which contributed to the loss;

(2) the comparative hardship which the applicant suffered because of the loss;

(3) the total amount of reimbursable losses of applicants on account of any one attorney or firm or association of attorneys;

(4) the total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund;

(5) the total amount of insurance or other source of funds available to compensate the applicant for any reimbursable loss.

(f) The board may, in its discretion, allow further reimbursement in any year of a reimbursable loss reimbursed in part by it in prior years.

(g) Provided, however, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise reimbursable losses sustained by any one applicant as a result of the dishonest conduct of one attorney in an amount in excess of $100,000.

(h) No reimbursement shall be made to any applicant unless reimbursement is approved by a majority vote of the entire board at a duly held meeting at which a quorum is present.

(i) No attorney shall be compensated by the board for prosecuting an application before it.

(j) An applicant may be advised of the status of the board's consideration of the application and shall be advised of the final determination of the board.

(k) All applications, proceedings, investigations, and reports involving applicants for reimbursement shall be kept confidential until and unless the board authorizes reimbursement to the applicant, or the attorney alleged to have engaged in dishonest conduct requests that the matter be made public. All participants involved in an application, investigation, or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to be provided by the board to disciplinary committees or to anyone else to whom the council authorizes release of information.

(l) The board may, in its discretion, for newly discovered evidence or other compelling reason, grant a request to reconsider any application which the board has denied in whole or in part; otherwise, such denial is final and no further consideration shall be given by the board to such application or another application upon the same alleged facts.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984; October 10, 1984; Readopted effective December 8, 1994; Amended effective March 6, 1997.

D.1419. Subrogation for reimbursement.

(a) In the event reimbursement is made to an applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the attorney or the attorney's estate either in the name of the applicant or in the name of the State Bar. As a condition of reimbursement, the applicant may be required to execute a "subrogation agreement" to such effect. Filing of an application constitutes an agreement by the applicant that the North Carolina State Bar shall be subrogated to the rights of the applicant to the extent of any reimbursement. Upon commencement of an action by the State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to recover any loss in excess of the amount reimbursed by the Fund. Any amounts recovered from the attorney by the board in excess of the amount to which the Fund is subrogated, less the board's actual costs of such recovery, shall be paid to or retained by the applicant as the case may be.

(b) Before receiving a payment from the Fund, the person who is to receive such payment or his or her legal representative shall execute and deliver to the board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his or her estate, the reimbursed applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

D.1420. Authority reserved by the Supreme Court.

The Fund may be modified or abolished by the Supreme Court. In the event of abolition, all assets of the Fund shall be disbursed by order of the Supreme Court.

History Note: Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

SECTION .1500. RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

D.1501. Scope, purpose and definitions.

(a) *Scope.*

Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar.

(b) *Purpose.*

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Revised Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Revised Rules of Professional Conduct themselves-to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(c) Definitions

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Administrative Committee" shall mean the Administrative Committee of the North Carolina State Bar.

(4) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(5) "Board" means the Board of Continuing Legal Education created by these rules.

(6) "Continuing legal education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(7) "Council" shall mean the North Carolina State Bar Council.

(8) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(9) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(10) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds

(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(11) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(12) "Participatory CLE" shall mean courses or segments of courses that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.

(13) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; b) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; and c) the effects of stress, substance abuse and chemical dependency, or debilitating mental condition on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(14) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct which transcend the requirements of the Revised Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, diversity of the legal profession and clients, advancement of the rule of law, and service to the community, and service to the disadvantaged and those unable to pay for legal services.

(15) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(16) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(17) "Year" shall mean calendar year.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective March 3, 1999; Amended effective June 7, 2001; March 3, 2005; Amended effective March 8, 2007; Amended effective April 25, 2008; Amended effective October 9, 2008.

D.1502. Jurisdiction: Authority.

The Council of the North Carolina State Bar hereby establishes the Board of Continuing Legal Education (board) as a standing committee of the council, which board shall have authority to establish regulations governing a continuing legal education program and a law practice assistance program for attorneys licensed to practice law in this state.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1503. Operational responsibility.

The responsibility for operating the continuing legal education program and the law practice assistance program shall rest with the board, subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1504. Size of board.

The board shall have nine members, all of whom must be attorneys in good standing and authorized to practice in the state of North Carolina.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1505. Lay participation.

The board shall have no members who are not licensed attorneys.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1506. Appointment of members; When; Removal.

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1507. Term of office.

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1508 of this subchapter.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1508. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1509. Succession.

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the board for at least three years.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1510. Appointment of chairperson.

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1511. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1512. Source of funds.

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for

courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with Rule .1512(a)(2) below.

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education activities for which the sponsor does not submit a fee under Rule .1512(a)(1) above. Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.

(b) Funding for a law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1513. Fiscal responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) *Maintenance of accounts: Audit.* The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) *Investment criteria.* The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursement.* Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council. The members of the board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the board or its committees.

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund; provided, however, that a portion of each sponsor or attendee fee, in an amount to be determined by the council but not to exceed $1.00 for each credit hour, shall be paid to the Chief Justice's Commission on Professionalism for administration of the activities of the commission. Excess funds may be expended by the council on lawyer competency programs approved by the council.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective December 30, 1998.

D.1514. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1515. Annual report.

The board shall prepare at least annually a report of its activities and shall present the same to the council one month prior to its annual meeting.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1516. Powers and duties of the board.

The board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of these rules;

(2) to adopt and amend regulations consistent with these rules with the approval of the council;

(3) to establish an office or offices and to employ such persons as the board deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the council;

(4) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the continuing legal education program;

(5) to submit an annual budget to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(6) to administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1517. Exemptions.

(a) *Notification of Board.* To qualify for an exemption for a particular calendar year, a member shall notify the board of the exemption in the annual report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter. All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) *Government Officials and Members of Armed Forces.* The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks. Members of the state judiciary who are required by virtue of their judicial offices to take an average of twelve (12) or more hours of continuing judicial or other legal education annually and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. A full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity, provided, however, that the exemption shall not exceed two consecutive calendar years and, further provided, that the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.

(d) *Nonresidents.* Any active member residing outside of North Carolina who does not practice in North Carolina and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.

(e) *Law Teachers.* An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government (formerly the Institute of Government) of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; or

(3) A full-time teacher of law-related courses at a professional school accredited by its respective professional accrediting agency.

(f) *Special Circumstances Exemptions.* The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(g) *Pro Hac Vice Admission.* Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(h) Senior Status Exemption. The board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older and

(2) the member does not render legal advice to or represent a client unless the member associates another active member who assumes responsibility for the advice or representation.

(i) CLE Record During Exemption Period. During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education activities. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education activity attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such activities will be required by the board.

(j) *Permanent Disability.* Attorneys who have a permanent disability that makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(k) Application for Substitute Compliance and Exemptions. Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(i) *Bar Examiners.* Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective February 12, 1997; Amended October 1, 2003; March 3, 2005.

D.1518. Continuing legal education program.

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602(c). This hour shall be

credited to the 12 hour requirement set forth in Rule .1518(a) above but shall be in addition to the requirement of Rule .1518(b)(1) above. To satisfy this requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

(c) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

(d) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective January 1, 1999; Amended effective March 3, 1999; Amended effective November 6, 2001; Amended October 1, 2003.

D.1519. Accreditation standards.

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. Subject to the limitations set forth in Rule .1611 of this subchapter, credit may also be given for continuing legal education activities on CD-ROM and on a computer website accessed via the Internet.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer presentation, computer website, or CD-ROM. A written agenda or outline for a presentation satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) Except as provided in Rule .1611 of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective December 30, 1998; Amended effective March 1, 2001; Amended October 1, 2003.

D.1520. Accreditation of sponsors and programs.

(a) *Accreditation of sponsors.* An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) *Presumptive approval for accredited sponsors.*

(1) Once an organization is approved as an accredited sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit and no application must be made to the board for approval. The board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter.

(2) The board may evaluate a program presented by an accredited sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the accredited sponsor that any presentation of the same program, the date for which was not included in the announcement required by Rule .1520(e) below, is not approved for credit. Such notice shall be sent by the board to the accredited sponsor within 30 days after the receipt of the announcement. The accredited sponsor may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) *Unaccredited sponsor request for program approval.*

(1) Any organization not accredited as an accredited sponsor that desires approval of a course or program shall apply to the board. The board shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(2) The board may at any time decline to accredit CLE programs offered by a non-accredited sponsor for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519 and Section .1600 of this subchapter.

(d) *Member request for program approval.* An active member desiring approval of a course or program that has not otherwise been approved shall apply to the board. The board that shall adopt regulations to administer approval requests consistent with the requirements Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(e) *Program announcements of accredited sponsors.* At least 30 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

(f) *Records.* The board may provide by regulation for the accredited sponsor, unaccredited sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective February 27, 2003; March 3, 2005.

D.1521. Credit hours.

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1522. Annual report and Compliance Period.

(a) *Annual Written Report.* Commencing in 1989, each active member of the North Carolina State Bar shall provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar. Upon receipt of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record unless, on or before July 31 of the year in which the report form is mailed to members, the member shows good cause for adjusting the member's continuing legal education record for the preceding year.

(b) *Compliance Period.* The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31. A member may complete the requirements for the year on or by the last day of February of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.

(c) *Report.* Prior to January 31 of each year, the prescribed report form concerning compliance with the continuing legal education program for the preceding year shall be mailed to all active members of the North Carolina State Bar.

(d) *Late Filing Penalty.* Any attorney who, for whatever reasons, files the report showing compliance or declaring an exemption after the due date of the last day of February shall pay a $75.00 late filing penalty. This penalty shall be submitted with the report. A report that is either received by the board or postmarked on or before the due date shall be considered timely filed. An attorney who is issued a notice to show cause pursuant to Rule .1523(b) shall pay a late compliance fee of $125.00 pursuant to Rule .1523(e) of this subchapter. The board may waive the late filing penalty or the late compliance fee upon a showing of hardship or serious extenuating circumstances or other good cause.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended October 1, 2003; Amended March 3, 2005; Amended March 2, 2006; Amended July 18, 2008; Amended effective October 9, 2008.

D.1523. Noncompliance.

(a) *Failure to comply with rules may result in suspension.* A member who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) *Notice of failure to comply.* The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the member shows in writing that he or she has complied with the requirements within the 30-day period after service of the notice. Notice shall be served on the member by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be served by personal service by a State Bar investigator or any other person authorized pursuant to Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) *Entry of order of suspension upon failure to respond to notice to show cause.* If a written response attempting to show good cause is not postmarked or received by the board by the last day of the 30-day period after the member was served with the notice to show cause, upon the recommendation of the board and the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(c) of this subchapter.

(d) *Procedure upon submission of a timely response to a notice to show cause.*

(1) *Consideration by the board.* If the member files a timely written response to the notice, the board shall consider the matter at its next regularly scheduled meeting or may delegate consideration of the matter to a duly appointed committee of the board. If the matter is delegated to a committee of the board and the committee determines that good cause has not been shown, the member may file an appeal to the board. The appeal must be filed within 30 calendar days of the date of the letter notifying the member of the decision of the committee. The board shall review all evidence presented by the member to determine whether good cause has been shown or to determine whether the member has complied with the requirements of these rules within the 30-day period after service of the notice to show cause.

(2) *Recommendation of the board.* The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has not been shown or that the member has not shown compliance with these rules within the 30-day period after service of the notice to show cause, then the board shall refer the matter to the Administrative Committee for hearing together with a written recommendation to the Administrative Committee that the member be suspended.

(3) *Consideration by and recommendation of the Administrative Committee.* The Administrative Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. Except as set forth above, the procedure for such hearing shall be as set forth in the Rule .0903(d)(1) and (2) of this subchapter.

(4) *Order of suspension.* Upon the recommendation of the Administrative Committee, the council may determine that the member has not complied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in the Rule .0903(d)(3) of this subchapter.

(e) *Late compliance fee.* Any member to whom a notice to show cause is issued pursuant to paragraph (b) above shall pay a late compliance fee as set forth in Rule .1608(b) of this subchapter; provided, however, upon a showing of good cause as determined by the board as described in paragraph (d)(2) above, the fee may be waived.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 7, 1996; Amended effective March 6, 1997; Amended effective February 3, 2000; Amended October 1, 2003; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.1524. Reinstatement.

(a) *Reinstatement within 30 days of service of suspension order.* A member who is suspended for noncompliance with the rules governing the continuing legal education program may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after the service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member that the member cured the continuing legal education deficiency for which the member was suspended. Such member shall not be required to file a formal reinstatement petition or pay a $250 reinstatement fee.

(b) *Procedure for reinstatement more than 30 days after service of the order of suspension.* Except as noted below, the procedure for reinstatement more than 30 days after service of the order of suspension shall be as set forth in Rule .0904(c) and (d) of this subchapter, and shall be administered by Administrative Committee.

(c) *Reinstatement petition.* At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary. The secretary shall transmit a copy of the petition to each member of the board. The reinstatement petition shall contain the information and be in the form required by Rule .0904(c) of this subchapter. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained in order to cure any continuing legal education deficiency for which the member was suspended.

(d) *Reinstatement fee.* In lieu of the $125.00 reinstatement fee required by Rule .0904(c)(4)(A), the petition shall be accompanied by a reinstatement fee payable to the board, in the amount of $250.00.

(e) *Determination of board; Transmission to Administrative Committee.* Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. The board's written determination and the reinstatement petition shall be transmitted to the secretary within five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the Administrative Committee.

(f) *Consideration by Administrative Committee.* The Administrative Committee shall consider the reinstatement petition, together with the board's determination, pursuant to the requirements of Rule .0902(c)-(f) of this subchapter.

(g) *Hearing upon denial of petition for reinstatement.* The procedure for hearing upon the denial by the Administrative Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 7, 1996; Amended effective March 6, 1997; Amended effective February 3, 2000; March 3, 2005.

D.1525. Reserved.

Editor's note. — Rule .1525, relating to Confidentiality, was deleted by order of the Court dated October 17, 2001.

D.1526. Effective date.

(a) The effective date of these rules shall be January 1, 1988.

(b) Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these rules for such year.

(c) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these rules for the next calendar year.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1527. Regulations.

The following regulations (Section .1600 of the Rules of the North Carolina State Bar) for the continuing legal education program are hereby adopted and shall remain in effect until revised or amended by the board with the approval of the council. The board may adopt other regulations to implement the continuing legal education program with the approval of the council.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

SECTION .1600. REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

D.1601. General Requirements for Course Approval.

(a) *Approval.* CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including one substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted by the sponsor not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within 45 days after the date the course or program was presented or, if the 45 days have elapsed, as soon as practicable after receiving notice from the board that the course accreditation request was not submitted by the sponsor.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(b) *Course Quality and Materials.* The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE course or program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(c) *Facilities.* Sponsors must provide a facility conductive to learning with sufficient space for taking notes.

(d) *Computer-Based CLE: Verification of Attendance.* The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

(e) *Records.* Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) furnish to the board a list in alphabetical order, in an electronic format if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(2) remit to the board the appropriate sponsor fee and, if payment is not received by the board within 30 days after the course is concluded, interest at the legal rate shall be incurred; and

(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(f) *Announcement.* Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(g) *Notice.* Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 45 days of their receipt when the request for approval is submitted before the program and within 45 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended October 1, 2003; March 3, 2005; Amended effective March 6, 2008.

D.1602. General content requirements.

(a) *Professional Responsibility Courses on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions.* Accredited professional responsibility courses on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations. No more than three hours of continuing legal education credit will be granted to any one such course or segment of a course.

(b) *Law School Courses.* Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(c) *Law Practice Management Courses.* A CLE accredited course on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited course on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and ticket systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management course may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).

(d) *Skills and Training Courses.* A course that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A course that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use computer hardware, non-legal software, or office equipment; public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) *Activities That Shall Not Be Accredited.* CLE credit will not be given for general and personal educational activities. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses that deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(f) *Service to the Profession Training.* A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment.

(g) *In-House CLE and Self-Study.* No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(c)(10) of this subchapter or as provided in Rule .1604(e) of this subchapter.

(h) *Bar Review/Refresher Course.* Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; Amended effective March 5, 1998; Amended effective March 3, 1999; Amended effective March 1, 2001; Amended effective June 7, 2001; Amended effective March 3, 2005; Amended effective March 2, 2006; Amended effective March 8, 2007; Amended effective April 25, 2008; Amended effective October 9, 2008.

D.1603. Accredited sponsors.

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule .1520(a) of this subchapter, the application of the sponsor must meet the following requirements:

(1) The application for accredited sponsor status shall be submitted on a form furnished by the board.

(2) The application shall contain all information requested on the form.

(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.

(6) Notwithstanding the provisions of Rule .1603 (3), (4) and (5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

D.1604. Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs.

(a) *Presentation Including Prerecorded Material.* Presentation Including Prerecorded Material. An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used. Prerecorded material may be either in a video or an audio format.

(b) *Simultaneous Broadcast.* An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast. The broadcast may include prerecorded material provided it also includes a live question and answer session with the presenter.

(c) *Accreditation Requirements.* A member attending a prerecorded presentation is entitled to credit if

(1) the live presentation or the presentation from which the program is recorded would, if attended by an active member, be an accredited course; and

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(d) *Minimum Registration and Verification of Attendance.* A minimum of three active members must register for the presentation of a prerecorded program. This requirement does not apply to the presentation of a live program broadcast by telephone, satellite or video conferencing equipment. Attendance at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by (1) the sponsor's report of attendance or (2) the execution of an affidavit of attendance by the participant.

(e) *Computer-Based CLE.* Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(1) A member may apply up to four credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than four credit hours of computer-based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(2) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; March 3, 2005; Amended effective May 4, 2005; Amended effective March 2, 2006; Amended effective March 6, 2008.

D.1605. Computation of credit.

(a) *Computation formula.* CLE and professional responsibility hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) *Actual instruction.* Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) speeches in connection with banquets or other events which are primarily social in nature;

(5) question and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE.

(c) *Teaching.* As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity or a continuing paralegal education activity held in North Carolina and approved pursuant to Section .0200 of Subchapter

G of these rules. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

(d) *Teaching law courses.*

(1) *Law School Courses.* If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn CLE credit for teaching courses at an ABA accredited law school. A member may also earn CLE credit by teaching courses at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.

(2) *Courses at Paralegal Schools or Programs.* Effective January 1, 2006, a member may earn CLE credit by teaching paralegal or substantive law courses at an ABA approved paralegal school or program.

(3) *Credit Hours.* Credit for teaching courses described in Rule .1605(d)(1) and (2) above may be earned without regard to whether the course is taught on-line or in a classroom. Credit will be calculated according to the following formula:

3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or

5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution.

(For example: a 3-semester hour course will qualify for 15 hours of CLE credit).

(4) *Other Requirements.* The member shall also complete the requirements set forth in Rule .1518(b) of this subchapter.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective March 3, 1999; Amended October 1, 2003; Amended November 16, 2006.

D.1606. Fees.

(a) *Sponsor fee.* The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit and further assumes that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $ 2.25
x Total Approved CLE hours (x 6)
x Number of NC Attendees (100)
= Total Sponsor Fee ($1350)

(b) *Attendee fee.* The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee, per approved CLE hour for which the attorney claims credit, is set at $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit and that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $ 2.25
x Total Approved CLE hours (x 3.0)
= Total Attendee Fee ($6.75)

(c) *Fee review.* The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee of $1.25 charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program. The council shall annually review the assessment for the Chief Justice's Commission on Professionalism and adjust it as necessary to maintain adequate finances for the operation of the commission.

(d) *Uniform application and financial responsibility.* The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee. The board shall make reasonable efforts to collect the sponsor fee from the sponsor of a CLE program when appropriate under Rule .1606(a) above. However, whenever a sponsor fee is not paid by the sponsor of a program, regardless of the reason, the lawyer requesting CLE credit for the program shall be financially responsible for the fee.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective December 30, 1998; Amended October 1, 2003.

D.1607. Special cases and exemptions.

(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(b) Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(c) Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended October 1, 2003.

D.1608. General compliance procedures.

(a) *Compliance period.* The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31. A member may complete the requirements for the year on or by February 28 of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.

(b) *Affidavit.* Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.

(c) *Late filing penalty.* Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1524 of this subchapter.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended October 1, 2003.

D.1609. Noncompliance procedures.

(a) *Reinstatement fee.* The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

(b) *Petition.* The attachment to the petition for reinstatement required by Rule .1524(b) of this subchapter shall list the CLE activities according to a form provided by the board.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994, Amended March 7, 1996.

D.1610. Authority for appeals.

(a) *Appeals.* Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board.

(b) *Procedure.* A decision made by the staff of the board pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

History Note: Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

D.1611. Accreditation of Computer-Based CLE.

(a) Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(b) A member may apply up to four credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than four credit hours of computer-based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(c) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail or a website bulletin board, with the presenter and/or other participants.

(d) The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

History Note: Adopted March 1, 2001; Amended effective February 27, 2003.

SECTION .1700. THE PLAN OF LEGAL SPECIALIZATION

D.1701. Purpose.

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, so that the public can more closely match its needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1702. Jurisdiction: Authority.

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Legal Specialization (board) as a standing committee of the council, which board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1703. Operational responsibility.

The responsibility for operating the specialization program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1704. Size of board.

The board shall have nine members, six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina. The lawyer members of the board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1705. Lay participation.

The board shall have three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1706. Appointment of members; When; Removal.

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1707. Term of office.

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1708 of this subchapter.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1708. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members (two lawyers and one nonlawyer) shall be elected to terms of one year; three members (two lawyers and one nonlawyer) shall be elected to terms of two years; and three members (two lawyers and one nonlawyer) shall be elected to terms of three years. Thereafter, three members (two lawyers and one nonlawyer) shall be elected in each year.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1709. Succession.

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years; provided, however, that any member who is designated chairperson may serve one additional three-year term in that capacity.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective April 25, 2008; Amended effective October 9, 2008.

D.1710. Appointment of chairperson.

The chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1711. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1712. Source of funds.

Funding for the program carried out by the board shall come from such application fees, examination fees, course accreditation fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1713. Fiscal responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) *Maintenance of accounts: Audit.* The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditure therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) *Investment criteria.* The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursement.* Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1714. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1715. Annual report.

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1716. Powers and duties of the board.

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) to administer the plan;

(2) subject to the approval of the council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialities and to provide procedures for the achievement of these purposes;

(3) to appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;

(4) to make and publish standards for the certification of specialists, upon the board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

(5) to certify specialists or deny, suspend or revoke the certification of specialists upon the board's own initiative, upon recommendations made by the specialty committees or upon requests for review of recommendations made by the specialty committees;

(6) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(7) to propose and request the council to make amendments to this plan whenever appropriate;

(8) to cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Rules of Professional Conduct to the appropriate disciplinary authority;

(9) to evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists;

(10) to cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization including, but not limited to, utilizing appropriate and qualified organizations that are ABA accredited, to prepare and administer the written specialty examinations for specialties based predominantly on federal law;

(11) notwithstanding any conflicting provision of the certification standards for any area of specialty, to direct any of the specialty committees not to administer a specialty examination if, in the judgment of the board, there are insufficient applicants or such would otherwise not be in the best interest of the specialization program.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended November 16, 2006.

D.1717. Retained jurisdiction of the council.

The council retains jurisdiction with respect to the following matters:

(1) upon recommendation of the board, establishing areas in which certificates of specialty may be granted;

(2) amending this plan;

(3) hearing appeals taken from actions of the board;

(4) establishing or approving fees to be charged in connection with the plan;

(5) regulating attorney advertisements of specialization under the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.1718. Privileges conferred and limitations imposed.

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law consistent with Canon 2 of the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

(3) All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member.

(4) Participation in the program shall be on a completely voluntary basis.

(5) A lawyer may be certified as a specialist in no more than two fields of law.

(6) When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Rules of Professional Conduct, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field.

(7) Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1719. Specialty committees.

(a) The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term, provided, however, that the board may reappoint the chairperson of a committee to a third three-year term if the board determines that the reappointment is in the best interest of the specialization program. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

(b) Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall

(1) after public hearing on due notice, recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(2) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of specialists and for procedures with respect thereto;

(3) administer procedures established by the board for applications for certification and continued certification as a specialist and for denial, suspension, or revocation of such certification;

(4) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

(5) make recommendations to the board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty;

(6) perform such other duties and make such other recommendations as may be delegated to or requested of the specialty committee by the board.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective November 7, 1996.

D.1720. Minimum standards for certification of specialists.

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state.

(2) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government, or corporate legal experience.

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty.

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicants competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and(5) above for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended Effective March 3, 2005.

D.1721. Minimum standards for continued certification of specialists.

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter) in the specialty during the entire period of certification as a specialist.

(2) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education accredited by the board for the specialty during the period of certification as a specialist, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist.

(3) The specialist must comply with the requirements set forth in Rule .1720(a)(1) and (4) of this subchapter.

(b) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for continued certification.

(c) After the period of initial certification, a specialist may request, in advance and in writing, approval from the board for a waiver of one year of the substantial involvement necessary to satisfy the standards for the specialist's next recertification. The specialist may request a waiver of one year of substantial involvement for every five years that the specialist has met the substantial involvement standard beginning with the period of initial certification. However, none of the years for which a waiver is requested may be consecutive. When a waiver of the substantial involvement requirement is granted, the specialist must satisfy all of the other requirements for recertification.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective March 6, 2002.

D.1722. Establishment of additional standards.

The board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification than those provided in Rules .1720 and .1721 of this subchapter. Additional standards or requirements established under this rule need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more or less stringent than the requirements in any other area of specialty.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1723. Revocation or suspension of certification as a specialist.

(a) *Automatic revocation.* The board shall revoke its certification of a lawyer as a specialist if the lawyer is disbarred or receives a disciplinary suspension from the North Carolina State Bar, a North Carolina court of law, or, if the lawyer is licensed in another jurisdiction in the United States, from a court of law or the regulatory authority of that jurisdiction. Revocation shall be automatic without regard for any stay of the suspension period granted by the disciplinary authority. This provision shall apply to discipline received on or after the effective date of this provision.

(b) *Discretionary revocation or suspension.* The board may revoke its certification of a lawyer as a specialist if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board as provided in Rule .1802 and Rule .1803, that

(1) the certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists;

(6) the lawyer certified as a specialist received public discipline from the North Carolina State Bar on or after the effective date of this provision, other than suspension or disbarment from practice and the board finds that the conduct for which the professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist; or

(7) the lawyer certified as a specialist was sanctioned or received public discipline on or after the effective date of this provision from any state or federal court or, if the lawyer is licensed in another jurisdiction, from the regulatory authority of that jurisdiction in the United States, and the board finds that the conduct for which the sanctions or professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist.

(c) *Report to Board.* A lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rule .1723(a) and (b) above.

(d) *Reinstatement.* If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist and upon such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefore and compliance with such conditions and requirements as the board may prescribe.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994; Amended
Effective February 5, 2004.

D.1724. Right to hearing and appeal to council.

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe. (See Section .1800 of this subchapter.)

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.1725. Areas of specialty.

There are hereby recognized the following specialties:
(1) bankruptcy law
(a) consumer bankruptcy law
(b) business bankruptcy law
(2) estate planning and probate law
(3) real property law
(a) real property — residential
(b) real property — business, commercial, and industrial
(4) family law
(5) criminal law
(a) criminal appellate practice
(b) state criminal law
(6) immigration law
(7) workers' compensation law.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended April 17, 1998; Amended effective February 27, 2003.

D.1726. Certification standards of the specialties of bankruptcy law, estate planning and probate law, real property law, family law, and criminal law.

Previous decisions approving the certification standards for the areas of specialty listed above are hereby reaffirmed.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .1800. HEARING AND APPEAL RULES OF THE BOARD OF LEGAL SPECIALIZATION

D.1801. Reconsideration of applications, failure of written examinations, and appeals.

(a) *Applications incomplete and/or applicants not in compliance with standards for certification.*

(1) *Incomplete applications.* The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified of the incompleteness of his or her application. The applicant must submit the completed application within 21 days of the date of mailing of the notice. If the applicant fails to provide the required information for the application during the requisite time period, the executive director will refer the application to the specialty committee for review.

(2) *Applicant not in compliance.* The executive director shall refer to the specialty committee for review any application which appears complete on its face but which does not satisfactorily demonstrate compliance with the standards for certification in the specialty area for which certification is sought.

(3) *Specialty committee action.* The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification. After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative

recommendation must be specified. The specialty committee must complete the above process within 14 days of receiving the applications.

(4) *Notification to applicant of the specialty committee's action.* The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application. The notification must specify the reason for the recommendation of rejection of the application. In addition, the notification shall inform the applicant of his or her right to petition the board for review of the application or request a hearing before the board.

(5) *Petition for review by the board.* Within 21 days of the mailing of the notice from the executive director that an application has been recommended for rejection by the specialty committee, the applicant may petition the board for review. The petition may be informal (e.g., by letter), but should include the date on which notice of the recommendation of rejection was received and the reasons for which the applicant believes the specialty committee's recommendation of rejection should not be accepted.

(6) *Review of petition by the board.* A three-member panel of the board, to be appointed by the chairperson of the board, shall review and take action by a majority of the panel upon the petition and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.

(7) *Request for hearing.* In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.

(8) *Hearing procedures.*

(A) *Notice: Time and place of hearing.* The chairperson of the board shall fix the time and place of the hearing as soon as practicable after the applicant's request for hearing is received. The applicant shall be notified of the hearing date. Such notice shall be given to the applicant at least 10 days prior to the time fixed for the hearing.

(B) *Quorum.* A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with the majority of those in attendance necessary to decide upon the matter.

(C) *Representation by counsel and witnesses.* The applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may cross-examine any witness.

(D) *Written briefs.* The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.

(E) *Depositions.* Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in detail as to what the witness is expected to testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.

(F) *Continuances.* Motions for continuance of the hearing should be made to the chairperson of the board and such motions will be granted or denied by the chairperson of the board.

(G) *Burden of proof: Preponderance of the evidence.* The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification. The burden of proof is upon the applicant.

(H) *Conduct of hearings: Rights of parties.*

(i) Hearings shall be reported by a certified court reporter. The applicant shall pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.

(ii) The applicant may retain counsel at all stages of the investigation and at all meetings. The applicant and his or her counsel shall have the right to attend all hearings.

(iii) Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.

(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights: (a) to call and examine witnesses; (b) to offer exhibits; (c) to cross-examine witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; and (d) to impeach any witness regardless of who first called such witness to testify and to rebut any evidence.

(v) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.

(9) *Failure of applicant to petition the board for review or request a hearing before the board within the time allowed by these rules.* If the applicant does not petition the board for review or request a hearing before the board regarding the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

(b) *Failure of a written examination.* Prepared and Administered by a Certification Committee.

(1) *Review of examination.* Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant shall not remove the examination from the board's office.

(2) *Petition for grade review.* If, after reviewing the examination, the applicant feels an error or errors were made in the grading, he or she may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the area or areas which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim. At the time of filing the petition, the applicant must either (A) request a hearing before a three-member panel of the board; or (B) waive his or her right to a hearing before the board and request that the board render a decision based upon its review of the applicant's examination, supporting documents, and the recommendations of the review committee of the specialty committee.

(3) *Review procedure.* The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying

information on the examination or the petition. The review committee of the specialty committee shall review the entire examination of the applicant. The review committee of the specialty committee shall recommend to the board that the grade of the examination remain the same or be changed.

(4) *Decision of the board.* A panel of the board shall consider the applicant's petition for grade review either by hearing or by a review only of the applicant's submitted materials.

(5) *Hearing procedures.* The rules set forth in Rule .1801(a)(8) above shall be followed when an applicant petitions for a hearing before the board for a grade review of his or her examination.

(6) *Burden of proof: Preponderance of the evidence.* The panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's grade on the examination should remain the same or be changed. The burden of proof is upon the applicant.

(c) *Failure of a written examination prepared and administered by a testing organization on behalf of the board.*

The applicant shall comply with the review and appeal procedures of any testing organization retained by the board to prepare and administer the certification examination.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended Effective June 1, 1995; Amended November 16, 2006.

D.1802. Denial, Revocation or Suspension of continued certification as a specialist.

(a) *Denial of continued certification.* The board, upon its initiative or upon recommendation of the appropriate specialty committee, may deny continued certification of a specialist, if the applicant does not meet the requirements as found in Rule .1721(a) of this subchapter.

(b) *Revocation and Suspension of Certification as a Specialist.* The board shall revoke the certification of a lawyer as provided in Rule .1723(a) of this subchapter and may revoke or suspend the certification of a lawyer as provided in Rule .1723(b) of this subchapter.

(c) *Notification of board action.* The executive director shall notify the lawyer of the board's action to grant or deny continued certification as a specialist upon application for continued certification pursuant to Rule .1721(a) of this subchapter, or to revoke or suspend continued certification pursuant to Rule .1723(a) or (b) of this subchapter. The lawyer will also be notified of his or her right to a hearing if a hearing is allowed by these rules.

(d) *Request for hearing.* Within 21 days of the mailing of notice from the executive director of the board that the lawyer has been denied continued certification pursuant to Rule .1721(a) or that certification has been revoked or suspended pursuant to Rule .1723(b), the lawyer must request a hearing before the board in writing. There is no right to a hearing upon automatic revocation pursuant to Rule .1723(a).

(e) *Hearing procedure.* Except as set forth in Rule .1802(f) below, the rules set forth in Rule .1801(a)(8) of this subchapter shall be followed when a lawyer requests a hearing regarding the denial of continued certification pursuant to Rule .1721(a) or the revocation or suspension of certification under Rule .1723(b).

(f) *Burden of proof: Preponderance of the evidence.* A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the lawyer's certification should be continued, revoked or suspended. In cases of denial of an application for continued certification under Rule .1721(a), the burden of proof is upon the lawyer. In cases of revocation or suspension under Rule .1723(b), the burden of proof is upon the board.

(g) *Notification of board's decision.* After the hearing, the board shall timely notify the lawyer of its decision to regarding continued certification as a specialist.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended October 24, 2003; Amended Effective February 5, 2004.

D.1803. Reserved.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994; Amended
Effective February 5, 2004.

D.1804. Appeal to the council.

(a) *Appealable decisions.* An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is incomplete and/or not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) *Filing the appeal.* An appeal from a decision of the board as described in Rule .1804(a) above may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the mailing of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) *Time and place of hearing.* The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) *Record on appeal to the council.*

(1) The record on appeal to the council shall consist of all the evidence offered at the hearing before the board. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) The appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) *Parties appearing before the council.* The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) *Appeal procedure.* The council shall consider the appeal in banc. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the meeting may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) *Notice of the council's decision.* The appellant shall receive written notice of the council's decision.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1805. Judicial review.

(a) *Appeals.* The appellant or the board may appeal from an adverse ruling by the council.

(b) *Wake County Superior Court.* All appeals from the council shall lie to the Wake County Superior Court. (See *N.C. State Bar v. Du Mont,* 304 N.C. 627, 286 S.E.2d 89 (1982).)

(c) *Judicial review procedures.* Article 4 of G.S. 150-B shall be complied with by all parties relative to the procedures for judicial review of the council's decision.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1806. Additional rules pertaining to hearings and appeals.

(a) *Notices.* Every notice required by these rules shall be mailed to the applicant.

(b) *Expenses related to hearings and appeals.* In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be borne by the applicant and shall not be paid by the board.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .1900. RULES CONCERNING THE ACCREDITATION OF CONTINUING LEGAL EDUCATION FOR THE PURPOSES OF THE BOARD OF LEGAL SPECIALIZATION

D.1901. General provisions.

(a) An applicant for certification in a specialty field must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the last three years prior to application in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for three years and dividing by three.

(b) An applicant for continued certification must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the five years of certification in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for the five years and dividing by five.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1902. Definitions.

(1) *Applicant.* The person applying for certification or continued certification of specialization.

(2) *Board.* The North Carolina State Bar Board of Legal Specialization.

(3) *Committee.* The specialty committee appointed by the board in the applicant's specialty field.

(4) *Sponsor.* An organization offering continuing legal education courses for attendance by attorneys.

(5) *Accredited sponsor.* A sponsor which has demonstrated to the satisfaction of the board that the continuing legal education programs offered by it meet the accreditation standards on a continuing basis warranting a presumption of accreditation.

(6) *Accreditation.* A determination by the board that the continuing legal education activities further the professional competence of the applicant and a certain number of hours of continuing legal education credit should be awarded for participation in the continuing legal education activity.

(7) *Continuing Legal Education (CLE).* Attendance at lecture-type instruction meeting the standards in Rule .1903 of this subchapter or participation in alternative activities described in Rule .1905 of this subchapter.

(8) *Specialty field.* An area of the law as defined by the board in which the board certifies specialists.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1903. Accreditation standards for lecture-type CLE activities.

(a) The CLE activity shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence in the applicant's specialty field.

(b) The CLE activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, or ethical obligations of lawyers in the applicant's specialty field.

(c) The CLE activity may be presented by either live instruction or mechanical or electronically recorded or reproduced material. If electronic transmission is used, an instructor should be present for comment or to answer questions. The board may reduce the hours of credit for electronic transmission when no instructor is present.

(d) Continuing legal education materials are to be prepared and activities conducted by an individual or group qualified by practical or academic experience in a setting suitable to the educational activity of the program.

(e) Except when not suitable or readily available because of the topic or the nature of the lecture, thorough, high quality, and carefully prepared written materials shall be provided to all attendees prior to or at the time the instruction is presented. Absence of materials should be the exception and not the rule.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1904. Computation of hours of instruction.

(a) Hours of CLE will be computed by adding the number of minutes of actual instruction, dividing by 60 and rounding the results to the nearest one-tenth of an hour.

(b) Only actual instruction will be included in computing the total hours of actual instruction. The following will be excluded:

(1) introductory remarks;
(2) breaks;
(3) business meetings;
(4) keynote speeches or speeches in connection with meals;
(5) question and answer sessions in excess of fifteen minutes per hour of instruction;
(6) programs of less than 60 minutes in length.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1905. Alternatives to lecture-type CLE course instruction.

(a) *Teaching.* Preparation and presentation of written materials at an accredited CLE course will qualify for CLE credit at the rate of six hours of credit for each hour of presentation as computed under Rule .1904 of this subchapter. In the case of joint preparation and/or presentation, each preparer and presenter will receive a proportionate share of the total credit available. Repeat presentations of substantially the same materials will not qualify for additional credit. Instruction at an academic institution will qualify for three hours of CLE credit per semester hour taught in the specialty field.

(b) *Publication.* Publication of a scholarly article in the applicant's specialty field will qualify for CLE credit in the discretion of the specialty committee, subject to board approval, based on a review of the article, its content, and its quality. No more than ten hours of credit will be given for a single article.

(c) *Self-study.* An individual may review video or audio tapes or manuscripts of lectures from qualified CLE courses, which lectures would meet the accreditation standards in Rule .1903 of this subchapter and receive credit according to the computation of hours in Rule .1904 of this subchapter provided that no more than two hours per year of self-study shall qualify to meet the CLE requirements for certification or recertification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994, Amended
March 7, 1996.

D.1906. Accreditation of courses.

(a) All courses offered by an accredited sponsor which relate to the specialty field as defined by the board shall be accredited and credit for attendance shall be given for the hours of instruction related to the specialty field of the applicant as determined by the board.

(b) The applicant shall make a showing that any course for which the applicant desires CLE credit offered by a sponsor not on the accredited sponsor list meets the accreditation standards of Rule .1903 of this subchapter. The board will then determine the number of hours of credit based upon the standards of Rule .1904 of this subchapter.

(c) An accredited sponsor may not represent or advertise that a CLE course is approved or that the attendees will be given CLE credit by the board unless such sponsor provides a brochure or other appropriate information describing the topics, hours of instruction, and instructors for its CLE offerings in a specialty field at least thirty days in advance of the date of the course.

(d) An unaccredited sponsor desiring advance accreditation of a course and the right to designate its accreditation for the appropriate number of CLE credits in its solicitations shall submit a brochure or other appropriate information describing the topics, hours of instruction, location, and instructors for its CLE offerings at least sixty days prior to the date of the course.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994; Amended
October 1, 2003.

D.1907. Accreditation of sponsor.

(a) The following is the list of accredited sponsors:

(1) North Carolina Bar Foundation

(2) North Carolina Academy of Trial Lawyers

(3) Wake Forest University Continuing Legal Education

(4) University of North Carolina at Chapel Hill Continuing Legal Education

(5) Duke University School of Law Continuing Legal Education

(6) Norman Adrian Wiggins School of Law Continuing Legal Education

(7) Middle District Bankruptcy Seminar

(8) UCB Estate Planning and Taxation Seminar

(9) any member of the Association of Continuing Legal Education Administrators

(10) University of Miami School of Law

(11) any of the following groups: American Bar Association, American College of Probate Counsel, American College of Trial Counsel, American Patent Law Association, Association of American Law Schools, Association of Life Insurance Counsel, Conference of Chief Justices, Council on Legal Education for Professional Responsibility, Inc., Federal Bar Association, Federal Communications Bar Association, Judge Advocates Association, Maritime Law Association of the United States, National Association of Attorneys General, National Association of Bar Executives, National Association of Bar Presidents, National Association of Bar Counsel, National Association of Women Lawyers, National Bar Association, National Conference of Bar Examiners, National Conference of Commissioners on Uniform State Laws, National Conference of Judicial Councils, National District Attorneys Association, and National Legal Aid and Defender Association.

(b) Any sponsor not listed in Rule .1907(a) above desiring to attain accredited sponsor status must submit to the board a description of the courses offered for the two years prior to application to the board for accredited sponsor status. The board may request copies of any course materials used in any of the offered courses. If, in the judgment of the board, the sponsor has met the accreditation standards of Rule .1903 of this subchapter for each of the courses offered, the board will designate the sponsor as an accredited sponsor.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.1908. Showing by applicants.

Every applicant will list each type of CLE activity under each of the following categories:

(1) *Attendance at CLE instruction offered by an accredited sponsor.* The course name, sponsor, and number of hours of CLE shall be listed by the applicant;

(2) *Attendance at CLE instruction offered by a sponsor not on the accredited sponsor list or not given advanced approval by the board under Rule .1906 of this subchapter.* A fee of $5.00 per course will be charged for accrediting each course listed by the applicant offered by a sponsor not on the accredited sponsor list or not given advanced approval under Rule .1906(d) of this subchapter. The course name, sponsor, and number of hours of CLE shall be listed by the applicant;

(3) *Participation as an instructor at a CLE course.* The course name, sponsor, and number of hours of instruction or preparation shall be stated by the applicant;

(4) *Publication of a scholarly article.* A copy of the publication shall accompany the application;

(5) *Self-study.* A description of the materials used, the dates of use, the number of hours claimed, and the source from which they were obtained shall accompany the application.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .2000. RULES OF THE BOARD OF LEGAL SPECIALIZATION FOR APPROVAL OF INDEPENDENT CERTIFYING ORGANIZATIONS

D.2001. Policy statement.

These guidelines for reviewing independent organizations which certify lawyers as specialists are designed to thoroughly evaluate the purpose and function of such certifying organizations and the procedures they use in their certification processes. These guidelines are not meant to be exclusive, but to provide a framework in which certifying organizations can be evaluated. The aim of this evaluation is to provide consumers of legal services a means of access to lawyers who are qualified in particular fields of law.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2002. General procedure.

As contemplated in Rule 2.5 of the North Carolina Rules of Professional Conduct, the North Carolina State Bar, through its Board of Legal Specialization (the board), shall, upon the filing of a completed application and the payment of any required fee, review the standards and procedures of any organization which certifies lawyers as specialists and desires the approval of the North Carolina State Bar. The board shall prepare an application form to be used by certifying organizations and shall administer the application process.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2003. Factors to be considered in reviewing certifying organizations.

(a) *Purpose of the organization.* The stated purposes for the original formation of the organization and any subsequent changes in those purposes shall be examined to determine whether the organization is dedicated to the maintenance of professional competence.

(b) *Background of the organization.* The length of time the organization has been in existence, whether the organization is a successor of another, the requirements for membership in the organization, the number of members which the organization has, the business structure under which the organization operates, and the professional qualifications of the individuals who direct the policies and operations of the organization shall be examined to determine whether the organization is a bona fide certifying organization.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2004. Standards for approval of certifying organizations.

The following standards are to be considered by the board in evaluating an application for approval of a certifying organization.

(1) *Uniform applicability of certification standards.* In general, the standards for certification in any specialty field must be understandable and easily applied to individual applicants. Certification by the organization must be available to any attorney who meets the standards, and the organization must not certify an attorney who has not demonstrably met each standard. The organization must agree to promptly inform the board of any material changes in its standards, definitions of specialty fields or certifying procedures and must further agree to respond promptly to any reasonable requests for information from the board.

(2) *Definitions of specialty fields.* Every field of law in which certification is offered must be susceptible of meaningful definition and be an area in which North Carolina lawyers regularly practice.

(3) *Decision making by recognized experts.* The persons in a certifying organization making decisions regarding applicants shall include lawyers who, in the judgment of the board, are experts in the subject areas of practice and who each have extensive practice or involvement in those areas of practice.

(4) *Certification standards.* A certifying organization's standards for certification of specialists must include, as a minimum, the standards required for certification set out in the North Carolina Plan of Legal Specialization (Section .1700 of this subchapter) and in the rules, regulations and standards adopted by the board from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for a determination that an applicant possesses special competence in a particular field of law, as demonstrated by the following means:

(a) *Substantial involvement.* Substantial involvement in the area of specialty during the five-year period immediately preceding application to the certifying agency. Substantial involvement is generally measured by the amount of time spent practicing in the area of specialty. In no event may the time spent in practicing the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice;

(b) *Peer review.* Peer recommendations from attorneys or judges who are familiar with the competence of the applicant in the area of specialty, none of whom are related to, engaged in legal practice with, or involved in continuing commercial relationships with the lawyer;

(c) *Written examination.* Objective evaluation of the applicant's knowledge of the substantive and procedural law in the area of specialty as determined by written examination;

(d) *Continuing legal education.* At least 36 hours of approved continuing legal education credit in the area of specialty during the three years immediately preceding application to the certifying organization.

(5) *Applications and procedures.* Application forms used by the certifying organization must be submitted to the board for review to determine that the requirements specified above are being met by applicants. Additionally, the certifying organization must submit a description of the process it uses to review applications.

(6) *Requirements for recertification.* The standards used by a certifying organization must provide for certification for a limited period of time, which shall not exceed five years, after which time persons who have been certified must apply for recertification. Requirements for recertification must include continued substantial involvement in the area of specialty, continuing legal education, and appropriate peer review.

(7) *Revocation of certification.* The standards used by a certifying organization shall include a procedure for revocation of certification. A certification shall be revoked upon a finding that the certificate holder has been disbarred or suspended from the practice

of law. The standards shall require a certificate holder to report his or her disbarment or suspension from the practice of law to the certifying organization.

(8) *Waiver.* The standards used by a certifying organization may provide for waiver of the peer review and written examination requirements set forth in Rule .2004(4)(b) and (c) above for an applicant who was responsible for formulating and grading the organization's initial written examination in his or her area of specialty.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2005. Application procedure.

(a) The organization may file an application seeking approval of the organization by the board. Applications shall be on forms available from and approved by the board. The application fee shall be $1,000.

(b) The organization which has been approved shall provide its standards, definitions and/or certifying procedures to the board in January of each year and must pay an annual administrative fee of $100 to maintain its approved status.

(c) When the board determines that an approved certifying organization has ceased to exist, has ceased to operate its certification program in the manner described in its application, or has failed to comply with the requirements of Rule .2005(b) above, its approved status shall be revoked. After such a revocation, no North Carolina lawyer may publicize a certification from the organization in question.

(d) The appeal procedures of the board shall apply to any application by an organization for approval as a certifying organization and any decision to revoke a certifying organization's approved status.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2006. Effect of approval of a certifying organization by the board of legal specialization.

When an organization is approved as a certifying organization by the board, any North Carolina lawyer certified as a specialist by that organization may publicize that certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .2100. CERTIFICATION STANDARDS FOR THE REAL PROPERTY LAW SPECIALTY

D.2101. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates real property law, including the subspecialties of real property-residential transactions and real property-business, commercial, and industrial transactions as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2102. Definition of specialty.

The specialty of real property law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases, and determination of property rights. Subspecialties in the field are identified and defined as follows:

(a) *Real property law-residential transactions.* The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition, of residential real property by individuals;

(b) *Real property law-business, commercial, and industrial transactions.* The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2103. Recognition as a specialist in real property law.

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-residential transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-business, commercial, and industrial transactions, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Business, Commercial, and Industrial Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for both the real property law-residential transactions subspecialty and the real property law-business, commercial, and industrial transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential, Business, Commercial and Industrial Transactions."

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2104. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in real property law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2105. Standards for certification as a specialist in real property law.

Each applicant for certification as a specialist in real property law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in real property law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of real property law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of real property law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent means service as a law professor concentrating in the teaching of real property law. Teaching may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in real property law during the three years preceding application with not less than 6 credits in any one year. Of the 36 hours of CLE, at least 30 hours shall be in real property law and the balance may be in the related areas of environmental law, taxation, business organizations, estate planning and probate law, and elder law.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in real property law.

(1) *Terms.* The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge in the following topics in real property law or in the subspecialty or subspecialties that the applicant has elected:

(A) title examinations, property transfers, financing, leases, and determination of property rights;

(B) the acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals;

(C) the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.2106. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2106(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2105(b) of this subchapter.

(b) *Continuing legal education.* The specialist must have earned no less than 60 hours of accredited continuing legal education credits in real property law as accredited by the board with not less than 6 credits earned in any one year. Of the 60 hours of CLE, at least 50 hours shall be in real property law and the balance may be in the related areas of environmental law, taxation, business organizations, estate planning and probate law, and elder law.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2105(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2105 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2105 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.2107. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in real property law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .2200. CERTIFICATION STANDARDS FOR THE BANKRUPTCY LAW SPECIALTY

D.2201. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates bankruptcy law, including the subspecialties of consumer bankruptcy law and business bankruptcy law, as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.2202. Definition of specialty.

The specialty of bankruptcy law is the practice of law dealing with all laws and procedures involving the rights, obligations, and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions. Subspecialties in the field are identified and defined as follows:

(a) *Consumer bankruptcy law.* The practice of law dealing with consumer bankruptcy and the representation of interested parties in contested matters or adversary proceedings in individual filings of Chapter 7, Chapter 12, or Chapter 13;

(b) *Business bankruptcy law.* The practice of law dealing with business bankruptcy and the representation of interested parties in contested matters or adversary proceedings in bankruptcy cases filed on behalf of debtors who are or have been engaged in business prior to an entity filing Chapter 7, Chapter 9, Chapter 11, or Chapter 12.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.2203. Recognition as a specialist in bankruptcy law.

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the consumer bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in Consumer Bankruptcy Law.” If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the business bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in Business Bankruptcy Law.” If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for both the consumer bankruptcy law and the business bankruptcy law subspecialties, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in Business and Consumer Bankruptcy Law.”

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.2204. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in bankruptcy law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2205. Standards for certification as a specialist in bankruptcy law.

Each applicant for certification as a specialist in bankruptcy law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in bankruptcy law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of bankruptcy law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of bankruptcy law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession

(A) service as a judge of any bankruptcy court, service as a clerk of any bankruptcy court, or service as a standing trustee;

(B) corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith;

(C) service as a deputy or assistant clerk of any bankruptcy court, as a research assistant to a bankruptcy judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in bankruptcy law, during the three years preceding application with not less than 6 credits in any one year.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be a judge of any bankruptcy court.

(2) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(3) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in bankruptcy law.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994; Amended
November 16, 2006.

D.2206. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2206(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2205(b) of this subchapter.

(b) *Continuing legal education.* Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in bankruptcy law with not less than 6 credits earned in any one year.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2205(d) of this subchapter.

(d) Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2205 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2205 of this subchapter.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2207. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in bankruptcy law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SECTION .2300. CERTIFICATION STANDARDS FOR THE ESTATE PLANNING AND PROBATE LAW SPECIALTY

D.2301. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates estate planning and probate law as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2302. Definition of specialty.

The specialty of estate planning and probate law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2303. Recognition as a specialist in estate planning and probate law.

If a lawyer qualifies as a specialist in estate planning and probate law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2304. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in estate planning and probate law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2305. Standards for certification as a specialist in estate planning and probate law.

Each applicant for certification as a specialist in estate planning and probate law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in estate planning and probate law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* The applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of estate planning and probate law.

(1) Substantial involvement shall be measured as follows:

(A) *Time spent.* During the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of estate planning and probate law, but not less than 400 hours in any one year;

(B) *Experience gained.* During the five years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) prepared or supervised the preparation of (1) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minor's trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments; and (2) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative before the clerk of superior court, guardianship, will contest, and declaratory judgment actions;

(iv) prepared, reviewed or supervised the preparation of federal estate tax returns, North Carolina inheritance tax returns, and federal and state fiduciary income tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board from an approved law school) may be substituted for one year of experience to meet the five-year requirement;

(B) service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may be substituted for one year of experience to meet the five-year requirement;

(C) service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board). Such service may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law (provided, however, that eight of the 45 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in the related areas of taxation, business organizations, real property, family law, elder law, Medicaid planning, and guardianship.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) *Terms.* The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge and application of the law in the following topics:

(A) federal and North Carolina gift taxes;

(B) federal estate tax;

(C) North Carolina inheritance tax;

(D) federal and North Carolina fiduciary income taxes;

(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;

(F) North Carolina law of wills and trusts;

(G) North Carolina probate law, including fiduciary accounting;

(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts;

(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;

(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corporations) which may be encountered in estate planning and administration.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.2306. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter.

(b) *Continuing legal education.* Since last certified, a specialist must have earned no less than 120 hours of accredited continuing legal education credits in estate planning and probate law. Of the 120 hours of CLE, at least 75 hours shall be in estate planning and probate law (provided, however, that 15 of the 75 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in the related areas of taxation, business organizations, real property, family law, elder law, Medicaid planning, and guardianship.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2305(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2305 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2305 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.2307. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in estate planning and probate law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .2400. CERTIFICATION STANDARDS FOR THE FAMILY LAW SPECIALTY

D.2401. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates family law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.2402. Definition of specialty.

The specialty of family law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2403. Recognition as a specialist in family law.

If a lawyer qualifies as a specialist in family law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Family Law."

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2404. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in family law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2405. Standards for certification as a specialist in family law.

Each applicant for certification as a specialist in family law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in family law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of family law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 600 hours a year to the practice of family law, and not less than 400 hours during any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) service as a law professor concentrating in the teaching of family law. Such service may be substituted for one year of experience to meet the five-year requirement.

(B) service as a district court judge in North Carolina, hearing a substantial number of family law cases. Such service may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* During the three calendar years prior to the year of application and the portion of the calendar year immediately prior to application, an applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, 9 of which may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiation (including training in mediation, arbitration and collaborative law), juvenile law, real property, estate planning and probate law, business organizations, employee benefits, bankruptcy, elder law, and immigration law. Only 9 hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course. Parenting coordinator training will not qualify for family law or related field hours. At least 9 hours of CLE in family law or related fields must be taken during each of the three calendar years preceding application.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in family law.

(1) *Terms.* The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

(A) contempt (Chapter 5A of the North Carolina General Statutes);
(B) adoptions (Chapter 48);
(C) bastardy (Chapter 49);
(D) divorce and alimony (Chapter 50);
(E) Uniform Child Custody Jurisdiction and Enforcement Act (Chapter 50A);
(F) domestic violence (Chapter 50B);
(G) marriage (Chapter 51);
(H) powers and liabilities of married persons (Chapter 52);
(I) Uniform Interstate Family Support Act (Chapter 52C);
(J) Uniform Premarital Agreement Act (Chapter 52B);
(K) termination of parental rights, as relating to adoption and termination for failure to provide support (Chapter 7B, Article 11);
(L) garnishment and enforcement of child support obligations (Chapter 110, Article 9);
(M) Parental Kidnapping Prevention Act (28 U.S.C.§ 1738A);
(N) Internal Revenue Code §§ 71 (Alimony), 215 (Alimony Deduction), 121 (Exclusion of Gain from the Sale of Principal Residence), 151 and 152 (Dependency Exemptions), 1041 (Transfer of Property Incidental to Divorce), 2043 and 2516 (Gift Tax Exception), 414(p) (Defining QDRO Requirements), 408 (d)(6) (IRA Transfer Requirements for Non-Taxable Event), and regulations interpretive of these Code sections; and
(O) Federal Wiretap Law.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective February 5, 2002; Amended effective February 27, 2003; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.2406. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter.

(b) *Continuing legal education.* Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiations (including training in mediation, arbitration and collaborative law), juvenile law, real property, estate planning and probate law, business organizations, employee benefits, bankruptcy, elder law, and immigration law. Only 9 hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course. Parenting coordinator training will not qualify for family law or related field hours.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2405(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2405 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2405 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 27, 2003; Amended effective July 18, 2008; Amended effective October 9, 2008.

D.2407. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in family law are subject to any general requirement, standards, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .2500. CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

D.2501. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law, including the subspecialties of criminal appellate practice and state criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.2502. Definition of specialty.

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialties in the field are identified and defined as follows:

(a) *Criminal appellate practice.* The practice of criminal law at the appellate court level.

(b) *State criminal law.* The practice of criminal law in state trial and appellate courts.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

D.2503. Recognition as a specialist in criminal law.

A lawyer may qualify as a specialist by meeting the standards set for criminal law or the subspecialties of criminal appellate practice or state criminal law. If a lawyer qualifies as a specialist by meeting the standards set for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in

Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for both criminal law and the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2504. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in criminal law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

D.2505. Standards for certification as a specialist.

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition each applicant shall meet the following standards for certification:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation in criminal trials, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of criminal law for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2505(b)(1) above;

(B) Service as a federal, state or tribal court judge for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2505(b)(1) above;

(3) For the specialty of criminal law and the subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as;

(A) representation during the applicant's entire legal career in criminal trials concluded by verdict;

(B) representation as principal counsel of record in federal felony cases or state felony cases (Class G or higher);

(C) court appearances in other substantive criminal proceedings in criminal court of any jurisdiction; and

(D) representation in appeals of decisions to the North Carolina Court of Appeals, the North Carolina Supreme Court, or any federal appellate court.

(4) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of criminal appellate law for at least five years prior to

certification during which the applicant devoted an average of at least 500 hours a year to the practice of criminal law (in both trial and appellate courts), but not less than 400 hours in any one year. The board may require an applicant to show substantial involvement in criminal appellate law by providing information regarding the applicant's participation, during the five years prior to application, in activities such as brief writing, motion practice, oral arguments, and the preparation and argument of extraordinary writs.

(c) *Continuing legal education.*

(1) In the specialty of criminal law, the state criminal law subspecialty, and the criminal appellate practice subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(A) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continuing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:

(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(d) *Peer review.*

(1) Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, and the subspecialty of criminal appellate practice must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(4) Each applicant for must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in last ten serious (Class G or higher) felony cases tried by the applicant.

(5) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) *Terms.* The examination(s) shall be in written form and shall be given at such times as the board deems appropriate. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

(A) the North Carolina and Federal Rules of Evidence;

(B) state and federal criminal procedure and state and federal laws affecting criminal procedure;

(C) constitutional law;

(D) appellate procedure and tactics;

(E) trial procedure and trial tactics;

(F) criminal substantive law;

(G) the North Carolina Rules of Appellate Procedure.

(3) *Required examination components.*

(A) *Criminal law specialty.* An applicant for certification in the specialty of criminal law must pass part I of the examination on general topics in criminal law and part II of the examination on federal and state criminal law.

(B) *State criminal law subspecialty.* An applicant for certification in the subspecialty of state criminal law must pass part I of the examination on general topics in criminal law and part III of the examination on state criminal law.

(C) *Criminal appellate practice subspecialty.* An applicant for certification in the subspecialty of criminal appellate practice must pass the criminal appellate practice examination in addition to passing part I of the criminal law examination (on general topics in criminal law) and passing part II (on federal and state criminal law) or part III (on state criminal law) of the examination. If an applicant for certification in criminal appellate practice is already certified as a specialist in the specialty of criminal law or the subspecialty of state criminal law, the applicant is only required to take and pass the criminal appellate practice examination.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended Effective February 5, 2004; Amended Effective August 23, 2007.

D.2506. Standards for continued certification as a specialist.

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2505(b).

(b) *Continuing legal education.* The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law with not less than 6 credits earned in any one year.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2505(d) of this subchapter.

(d) *Time for application.* Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2505 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2505 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended Effective February 5, 2004.

D.2507. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in criminal law, the subspecialty of state criminal law and the subspecialty of criminal appellate practice are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .2600. CERTIFICATION STANDARDS FOR THE IMMIGRATION LAW SPECIALTY

D.2601. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates immigration law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Adopted March 6, 1997.

D.2602. Definition of specialty.

The specialty of immigration law is the practice of law dealing with obtaining and retaining permission to enter and remain in the United States including, but not limited to, such matters as visas, changes of status, deportation and exclusion, naturalization, appearances before courts and governmental agencies, and protection of constitutional rights.

History Note: Adopted March 6, 1997.

D.2603. Recognition as a specialist in immigration law.

If a lawyer qualifies as a specialist in immigration law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Immigration Law."

History Note: Adopted March 6, 1997.

D.2604. Applicability of provisions of the North Carolina Plan of Legal Specialization.

Certification and continued certification of specialists in immigration law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Adopted March 6, 1997.

D.2605. Standards for certification as a specialist in immigration law.

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least five of the seven categories of activities listed below during the five years immediately preceding the date of application:

(A) *Family immigration.* Representation of clients before the U.S. Immigration and Naturalization Service and the State Department in the filing of petitions and applications.

(B) *Employment related immigration.* Representation of employers and/or aliens before at least one of the following: the N.C. Employment Security Commission, U.S. Department of Labor, U.S. Immigration and Naturalization Service, U.S. Department of State or U.S. Information Agency.

(C) *Naturalization.* Representation of clients before the U.S. Immigration and Naturalization Service and judicial courts in naturalization matters.

(D) *Administrative hearings and appeals.* Representation of clients before Immigration Judges in deportation, exclusion, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals, Administrative Appeals Unit, Board of Alien Labor Certification Appeals, Regional Commissioners, Commissioner, Attorney General, Department of State Board of Appellate Review, and Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) *Administrative Proceedings and Review in Judicial Courts.* Representation of clients in judicial matters such as applications for habeas corpus, mandamus and declaratory judgments; criminal matters involving the immigration law; petitions for review in judicial courts; and ancillary proceedings in judicial courts.

(F) *Asylum and Refugee Status.* Representation of clients in these matters.

(G) *Employer Verification, Sanctions, Document Fraud, Bond and Custody, Rescission, Registry, and Fine Proceedings.* Representation of clients in these matters.

(c) *Continuing Legal Education.* An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(d) *Peer Review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. At least two of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

History Note: Adopted March 6, 1997.

D.2606. Standards for Continued Certification as a Specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2606(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial Involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2605(b) of this subchapter.

(b) *Continuing Legal Education.* The specialist must have earned no less than 60 hours of accredited continuing legal education credits in immigration law as accredited by the board. At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(c) *Peer Review.* The specialist must comply with the requirements of Rule .2605(d) of this subchapter.

(d) *Time for Application.* Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) *Lapse of Certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2605 of this subchapter, including the examination.

(f) *Suspension or Revocation of Certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2605 of this subchapter.

History Note: Adopted March 6, 1997.

D.2607. Applicability of Other Requirements.

The specific standards set forth herein for certification of specialists in immigration law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Adopted March 6, 1997.

SECTION .2700. CERTIFICATION STANDARDS FOR THE WORKERS' COMPENSATION LAW SPECIALTY

D.2701. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates workers' compensation as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

D.2702. Definition of specialty.

The specialty of workers' compensation is the practice of law involving the analysis of problems or controversies arising under the North Carolina Workers' Compensation Act (Chapter 97, North Carolina General Statutes) and the litigation of those matters before the North Carolina Industrial Commission.

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

D.2703. Recognition as a specialist in workers' compensation law.

If a lawyer qualifies as a specialist in workers' compensation law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Workers' Compensation Law."

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

D.2704. Applicability of provisions of the North Carolina Plan of Legal Specialization.

Certification and continued certification of specialists in workers' compensation law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

D.2705. Standards for certification as a specialist in workers' compensation law.

Each applicant for certification as a specialist in workers' compensation law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in workers' compensation law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of workers' compensation law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of workers' compensation law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2705(b)(1) above;

(B) Service as a mediator of workers' compensation cases may be included in the hours necessary to satisfy the requirement set forth in Rule .2705(b)(1) above;

(C) Service as a deputy commissioner or commissioner of the North Carolina Industrial Commission may be substituted for the substantial involvement requirements in Rule .2705(b)(1) above provided

(i) the applicant was a full time deputy commissioner or commissioner throughout the five years prior to application, or

(ii) the applicant was engaged in the private representation of clients for at least one year during the five years immediately preceding the application; and, during this year, the applicant devoted not less than 400 hours to the practice of workers's compensation law. During the remaining four years, the applicant was either engaged in the private representation of clients and devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year, or served as a full time deputy commissioner or commissioner of the North Carolina Industrial Commission.

(3) The board may require an applicant to show substantial involvement in workers' compensation law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in activities such as those listed below:

(i) representation as principal counsel of record in complex cases tried to an opinion and award of the North Carolina Industrial Commission;

(ii) representation in occupational disease cases tried to an opinion and award of the North Carolina Industrial Commission; and

(iii) representation in appeals of decisions to the North Carolina Court of Appeals or the North Carolina Supreme Court.

(c) *Continuing legal education.* An applicant must earn no less than thirty-six hours of accredited continuing legal education (CLE) credits in workers' compensation law during the three years preceding application, with not less that six credits earned in any one year. Of the thirty-six hours of CLE, at least eighteen hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in workers' compensation law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference by a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) *Examination.* An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of workers' compensation law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

D.2706. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2706(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2705(b) of this subchapter, provided, however, that a specialist who served on the Industrial Commission as a full time commissioner or deputy commissioner during the five years preceding application may substitute each year of service on the Industrial Commission for one year of practice.

(b) *Continuing legal education.* The specialist must earn no less than sixty hours of accredited continuing legal education credits in workers' compensation law during the five years preceding application. Not less than six credits may be earned in any one year. Of the sixty hours of CLE, at least thirty hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2705(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than 180 days nor less than ninety days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2705 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2705 of this subchapter.

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

D.2707. Applicability of other requirements.

The specific standards set forth herein for certification of specialist in workers' compensation law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23,
Adopted May 4, 2000.

SECTION .2800. CERTIFICATION STANDARDS FOR THE SOCIAL SECURITY DISABILITY LAW SPECIALTY

D.2801. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates Social Security disability law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

D.2802. Definition of Specialty.

The specialty of Social Security disability law is the practice of law relating to the analysis of claims and controversies arising under Title II and Title XVI of the Social Security Act and the representation of claimants in those matters before the Social Security Administration and/or the federal courts.

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

D.2803. Recognition as a Specialist in Social Security Disability Law.

If a lawyer qualifies as a specialist in Social Security disability law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Social Security Disability Law."

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

D.2804. Applicability of provisions of the North Carolina Plan of Legal Specialization.

Certification and continued certification of specialists in Social Security disability law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

D.2805. Standards for certification as a Specialist in Social Security Disability Law.

Each applicant for certification as a specialist in Social Security disability law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in Social Security disability law:

(a) *Licensure and Practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial Involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of Social Security disability law.

(1) "Substantial involvement" shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 600 hours a year to the practice of Social Security disability law, but not less than 500 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of Social Security disability law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2805(b)(1) above;

(B) Service as a Social Security administrative law judge, Social Security staff lawyer, or assistant United States attorney involved in cases arising under Title II and Title XVI may be substituted for three of the five years necessary to satisfy the requirement set forth in Rule .2805(b)(1) above;

(3) The board may require an applicant to show substantial involvement in Social Security disability law by providing information regarding the applicant's participation, during his or her legal career, as primary counsel of record in the following:

(A) Proceedings before an administrative law judge;

(B) Cases appealed to the appeals council of the Social Security Administration; and

(C) Cases appealed to federal district court.

(c) *Continuing Legal Education.* An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in Social Security disability law and related fields during the three years preceding application, with not less than six credits earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; and the law relating to long term disability or Medicaid/Medicare claims.

(d) *Peer Review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in a jurisdiction in the United States and have substantial practice or judicial experience in Social Security disability law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) *Examination.* An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of Social Security disability law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(1) *Subject Matter.* The examination shall cover the applicant's knowledge and application of the law relating to the following:

(A) Title II and Title XVI of the Social Security Act;

(B) Federal practice and procedure in Social Security disability cases;

(C) Medical proof of disability;

(D) Vocational aspects of disability;

(E) Workers' compensation offset;

(F) Eligibility for Medicare and Medicaid;

(G) Eligibility for Social Security retirement and survivors benefits;

(H) Interaction of Social Security benefits with employee benefits (e.g., long term disability and back pay);

(I) Equal Access to Justice Act; and

(J) Fee collection and other ethical issues in Social Security practice.

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

D.2806. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2806(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial Involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2805(b) of this subchapter.

(b) *Continuing Legal Education.* The specialist must earn no less than 60 hours of accredited continuing legal education credits in Social Security disability law and related fields during the five years preceding application. Not less than six of the credits may be earned in any one-year. Of the 60 hours of CLE, at least 20 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; and the law relating to long term disability or Medicaid/Medicare claims.

(c) *Peer Review.* The specialist must comply with the requirements of Rule .2805(d) of this subchapter.

(d) *Time for Application.* Application for continued certification shall be made not more than 180 days nor less than 80 days prior to the expiration of the prior period of certification.

(e) *Lapse of Certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2805 of this subchapter, including the examination.

(f) *Suspension or Revocation of Certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2805 of this subchapter.

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

D.2807. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in Social Security disability law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23,
Adopted March 2, 2006.

SUBCHAPTER 1E. REGULATIONS FOR ORGANIZATIONS PRACTICING LAW

SECTION .0100. REGULATIONS FOR PROFESSIONAL CORPORATIONS AND PROFESSIONAL LIMITED LIABILITY COMPANIES PRACTICING LAW

E.0101. Authority, scope, and definitions.

(a) *Authority.* Chapter 55B of the General Statutes of North Carolina, being "the Professional Corporation Act," particularly Section 55B-12, and Chapter 57C, being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c), authorizes the Council of the North Carolina State Bar (the council) to adopt regulations for professional corporations and professional limited liability companies practicing law. These regulations are adopted by the council pursuant to that authority.

(b) *Statutory law.* These regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and professional limited liability companies (Chapter 57C) and shall be interpreted in harmony with those statutes and with other statutes and laws governing corporations and limited liability companies generally.

(c) *Definitions.* All terms used in these regulations shall have the meanings set forth below or shall be as defined in the Professional Corporation Act or the North Carolina Limited Liability Company Act as appropriate.

(1) "Council" shall mean the Council of the North Carolina State Bar.

(2) "Licensee" shall mean any natural person who is duly licensed to practice law in North Carolina.

(3) "Professional limited liability company or companies" shall mean any professional limited liability company or companies organized for the purpose of practicing law in North Carolina.

(4) "Professional corporations" shall mean any professional corporation or corporations organized for the purpose of practicing law in North Carolina.

(5) "Secretary" shall mean the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0102. Name of professional corporation or professional limited liability company.

(a) *Name of professional corporation.* The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word, or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(a)(1), (2) and (5) below. The following additional requirements shall apply to the name of a professional corporation:

(1) *Corporate designation.* The name of a professional corporation shall end with the following words:

(A) "Professional Association" or the abbreviation "P.A."; or

(B) "Professional Corporation" or the abbreviation "P.C."

(2) *Deceased or retired shareholder.* The surname of any shareholder of a professional corporation may be retained in the corporate name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her shares of stock in the professional corporation;

(3) *Disqualified shareholder.* If a shareholder in a professional corporation whose surname appears in the corporate name becomes legally disqualified to render professional services in North Carolina or, if the shareholder is not licensed in North Carolina, in any other jurisdiction in which the shareholder is licensed, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his or her shares of stock in the corporation;

(4) *Shareholder becomes judge or official.* If a shareholder in a professional corporation whose surname appears in the corporate name becomes a judge or other adjudicatory officer or holds any other office which disqualifies such shareholder to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his or her shares of stock in the corporation;

(5) *Trade name allowed.* A professional corporation shall not use any name other than its corporate name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Rules of Professional Conduct.

(b) *Name of professional limited liability company.* The name of every professional limited liability company shall contain the surname of one or more of its members or one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(b)(1), (2) and (5) below. The following requirements shall apply to the name of a professional limited liability company:

(1) *Professional limited liability company designation.* The name of a professional limited liability company shall end with the words "Professional Limited Liability Company" or the abbreviation "P.L.L.C." or "PLLC";

(2) *Deceased or retired member.* The surname of any member of a professional limited liability company may be retained in the limited liability company name after such person's death, retirement, or inactivity due to age or disability, even though such person may have disposed of his or her interest in the professional limited liability company;

(3) *Disqualified member.* If a member of a professional limited liability company whose surname appears in the name of such professional limited liability company becomes legally disqualified to render professional services in North Carolina or, if the member is not licensed in North Carolina, in any other jurisdiction in which the member is licensed, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member, and such member shall promptly dispose of his or her interest in the professional limited liability company;

(4) *Member becomes judge or official.* If a member of a professional limited liability company whose surname appears in the professional limited liability company name becomes a judge or other adjudicatory official or holds any other office which disqualifies such person to practice law, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member and such person shall promptly dispose of his or her interest in the professional limited liability company;

(5) *Trade name allowed.* A professional limited liability company shall not use any name other than its limited liability company name, except to the extent a trade name or other name is required or permitted by statute, rule of court, or the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

E.0103. Registration with the North Carolina State Bar.

(a) *Registration of professional corporation.* At least one of the incorporators of a professional corporation shall be an attorney at law duly licensed to practice in North Carolina. The incorporators shall comply with the following requirements for registration of a professional corporation with the North Carolina State Bar:

(1) *Filing with State Bar.* Prior to filing the articles of incorporation with the secretary of state, the incorporators of a professional corporation shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of incorporation;
(B) an additional executed copy of the articles of incorporation;
(C) a conformed copy of the articles of incorporation;
(D) a registration fee of fifty dollars;
(E) an application for certificate of registration for a professional corporation (Form DC-1; see Section .0106(a) of this subchapter) verified by all incorporators, setting forth (i) the name and address of each person who will be an original shareholder or an employee who will practice law for the corporation in North Carolina; (ii) the name and address of at least one person who is an incorporator; (iii) the name and address of at least one person who will be an original director; and (iv) the name and address of at least one person who will be an original officer, and stating that all such persons are duly licensed to practice law in North Carolina. The application shall also (i) set forth the name, address, and license information of each original shareholder who is not licensed to practice law in North Carolina but who shall perform services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation that the corporation will be conducted in compliance with the Professional Corporation Act and these regulations; and

(F) a certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of incorporation, to be executed by the secretary in accordance with Rule .0103(a)(2) below.

(2) *Certificates issued by secretary and council.* The secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and these regulations. If the secretary determines that all persons who will be original shareholders are active members in good standing with the North Carolina State Bar, or duly licensed to practice law in another jurisdiction in which the corporation shall maintain an office, and that the articles of incorporation conform with the laws relating to professional corporations and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter) attached to the original, the executed copy, and the conformed copy of the articles of incorporation and return the original and the conformed copies of the articles of incorporation, together with the attached certificates, to the incorporators for filing with the secretary of state;

(B) retain the executed copy of the articles of incorporation together with the application (Form PC-1) and the certification of council (Form PC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional corporation (Form PC-3; see Rule .0106(c) of this subchapter) to the professional corporation to become effective upon the effective date of the articles of incorporation after said articles are filed with the secretary of state.

(b) *Registration of a professional limited liability company.* At least one of the persons executing the articles of organization of a professional limited liability company shall be an attorney at law duly licensed to practice law in North Carolina. The persons executing the articles of organization shall comply with the following requirements for registration with the North Carolina State Bar:

(1) *Filing with State Bar.* Prior to filing the articles of organization with the secretary of state, the persons executing the articles of organization of a professional limited liability company shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of organization;

(B) an additional executed copy of the articles of organization;

(C) a conformed copy of the articles of organization;

(D) a registration fee of $50;

(E) an application for certificate of registration for a professional limited liability company (Form PLLC-1; see Rule .0106(f) of this subchapter) verified by all of the persons executing the articles of organization, setting forth (i) the name and address of each original member or employee who will practice law for the professional limited liability company in North Carolina; (ii) the name and address of at least one person executing the articles of organization; and (iii) the name and address of at least one person who will be an original manager, and stating that all such persons are duly licensed to practice law in North Carolina. The application shall also (i) set forth the name, address, and license information of each original member who is not licensed to practice law in North Carolina but who shall perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and these regulations;

(F) a certification for professional limited liability company by the Council of the North Carolina State Bar, (Form PLLC-2; see Rule .0106(g) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of organization, to be executed by the secretary in accordance with Rule .0103(b)(2) below.

(2) *Certificates issued by the secretary.* The secretary shall review the articles of organization for compliance with the laws relating to professional limited liability companies and these regulations. If the secretary determines that all of the persons

who will be original members are active members in good standing with the North Carolina State Bar, or duly licensed in another jurisdiction in which the professional limited liability company shall maintain an office, and the articles of organization conform with the laws relating to professional limited liability companies and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional limited liability company by the Council of the North Carolina State Bar (Form PLLC-2) attached to the original, the executed copy and the conformed copy of the articles of organization and return the original and the conformed copy of the articles of organization, together with the attached certificates, to the persons executing the articles of organization for filing with the secretary of state;

(B) retain the executed copy of the articles of organization together with the application (Form PLLC-1) and the certification (Form PLLC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional limited liability company (Form PLLC-3; see Rule .0106(h) of this subchapter) to the professional limited liability company to become effective upon the effective date of the articles of organization after said articles are filed with the secretary of state.

(c) *Refund of registration fee.* If the secretary is unable to make the findings required by Rules .0103(a)(2) or .0103(b)(2) above, the secretary shall refund the $50 registration fee.

(d) *Expiration of certificate of registration.* The initial certificate of registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

(e) *Renewal of certificate of registration.* The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) *Renewal of certificate of registration for professional corporation.* A professional corporation shall submit an application for renewal of certificate of registration for a professional corporation (Form PC-4; see Rule .0106(d) of this subchapter) to the secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation in North Carolina and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the state of North Carolina and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act. Such application shall also (i) set forth the name, address, and license information of each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all shareholders are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the corporation maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(2) *Renewal of certificate of registration for a professional limited liability company.* A professional limited liability company shall submit an application for renewal of certificate of registration for a professional limited liability company (Form PLLC-4; see Rule .0106(i) of this subchapter) to the secretary listing the names and addresses of all of the members and employees of the professional limited liability company who practice law in North Carolina, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the state of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Such application shall also (i) set forth the name, address, and license information of each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all members are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the professional limited liability company

maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(3) *Renewal fee.* An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of $25;

(4) *Refund of renewal fee.* If the secretary is unable to make the findings required by Rule .0103(e)(1) or .0103(e)(2) above, the secretary shall refund the $25 registration fee;

(5) *Failure to apply for renewal of certificate of registration.* In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of $10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application and the renewal fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the secretary of state of the suspension of said certificate of registration;

(6) *Reinstatement of suspended certificate of registration.* Upon (A) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees and late fees; and (B) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

(7) *Inactive status pending dissolution.* If a professional corporation or professional limited liability company notifies the State Bar in writing or, in response to a notice to show cause issued pursuant to Rule .0103(e)(5) of this subchapter, a delinquent professional corporation or professional limited liability company shows that the organization is no longer practicing law and is winding down the operations and financial activities of the organization, no renewal fee or late fee shall be owed and the organization shall be moved to inactive status for a period of not more than one year. If, at the end of that period, a copy of the articles of dissolution has not been filed with the State Bar, the secretary of the State Bar shall send a notice to show cause letter and shall pursue suspension of the certificate of registration as set forth in Rule .0103(e)(5) of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997; Amended October 1, 2003.

E.0104. Management and financial matters.

(a) *Management.* At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be active members in good standing with the North Carolina State Bar.

(b) *Authority over professional matters.* No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services in North Carolina or in matters of North Carolina law.

(c) *No income to disqualified person.* The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is legally disqualified to render professional services in North Carolina or, if the shareholder or member is not licensed in North Carolina, in any other jurisdiction in which the shareholder or member is licensed or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rule .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) *Stock of a professional corporation.* A professional corporation may acquire and hold its own stock.

(e) *Acquisition of shares of deceased or disqualified shareholder.* Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) *Stock certificate legend.* There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) *Transfer of stock of professional corporation.* When stock of a professional corporation is transferred to a licensee, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC-5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars for each transferee listed on the stock transfer certificate.

(h) *Stock register of professional corporation.* The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

History Note: Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

E.0105. General and administrative provisions.

(a) *Administration of regulations.* These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) *Appeal to council.* If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) *Articles of amendment, merger, and dissolution.* A copy of the following documents, duly certified by the secretary of state, shall be filed with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) *Filing fee.* Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee of two dollars.

(e) *Accounting for filing fees.* All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) *Records of State Bar.* The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) *Additional information.* A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0106. Forms.

(a) Form PC-1:

Application for Certificate of Registration for a
Professional Corporation

The undersigned, being all of the incorporators of ______________, a professional corporation to be incorporated under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person who is an incorporator, at least one person who will be an original officer, and at least one person who will be an original director, and all persons who, to the best knowledge and belief of the undersigned, will be original shareholders and employees who will practice law for said professional corporation in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name and Position (incorporator, officer, director, shareholder, employee) — Address

____

________________________ ________________________

________________________ ________________________

2. Each original shareholder who is not licensed to practice law in North Carolina but who will perform services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

____

____

____

3. The jurisdictions other than North Carolina in which the corporation will maintain an office are:

Name of Jurisdiction and Address of Office(s)

____

____

____

4. The undersigned represent that the professional corporation will be conducted in compliance with the Professional Corporations Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

5. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional corporation's articles of incorporation after said articles are filed with the secretary of state.

6. Attached hereto is the registration fee of $50.

This the ______ day of __________, ______.

Incorporator

Incorporator

Incorporator

[Signatures of all incorporators.]

NORTH CAROLINA
______ COUNTY

I hereby certify that __________, __________, __________, __________, and __________, being all of the incorporators of __________, a professional corporation, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of ______, ______.

Notary Public

My commission expires:

____

(b) Form PC-2:

Certification for Professional Corporation by Council of the North Carolina State Bar

The incorporators of ______________, a professional corporation, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original owners of said professional corporation's shares.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that the ownership of the shares of stock is in compliance with the requirements of G.S. 55B-4(2) and G.S. 55B-6.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ______ day of ______, ______.

Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and must be attached to the original articles of incorporation when filed with the secretary of state. See Rule .0103(a)(2) of this subchapter.]

(c) Form PC-3:

Certificate of Registration for a Professional Corporation

It appears that ______________, a professional corporation, has met all of the requirements of G.S. 55B-4, G.S. 55B-6 and the Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law of the North Carolina State Bar.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Corporation pursuant to the provisions of G.S. 55B-10 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of incorporation of said professional corporation, after said articles are filed with the secretary of state, and expires on June 30, ______.

This the ______ day of ______, ______.

Secretary of the North Carolina State Bar

(d) Form PC-4:

Application for Renewal of Certificate of Registration for Professional Corporation

Application is hereby made for renewal of the Certificate of Registration for Professional Corporation of ______________, a professional corporation.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the officers and one of the directors, and all of the shareholders and employees of said professional corporation who practice law for said professional corporation in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name and Position (officer, director, shareholder, employee)	Address
______________________	______________________
______________________	______________________
______________________	______________________
______________________	

2. Each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

____

____

3. The jurisdictions other than North Carolina in which the corporation maintains an office are:

Name of Jurisdiction and Address of Office(s)

____

____

____

4. At all times since the issuance of its Certificate of Registration for Professional Corporation, said professional corporation has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the Professional Corporations Act.

5. Attached hereto is the renewal fee of $25.

This the ____ day of ______________, ________.

____
(Professional Corporation)
By ______________________________
President (or Chief Executive)

NORTH CAROLINA
______________ COUNTY

I hereby certify that ______________, being the ____________ of ______________, a professional corporation, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of ____________, ____.

____
Notary Public

My commission expires:

____

(e) Form PC-5:

North Carolina State Bar Stock Transfer Certificate

I hereby certify that ______________________________
(transferee)

is duly licensed to practice law in the state of North Carolina and as of this date may be a transferee of shares of stock in a professional corporation formed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of ____________, ________.

____
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-6 and must be attached to the transferee's stock certificate. See Rule .0104(g) of this subchapter.]

(f) Form PLLC-1:

Application for Certificate of Registration for a
Professional Limited Liability Company

The undersigned, being all of the persons executing the articles of organization of ____________________, a professional limited liability company to be organized under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person executing the articles of organization, at least one person who will be an original manager, and all persons who, to the best knowledge and belief of the undersigned, will be original members and employees who will practice law for said professional limited liability company in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

Name and Position (signer of articles, manager, member, employee)	Address
______________________________	______________________________
______________________________	______________________________
______________________________	______________________________

2. Each original member who is not licensed to practice law in North Carolina but who will perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:

Name, Address, Jurisdiction Where Licensed, License Number

____

____

____

3. The jurisdictions other than North Carolina in which the professional limited liability company will maintain an office are:

Name of Jurisdiction and Address of Office(s)

____

____

____

4. The undersigned represent that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

5. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional limited liability company's articles of organization after said articles are filed with the secretary of state.

6. Attached hereto is the registration fee of $50.

This the ____ day of ____________, ________.

____

____

____

[Signatures of all persons executing articles of organization.]

NORTH CAROLINA
__________ COUNTY

I hereby certify that __________, ________, __________, ________, and ________, being all of the persons executing the articles of organization of __________, a professional limited liability company, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of ________, ______.

____
Notary Public

My commission expires:
____

(g) Form PLLC-2:

Certification for Professional Limited Liability Company
by Council of the North Carolina State Bar

All of the persons executing the articles of organization of ________, a professional limited liability company, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original members of said professional limited liability company.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that the membership interest is in compliance with the requirements of G.S. 55C-2-01(c), and, by reference, G.S. 55B-4(2) and G.S. 55B-6.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of ________, ______.

____
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and G.S. 57C-2-01 and must be attached to the original articles of organization when filed with the secretary of state. See Rule .0103(b)(2) of this subchapter.]

(h) Form PLLC-3:

Certificate of Registration for a
Professional Limited Liability Company

It appears that ______________, a professional limited liability company, has met all of the requirements of G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Limited Liability Company pursuant to the provisions of G.S. 55B-10, G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of organization of said professional limited liability company, after said articles are filed with the secretary of state, and expires on June 30, ________.

This the ____ day of ________, ________.

____
Secretary of the North Carolina State Bar

(i) Form PLLC-4:

Application for Renewal of Certificate of Registration for Professional Limited Liability Company

Application is hereby made for renewal of the Certificate of Registration for Professional Limited Liability Company of ____________, a professional limited liability company.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the managers, and all of the members and employees of said professional limited liability company who practice law for said professional limited liability company in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

Name and Position (manager, member, employee)	Address
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________

2. Each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:

Name, Address, Jurisdiction Where Licensed, License Number

____

____

3. The jurisdictions other than North Carolina in which the professional limited liability company maintains an office are:

Name of Jurisdiction and Address of Office(s)

____

____

____

4. At all times since the issuance of its Certificate of Registration for Professional Limited Liability Company, said professional limited liability company has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the provisions of the North Carolina Limited Liability Company Act.

5. Attached hereto is the renewal fee of $25.

This the ________ day of ____________, ________.

____
(Professional Limited Liability Company)
By ____
Manager

NORTH CAROLINA
____________ COUNTY

I hereby certify that ____________, being a manager of ____________, a professional limited liability company, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of ____________, ____.

____
Notary Public

My commission expires:

____

SECTION .0200. REGISTRATION OF INTERSTATE AND INTERNATIONAL LAW FIRMS

E.0201. Registration requirement.

No law firm or professional organization which maintains offices in North Carolina and one or more other jurisdictions may do business in North Carolina without first obtaining a certificate of registration from the North Carolina State Bar provided, however, that no law firm or professional organization shall be required to obtain a certificate of registration if all attorneys associated with the law firm or professional organization, or any law firm or professional organization that is in partnership with said law firm or professional organization, are licensed to practice law in North Carolina.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

E.0202. Conditions of registration.

The secretary of the North Carolina State Bar shall issue such a certificate of registration upon satisfaction of the following conditions:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional organization;

(b) addresses of all offices maintained by the filing law firm or professional organization;

(c) the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder, member or employee of the filing law firm or professional organization or who is a partner, shareholder, member or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

(e) the relationship of each attorney identified in Rule .0202(1)(d) above to the filing law firm or professional organization;

(f) the jurisdictions to which each attorney identified in Rule .0202(1)(d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization executed by a responsible attorney associated with the filing law firm or professional organization who is licensed in North Carolina certifying that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of the bar of each jurisdiction to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization executed by a responsible attorney associated with the filing law firm or professional organization who is licensed in North Carolina affirming that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina will govern his or her professional conduct with respect to legal matters arising from North Carolina in accordance with the Revised Rules of Professional Conduct of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

E.0203. Registration fee.

There shall be submitted with each registration statement and supporting documentation a registration fee of $500.00 as administrative cost.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

E.0204. Certificate of registration.

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0205. Effect of registration.

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

History Note: Statutory Authority G.S. 84-16;
G.S. 84-23, Readopted Effective December 8, 1994.

E.0206. Non-renewal of registration.

If a law firm or professional organization registered under these rules no longer meets the criteria for registration, it shall notify the State Bar in writing. If such written notice is not received by the State Bar on or before December 31 of the year in which registration is no longer required, the registration fee for the next calendar year, as set forth in Rule .0203 of this subchapter, shall be owed.

History Note: Statutory Authority G.S. 84-23,
Adopted October 1, 2003.

SECTION .0300. RULES CONCERNING PREPAID LEGAL SERVICES PLANS

E.0301. Bar may not approve or disapprove plans.

The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under these rules shall not be construed to indicate approval or disapproval of the plan.

History Note: Statutory Authority G.S. 84-23;
G.S. 84-23.1, Readopted Effective December 8, 1994;
Amended Effective August 23, 2007.

E.0302. Registration requirement.

A prepaid legal services plan ("plan") must be registered with the North Carolina State Bar before its implementation or operation in North Carolina. No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below. No prepaid legal services plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services offered under the plan at all times during the operation of the plan. No prepaid legal services plan may operate in any manner that constitutes the unauthorized practice of law. No plan may operate until its registration has been accepted by the North Carolina State Bar in accordance with these rules.

History Note: Statutory Authority G.S. 84-23;
G.S. 84-23.1, Readopted Effective December 8, 1994;
Amended Effective August 23, 2007.

E.0303. Definition of prepaid plan.

A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of specified legal services that are paid for in advance of any immediate need for the specified legal services ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services offered by a plan must be provided by a North Carolina licensed lawyer who is not an employee, director, or owner of the plan. A prepaid legal services plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. [This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1, Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0304. Registration procedures.

To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:

(a) A prepaid legal services plan seeking to operate in North Carolina must file an initial registration statement form with the secretary of the North Carolina State Bar, using a form promulgated by the State Bar, requesting registration.

(b) The owner or sponsor of the prepaid legal services plan must fully disclose in its initial registration statement form filed with the secretary at least the following information: the name of the plan, the name of the owner or sponsor of the plan, a principal address for the plan in North Carolina, a designated plan representative to whom communications with the State Bar will be directed, all persons or entities with ownership interest in the plan and the extent of their interests, all terms and conditions of the plan, all services provided under the plan and a schedule of benefits and fees or charges for the plan, a copy of all plan documents, a copy of all plan marketing and advertising materials, a copy of all plan contracts with its customers, a copy of all plan contracts with plan attorneys, and a list of all North Carolina attorneys who have agreed to participate in the plan. Additionally, the owner or sponsor will provide a detailed statement explaining how the plan meets the definition of a prepaid legal services plan in North Carolina. The owner or sponsor of the prepaid legal services plan will certify or acknowledge the veracity of the information contained in the registration statement, an understanding of the rules applicable to prepaid legal services plans, and an understanding of the law on unauthorized practice.

(c) The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall review the initial registration statements submitted by each prepaid legal services plan to determine if the plan, as represented in its registration statement, meets the definition of a prepaid legal services plan as defined in Rule .0303, and therefore should be registered in North Carolina. The committee may appoint a subcommittee to conduct an initial review and to recommend to the committee whether the plan meets the definition of a prepaid legal services plan. The committee shall also establish any deadlines by when registrations may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.

History Note: Amended Effective February 5, 2002; Amended Effective August 23, 2007.

E.0305. Registration.

The committee shall review the plan's initial registration statement form to determine whether the plan meets the definition of a prepaid legal services plan. If the plan, as submitted, meets the definition, the committee shall instruct the secretary to issue a certificate of registration to the plan's sponsor. If the plan does not meet the definition, the secretary shall advise the plan's sponsor of the committee's decision and the reasons therefore. Upon notice that the plan's registration has not been accepted, the plan sponsor may resubmit an amended plan registration form or request a hearing before the committee pursuant to Rule .0313 below.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1, Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0306. Requirement to file amendments.

Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar no later than 30 days after the adoption of such amendments. Plan amendments must be submitted in the same manner as the initial registration and may not be implemented until the amended plan is registered in accordance with Rule .0305.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1, Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0307. Annual registration.

After its initial registration, a prepaid legal services plan may continue to operate so long as it is operated as registered and it renews its registration annually on or before January 31 by filing a registration renewal form with the secretary and paying the annual registration fee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1, Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0308. Registration fee.

The initial and annual registration fees for each prepaid legal services plan shall be $100.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1, Redopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0309. Index of registered plans.

The North Carolina State Bar shall maintain an index of the prepaid legal services plans registered pursuant to these rules. All documents filed in compliance with this rule are considered public documents and shall be available for public inspection during normal business hours.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1; Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0310. Advertising of state bar approval prohibited.

Any plan that advertises or otherwise represents that it is registered with the North Carolina State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar.

History Note: Statutory Authority G.S. 84-23, G.S. 84-23.1; Readopted Effective February 5, 2002; Amended Effective February 5, 2002; Amended Effective August 23, 2007.

E.0311. State Bar jurisdiction.

The North Carolina State Bar retains jurisdiction of North Carolina licensed attorneys who participate in prepaid legal services plans and North Carolina licensed attorneys are subject to the rules and regulations of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23, G.S. 84-23.1; Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0312. Revocation of registration.

Whenever it appears that a plan no longer meets the definition of a prepaid legal services plan; is marketed or operates in a manner that is not consistent with the representations made in the initial or amended registration statement and accompanying documents upon which the State Bar relied in registering the plan; is marketed or operates in a manner that would constitute the unauthorized practice of law; is marketed or operates in a manner that violates state or federal laws or regulations, including the rules and regulations of the North Carolina State Bar; or has failed to pay the annual registration fee, the committee may instruct the secretary to serve upon the plan's sponsor a notice to show cause why the plan's registration should not be revoked. The notice shall specify the plan's apparent deficiency and allow the plan's sponsor to file a written response within 30 days of service by sending the same to the secretary. If the sponsor fails to file a timely written response, the secretary shall issue an order revoking the plan's registration and shall serve the order upon the plan's sponsor. If a timely written response is filed, the secretary shall schedule a hearing, in accordance with Rule .0313 below, before the Authorized Practice Committee at its next regularly scheduled meeting and shall so notify the plan sponsor. All notices to show cause and orders required to be served herein may be served by certified mail to the last address provided for the plan sponsor on its most current registration statement or in accordance with Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. The State Bar will not renew the annual registration of any plan that has received a notice to show cause under this section, but the plan may continue to operate under the prior registration until resolution of the show cause notice by the council.

History Note: Statutory Authority G.S. 84-23, G.S. 84-23.1; Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0313. Hearing before the authorized practice committee.

At any hearing concerning the registration of a prepaid legal services plan, the committee chair will preside to ensure that the hearing is conducted in accordance with these rules. The committee chair shall cause a record of the proceedings to be made. Strict compliance with the Rules of Evidence is not required, but may be used to guide the committee in the conduct of an orderly hearing. The plan sponsor may appear and be heard, be represented by counsel, offer witnesses and documents in support of its position and cross-examine any adverse witnesses. The counsel may appear on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the sponsor to establish the plan meets the definition of a prepaid legal services plan, that all registration fees have been paid, and that the plan has operated in a manner consistent with all material representations made in its then current registration statement, the law, and these rules. If the sponsor carries its burden of proof, the plan's registration shall be accepted or continued. If the sponsor fails to carry its burden of proof, the committee shall recommend to the council that the plan's registration be denied or revoked.

History Note: Statutory Authority G.S. 84-23, G.S. 84-23.1; Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

E.0314. Action by the Council.

Upon the recommendation of the committee, the council may enter an order denying or revoking the registration of the plan. The order shall be effective when entered by the council. A copy of the order shall be served upon the plan's sponsor as prescribed in Rule .0312 above.

History Note: Statutory Authority G.S. 84-23, G.S. 84-23.1; Readopted Effective December 8, 1994; Amended Effective August 23, 2007.

SECTION .0400. RULES FOR ARBITRATION OF INTERNAL LAW FIRM DISPUTES

E.0401. Purpose.

Subject to these rules, the North Carolina State Bar will administer a voluntary binding arbitration program for resolution of disputed issues between lawyers arising out of the dissolution of law firms or disputes within law firms. The purpose of this arbitration procedure is to provide a mechanism for resolving economic disputes between lawyers arising out of the operation or dissolution of law firms.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

E.0402. Submission to arbitration.

The program is voluntary. The procedure shall be instituted by a written submission to arbitration agreement, executed by all the parties to the dispute, in a form and manner as provided by the executive director of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

E.0403. Jurisdiction.

The procedure may be used for the resolution of any dispute if all of the following conditions are met:

(a) the disputed issues submitted to arbitration hereunder shall be solely between or among lawyers who are members of the same law firm;

(b) the dispute arises out of an economic relationship between or among lawyers concerning the operation, dissolution, or proposed dissolution of the law firm of which they are members;

(c) at least one of the parties to such dispute resides or maintains an office for the practice of law in the state of North Carolina and is a member of the North Carolina State Bar;

(d) all parties agree in a written submission to arbitration agreement to submit the issues in dispute to binding arbitration under these rules and procedures.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

E.0404. Administration.

The North Carolina State Bar is the administrator of the arbitration program, through its executive director and his designees, to carry out all administrative functions, including those specified in Rules .0406 through .0410 of this subchapter.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

E.0405. Uniform Arbitration Act.

Except as modified herein, all arbitration procedures will be governed by Article 45A of Chapter 1 of the General Statutes of North Carolina (Uniform Arbitration Act). Said Uniform Arbitration Act and any amendments thereto are hereby incorporated by reference and constitute a part of these rules.

History Note: Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

E.0406. List of arbitrators.

The North Carolina State Bar shall establish a list of arbitrators, consisting of attorneys or retired judges, who have been members of the North Carolina State Bar for at least ten years and who have indicated a willingness to serve. The parties shall, in their submission to arbitration agreement, elect to have one or three arbitrators. The administrator shall thereafter provide each party with the list of arbitrators.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0407. Selection of arbitrators.

If three arbitrators are to be selected, then

(a) each party to the dispute shall, within ten days after receipt of notice from the administrator, select one arbitrator on the approved list who shall be contacted by the administrator concerning his or her ability to serve and dates of availability. The two arbitrators so chosen shall execute an oath and appointment of arbitrator certificate provided by the administrator. Within fifteen days after certification, the two arbitrators shall choose a third from the administrator's approved list, who shall also execute an oath and appointment certificate. Failure of the two arbitrators to choose a third within the allotted time shall constitute a consent to have the third arbitrator chosen by the administrator;

(b) if the opposing parties cannot, because of the number of parties involved, settle upon two arbitrators who are to choose the third as set forth above, then the administrator shall notify the parties and appoint all three arbitrators from the approved list.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0408. Fees and expenses.

All expenses and the arbitrator(s') fees shall be paid by the parties. Arbitrator(s') compensation shall be at the same rate paid to retired judges who are assigned to temporary active service as provided in G.S. 7A-52 or any successor statutory provision. The administrator may require from each party an escrow deposit covering anticipated fees and expenses.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0409. Confidentiality.

It is the policy of the North Carolina State Bar to protect the confidentiality of all arbitration proceedings. The parties, the arbitrators, and the North Carolina State Bar shall keep all proceedings confidential, except that any final award shall be enforceable under Chapter 1, Article 45A.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

E.0410. Authority to adopt amendments and regulations.

The North Carolina State Bar may, from time to time, adopt and amend procedures and regulations consistent with these rules and amend or supplement these rules or otherwise regulate the arbitration procedure.

History Note: Statutory Authority G.S. 84-23,
Readopted Effective December 8, 1994.

SUBCHAPTER 1F. FOREIGN LEGAL CONSULTANTS

SECTION .0100. FOREIGN LEGAL CONSULTANTS

F.0101. Applications.

All applicants for certification as a foreign legal consultant must be made on forms supplied by the North Carolina State Bar and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or by telephoning the Bar's offices.

History Note: Adopted March 7, 1996.

F.0102. Application form.

(a) The application for certification as a foreign legal consultant form requires an applicant to supply full and complete information under oath relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, citizenship, credit status, involvement in disciplinary, civil, or criminal proceedings, substance abuse, mental treatment and bar admission and discipline history.

(b) Every applicant must submit as part of the application:

(1) A certificate from the authority that has final jurisdiction regarding matters of professional discipline in the foreign country or jurisdiction in which the applicant is admitted to practice law, or the equivalent thereof. This certificate must be signed by a responsible official or one of the members of the executive body of the authority, imprinted with the official seal of the authority, if any, and must certify:

(A) The authority's jurisdiction in such matters;

(B) The applicant's admission to practice law, or the equivalent thereof, in the foreign country, the date of admission and the applicant's standing as an attorney or the equivalent thereof; and

(C) Whether any charge or complaint has ever been filed with the authority against the applicant and if so, the substance of and adjudication or resolution of each charge or complaint.

(2) A letter of recommendation from one of the members of the executive body of this authority or from one of the judges of the highest law court or court of general original jurisdiction of the foreign country, certifying the applicant's professional qualifications, and a certificate from the clerk of this authority or the clerk of the highest law court or court of general original jurisdiction, attesting to the genuineness of the applicant's signature;

(3) A letter of recommendation from at least two attorneys, or the equivalent thereof, admitted in and practicing law in the foreign country, stating the length of time, when, and under what circumstances they have known the applicant and their appraisal of the applicant's moral character;

(4) Two sets of clear fingerprints;

(5) Two executed informational Authorization and Release forms;

(6) A birth certificate;

(7) Copies of all applications to take a bar examination or an attorney's examination or for admission to the practice of law that the applicant has filed in any state or territory of the U.S., or the District of Columbia or in any foreign country;

(8) Certified copies of any legal proceedings in which the applicant has been a party;

(9) Two recent 2-inch by 3-inch photographs of the applicant showing a front view of the applicant's head and shoulders; and

(10) Any other relevant documents or information as may be required by the North Carolina State Bar.

(c) The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(d) The application and all required attachments shall be in English or accompanied by duly authenticated English translations.

History Note: Adopted March 7, 1996.

F.0103. Requirements for applicants.

As a prerequisite to being certified as a foreign legal consultant, an applicant shall:

(a) Possess the qualifications of character and general fitness requisite for an attorney and counselor at law and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0104 of this Chapter at the time the certificate is issued;

(b) Have been admitted to practice as an attorney, or the equivalent thereof, in a foreign country for at least five years as of the date of application for a certificate of registration;

(c) Certify in writing that he or she intends to practice in the State as a foreign legal consultant and intends to maintain an office in the State for this practice;

(d) Be at least 21 years of age;

(e) Have been actively and substantially engaged in the practice of law or a profession or occupation that requires admission to the practice of law, or the equivalent thereof, in the foreign country in which the applicant holds a license for at least five of the seven years immediately preceding the date of application for a certificate of registration and is in good standing as an attorney, or the equivalent thereof, in that country;

(f) Have filed an application as prescribed in section .0102 above;

(g) Be at all times in good professional standing and entitled to practice in every state or territory of the U.S. or in the District of Columbia, in which the applicant has been licensed to practice law, and in every foreign country in which the applicant is admitted to the practice of law or the equivalent thereof and is not under any pending charges of misconduct. The applicant may be inactive and in good standing in any foreign country or in any state or territory of the U.S. or in the District of Columbia; and

(h) Satisfy the Bar that the foreign country in which the applicant is licensed will admit North Carolina attorneys to practice as foreign legal consultants or the equivalent thereof.

History Note: Adopted March 7, 1996.

F.0104. Burden of proving moral character and general fitness.

Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

History Note: Adopted March 7, 1996.

F.0105. Failure to disclose.

No one shall be issued a certificate of registration as a foreign legal consultant in this state:

(a) Who fails to disclose fully to the Bar, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have terminated or not, in this or any other state, or any federal court or other jurisdiction or foreign country, or

(b) Who fails to disclose fully to the Bar, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state, or any federal court or other jurisdiction or foreign country.

History Note: Adopted March 7, 1996.

F.0106. Investigation by counsel.

The counsel will conduct any necessary investigation regarding the application and will advise the Administrative Committee of the North Carolina State Bar (the committee) of the findings of any such investigation.

History Note: Adopted March 7, 1996; Amended effective February 3, 2000.

F.0107. Recommendation of Administrative Committee.

(a) Upon receipt of all completed application forms, attachments, filing fees and information required by the Bar, and completion of the Bar's investigation, the committee shall make a written recommendation to the council respecting whether an applicant for certification as a foreign legal consultant has met the requirements of G.S. 84A-1 and these rules. Prior to making a written recommendation, the Committee may request further information from the applicant or other sources and may require the applicant to appear before it upon reasonable notice. The Committee's written recommendation shall include a statement of the reason(s) for the Committee's decision.

(b) A copy of the Committee's recommendation shall be served upon the applicant by pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

History Note: Adopted March 7, 1996; Amended effective February 3, 2000.

F.0108. Appeal from committee decision.

(a) The applicant will have 30 days from the date of service of the committee's recommendation in which to serve a written request for a hearing upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(b) If the applicant does not request a hearing in a timely fashion, the committee will forward its recommendation to the council. The council will consider the application and the recommendation of the committee and will make a final written recommendation to the N.C. Supreme Court, as set out in section .0110(f) below.

History Note: Adopted March 7, 1996; Amended effective February 3, 2000.

F.0109. Hearing procedure.

(a) *Notice, time & place of hearing.*

(1) The chair of the committee shall fix the time and place of hearing within 30 days after the applicant's request for a hearing is served upon the Secretary. The hearing shall be held as soon as practicable after the request is filed.

(2) The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the applicant at least 10 days before the hearing date.

(b) *Hearing panel.*

(1) The chair of the committee shall appoint a hearing panel composed of three members of the committee to consider the application and make a written recommendation to the counsel.

(2) The chair shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure which arises during the hearing; preside at the deliberations of the panel, sign the written determinations of the panel and report the panel's determination to the council.

(c) *Proceedings before the hearing panel.*

(1) A majority of the panel members is necessary to decide the application.

(2) Following the hearing on the contested application, the panel will make a written recommendation to the council on behalf of the committee regarding whether the application should be granted. The recommendation shall include appropriate findings of fact and conclusions of law.

(3) The applicant will have the burden of proving that he or she has met all the requirements of sections .0102-.0104 above.

(4) At the hearing, the applicant and State Bar counsel will have the right

(A) to appear personally and be heard

(B) to call and examine witnesses

(C) to offer exhibits

(D) to cross-examine witnesses

(5) In addition the applicant will have the right to be represented by counsel.

(6) The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and by the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree otherwise.

(7) The hearing shall be reported by a certified court reporter. The applicant will pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant may also be taxed with all other costs of the hearing, but the costs shall not include any compensation to the members of the hearing panel.

(8) The written recommendation of the hearing panel shall be served upon the member and the counsel within 14 days of the date of the hearing.

History Note: Adopted March 7, 1996; Amended effective February 3, 2000.

F.0110. Review and order of council.

(a) *Review by council.*

The applicant shall compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence at the hearing, all pleadings and all motions and orders, unless the applicant and counsel agree in writing to shorten the record. Any agreement regarding the record shall be included in the record transmitted to the council.

(b) *Transmission of record to council.*

The applicant shall provide a copy of the record to the council not later than 90 days after the hearing unless an extension is granted by the president of the N.C. State Bar for good cause shown. The applicant shall transmit a copy of the record to each member of the council, at the applicant's expense, no later than 30 days before the council meeting at which the application is to be considered.

(c) *Costs.*

The applicant shall bear all of the costs of transcribing, copying, and transmitting the record to the members of the council.

(d) *Dismissal for failure to apply.*

If the applicant fails to comply fully with any provisions of this rule, the counsel may file a motion with the secretary to dismiss the application.

(e) *Appearance before the council.*

In his or her discretion, the president of the State Bar may permit the counsel for the State Bar and the applicant to present oral or written argument but the council will not consider additional evidence not in the record transmitted from the hearing panel absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(f) *Order by council.*

The council will review the recommendation of the hearing panel and the record and will determine whether the applicant has met all of the requirements of sections .0102-.0104 above. The council will make a written recommendation to the N.C. Supreme Court regarding whether the application should be granted. The council's recommendation will contain a statement of the reasons for the recommendation and shall attach to it the application.

(g) *Costs.*

The council may tax the costs attributable to the proceeding against the applicant.

History Note: Adopted March 7, 1996.

F.0111. Application fees; Refunds; Returns checks.

(a) Every application and every reapplication for certification as a foreign legal consultant shall be accompanied by a fee of $200 paid in U.S. currency.

(b) No part of the fee will be refunded.

(c) Failure to pay the application fees required by the these rules shall cause the application to be deemed not filed. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank, the application will be deemed not filed. All checks presented to the Bar for any fees which are not honored upon presentment will be returned to the applicant, who shall pay the Bar in cash, cashier's check, certified check or money order any fees payable to the Bar, along with a $20 additional fee for processing the dishonored check.

History Note: Adopted March 7, 1996.

F.0112. Permanent record.

All information furnished to the Bar by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Bar. Records, papers and other documents containing information collected or compiled by the North Carolina State Bar and its members or employees as a result of any investigation, application, inquiry or interview conducted in connection with an application for certificate of registration are not public records within the meaning of Chapter 132 of the General Statutes.

History Note: Adopted March 7, 1996.

F.0113. Denial; Re-application.

No new application or petition for reconsideration of a previous application from an applicant who has been denied a certificate of registration as a foreign legal consultant shall be considered by the Bar within a period of three years (3) next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Bar.

History Note: Adopted March 7, 1996.

SUBCHAPTER 1G. THE PLAN FOR CERTIFICATION OF PARALEGALS

SECTION .0100. THE PLAN FOR CERTIFICATION OF PARALEGALS

G.0101. Purpose.

The purpose of this plan for certification of paralegals (plan) is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.

History Note: Adopted October 6, 2004.

G.0102. Jurisdiction; Authority.

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Paralegal Certification (board), which board shall have jurisdiction over the certification of paralegals in North Carolina.

History Note: Adopted October 6, 2004.

G.0103. Operational Responsibility.

The responsibility for operating the paralegal certification program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Adopted October 6, 2004.

G.0104. Size and Composition of Board.

The board shall have nine members, five of whom must be lawyers in good standing and authorized to practice law in the state of North Carolina. One of the members who is a lawyer shall be a program director at a qualified paralegal studies program. Four members of the board shall be paralegals certified under the plan, provided, however, that the paralegals appointed to the inaugural board shall be exempt from this requirement during their initial and successive terms but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the member meets the requirements for certification in Rule .0119(b).

History Note: Adopted October 6, 2004; amended effective March 2, 2006.

G.0105. Appointment of Members; When; Removal.

(a) *Appointment.* The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member shall be selected by the council from two nominees determined by a vote by mail of all active certified paralegals in an election conducted by the board.

(b) *Procedure for Nomination of Candidates for Paralegal Members.*

(1) *Composition of Nominating Committee.* At least 60 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three year term, the board shall appoint a nominating committee comprised of certified paralegals as follows:

(i) A representative selected by the North Carolina Paralegal Association;

(ii) A representative selected by the North Carolina Bar Association Legal Assistants Division;

(iii) A representative selected by the North Carolina Academy of Trial Lawyers Legal Assistants Division;

(iv) Three representatives from three local or regional paralegal organizations to be selected by the board; and

(v) An independent paralegal (not employed by a law firm, government entity, or legal department) to be selected by the board.

(2) *Selection of Candidates.* The nominating committee shall meet within 30 days of its appointment to select five (5) certified paralegals as candidates for each paralegal member vacancy on the board for inclusion on the ballot to be mailed to all active certified paralegals.

(3) *Vote of Certified Paralegals.* At least 30 days prior to the meeting of the council at which a paralegal member appointment to the board will be made, a ballot shall be mailed to all active certified paralegals at each certified paralegal's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions, and shall state how many paralegal member positions on the board are subject to appointment, the names of the candidates selected by the nominating committee for each such position, and when and where the ballot should be returned. Write-in candidates shall be permitted and the instructions shall so state. Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The board shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted. Ballots received after the deadline stated on the ballot will not be counted. The names of the two candidates receiving the most votes for each open paralegal member position shall be the nominees submitted to the council.

(c) *Time of Appointment.* The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually at the quarterly meeting of the council occurring on the anniversary of the appointment of the initial board.

(d) *Vacancies.* Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council, subject to the requirements of Rule .0105(a)1, at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

(e) *Removal.* Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Adopted October 6, 2004; Amended effective March 8, 2007.

G.0106. Term of Office.

Subject to Rule .0107 of this subchapter, each member of the board shall serve for a term of three years beginning as of the first day of the month following the date on which the council appoints the member.

History Note: Adopted October 6, 2004.

G.0107. Staggered Terms.

The members of the board shall be appointed to staggered terms such that three members are appointed in each year. Of the initial board, three members (one lawyer and two paralegals) shall be appointed to terms of one year; three members (two lawyers and one paralegal) shall be appointed to terms of two years; and three members (two lawyers and one paralegal) shall be appointed to terms of three years. Thereafter, three members (lawyers or paralegals as necessary to fill expired terms) shall be appointed in each year for full three year terms.

History Note: Adopted October 6, 2004.

G.0108. Succession.

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

History Note: Adopted October 6, 2004.

G.0109. Appointment of Chairperson.

The council shall appoint the chairperson of the board from among the lawyer members of the board. The term of the chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Adopted October 6, 2004.

G.0110. Appointment of Vice-Chairperson.

The council shall appoint the vice-chairperson of the board from among the members of the board. The term of the vice-chairperson shall be one year. the vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Adopted October 6, 2004.

G.0111. Source of Funds.

Funding for the program carried out by the board shall come from such application fees, examination fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

History Note: Adopted October 6, 2004.

G.0112. Fiscal Responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) *Maintenance of Accounts: Audit* —. The North Carolina State bar shall maintain a separate account for funds of the board such that such funds and expenditures there from can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) *Investment Criteria* —. The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursement* —. Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

History Note: Adopted October 6, 2004.

G.0113. Meetings.

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson. Notice of meeting shall be given at least one day prior to the meeting by mail, electronic mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be five or more of the members serving at the time of the meeting.

History Note: Adopted October 6, 2004.

G.0114. Annual Report.

The board shall prepare a report of its activities for the preceding year and shall present the same at the annual meeting of the council.

History Note: Adopted October 6, 2004.

G.0115. Powers and Duties of the Board.

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to certification of paralegals and shall have the power and duty

(1) to administer the plan of certification for paralegals;

(2) to appoint, supervise, act on the recommendations of, and consult with committees as appointed by the board or the chairperson;

(3) to certify paralegals or deny, suspend or revoke the certification of paralegals;

(4) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(5) to propose and request the council to make amendments to this plan whenever appropriate;

(6) to cooperate with other boards or agencies in enforcing standards of professional conduct;

(7) to evaluate and approve continuing legal education courses for the purpose of meeting the continuing legal education requirements established by the board for the certification of paralegals;

(8) to cooperate with other organizations, boards and agencies engaged in the recognition, education or regulation of paralegals; and

(9) to set fees, with the approval of the council, and to, in appropriate circumstances, waive such fees.

History Note: Adopted October 6, 2004;
Amended effective March 2, 2006.

G.0116. Retained Jurisdiction of the Council.

The council retains jurisdiction with respect to the following matters:
(1) amending this plan;
(2) hearing appeals taken from actions of the board;
(3) establishing or approving fees to be charged in connection with the plan;
(4) regulating the conduct of lawyers in the supervision of paralegals; and
(5) determining whether to pursue injunctive relief as authorized by G.S. 84-37 against persons acting in violation of this plan.

History Note: Adopted October 6, 2004.

G.0117. Privileges Conferred and Limitations Imposed.

The board in the implementation of this plan shall not alter the following privileges and responsibilities of lawyers and their non-lawyer assistants.

(1) No rule shall be adopted which shall in any way limit the right of a lawyer to delegate tasks to a non-lawyer assistant or to employ any person to assist him or her in the practice of law.

(2) No person shall be required to be certified as a paralegal to be employed by a lawyer to assist the lawyer in the practice of law.

(3) All requirements for and all benefits to be derived from certification as a paralegal are individual and may not be fulfilled by nor attributed to the law firm or other organization or entity employing the paralegal.

(4) Any person certified as a paralegal under this plan shall be entitled to represent that he or she is a “North Carolina Certified Paralegal (NCCP)”, a “North Carolina State Bar Certified Paralegal (NCSB/CP)” or a “Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification.”

History Note: Adopted October 6, 2004.

G.0118. Certification Committee.

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board’s determination that the committee member meets the requirements for certification in Rule .0119(b).

(b) Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the committee. All members shall be eligible for reappointment to not more than one additional three-year term, provided, however, that the board may reappoint the chairperson of the committee to a third three-year term if the board determines that the reappointment is in the best interest of the program. Meetings of the certification committee shall be held at regular intervals at such times, places and upon such notices as the committee may from time to time prescribe or upon direction of the board.

(c) The committee shall advise and assist the board in carrying out the board’s objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

(2) administer procedures established by the board for evaluation of applications for certification and continued certification as a paralegal and for denial, suspension, or revocation of such certification;

(3) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as paralegals; and

(4) perform such other duties and make such other recommendations as may be delegated to or requested by the board.

History Note: Adopted October 6, 2004; Amended effective March 2, 2006.

G.0119. Standards for Certification of Paralegals.

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) *Education.* The applicant must have earned one of the following:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program; or

(B) an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education and a certificate from a qualified paralegal studies program.

(2) *Examination.* The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) *Alternative Qualification Period.* For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:

(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and, during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;

(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)êrtified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board, and worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or

(3) worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application and fulfilled one of the following educational requirements:

(A) set forth in Rule .0119(a)(1), or

(B) earned an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education and successfully completed at least the equivalent of 18 semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness or fitness as a paralegal; or

(4) the individual is not a legal resident of the United States.

(d) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, examinations and examination scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(e) *Qualified Paralegal Studies Program.* A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education.

(f) *Designation as a Qualified Paralegal Studies Program.* The board shall determine whether a paralegal studies program is a qualified paralegal studies program upon submission by the program of an application to the board provided, however, a paralegal studies program is not required to submit an application for qualification as long as the program satisfies the requirements of Rule .0119(e)(1) or (2).

(1) A program designated by the board as a qualified paralegal studies program shall renew its application for designation every five years.

(2) An applicant for certification who lists on a certification application a paralegal studies program that does not satisfy the requirements of Rule .0119(e)(1) or (2) or that has not been designated by the board as a qualified paralegal studies program shall be responsible for obtaining a completed application for designation from the program or shall submit the information required on the application for determination that the program is a qualified paralegal studies program.

(3) Designation of a paralegal studies program as a qualified paralegal studies program under this section does not constitute an approval or an endorsement of the program by the board or the North Carolina State Bar.

History Note: Adopted October 6, 2004; Amended effective March 2, 2006; Amended effective March 8, 2007.

G.0120. Standards for Continued Certification of Paralegals.

(a) The period of certification as a paralegal shall be one (1) year. During such period the board may require evidence from the paralegal of his or her continued qualification for certification as a paralegal, and the paralegal must consent to inquiry by the board regarding the paralegal's continued competence and qualification to be certified. Application for and approval of continued certification shall be required annually prior to the end of each certification period. To qualify for continued certification as a paralegal, an applicant must demonstrate participation in not less than 6 hours of credit in board approved continuing legal education, or its equivalent, during the year within which the application for continued certification is made.

(b) Upon written request of the paralegal, the board may for good cause shown waive strict compliance by such paralegal with the criteria relating to continuing legal education, as those requirements are set forth in Rule .0120(a).

History Note: Adopted October 6, 2004.

G.0121. Lapse, Suspension or Revocation of Certification.

(a) The board may suspend or revoke its certification of a paralegal, after hearing before the board on appropriate notice, upon a finding that

(1) the certification was made contrary to the rules and regulations of the board;

(2) the individual certified as a paralegal made a false representation, omission or misstatement of material fact to the board;

(3) the individual certified as a paralegal failed to abide by all rules and regulations promulgated by the board;

(4) the individual certified as a paralegal failed to pay the fees required;

(5) the individual certified as a paralegal no longer meets the standards established by the board for the certification of paralegals; or

(6) the individual is not eligible for certification on account of one or more of the grounds set forth in Rule .0019(c); or

(7) the individual violated the confidentiality agreement relative to the questions on the certification examination.

(b) An individual certified as a paralegal has a duty to inform the board promptly of any fact or circumstance described in Rule .0121(a).

(c) If an individual's certification lapses, or if the board revokes a certification, the individual cannot again be certified as a paralegal unless he or she so qualifies upon application made as if for initial certification and upon such other conditions as the board may prescribe. If the board suspends certification of an individual as a paralegal, such certification cannot be reinstated except upon the individual's application and compliance with such conditions and requirements as the board may prescribe.

History Note: Adopted October 6, 2004; Amended effective March 6, 2008.

G.0122. Right to Review and Appeal to Council.

(a) An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(b) *Notification of the Decision of the Board.* Following the meeting at which the board denies certification for failure to meet the standards for certification, including failing the examination, denies continued certification, or suspends or revokes certification, the executive director shall promptly notify the individual in writing of the decision of the board. The notification shall specify the reason for the decision of the board and shall inform the individual of his or her right to request a review before the board.

(c) *Request for Review by the Board.* Except as provided in paragraph (e) of this rule, within 30 days of the mailing of the notice from the executive director described in paragraph (b) of this rule, the individual may request review by the board. The request shall be in writing and state the reasons for which the individual believes the prior decision of the board should be reconsidered and withdrawn. The request shall state whether the board's review shall be on the written record or at a hearing.

(d) *Review by the Board.* A three-member panel of the board shall be appointed by the chair of the board to reconsider the board's decision and take action by a majority of the panel. At least one member of the panel shall be a lawyer member of the board and at least one member of the panel shall be a paralegal member of the board. The decision of the panel shall constitute the final decision of the board.

(1) *Review on the Record.* If requested, the panel shall review the entire written record including the individual's application, all supporting documentation, and any written materials submitted by the individual within 30 days of mailing the request for review. The panel shall make its decision within sixty (60) days of receipt of the written request for review from the individual.

(2) *Review Hearing.* If requested, the panel shall hold a hearing at a time and location that is convenient for the panel members and the individual provided the hearing occurs within sixty (60) days of receipt of the written request for review from the individual. The hearing shall be informal. The Rules of Evidence and the Rules of Civil Procedure shall not apply. The individual may be represented by lawyer at the hearing, may offer witnesses and exhibits, and may question witnesses for the board. The panel may ask witnesses to appear and may consider exhibits on its own request. Witnesses shall not be sworn. The hearing shall not be reported unless the applicant pays the costs of the transcript and arranges for the preparation of the transcript with the court reporter.

(3) *Decision of the Panel.* The individual shall be notified in writing of the decision of the panel and, if unfavorable, the right to appeal the decision to the council under such rules and regulations as the council may prescribe.

(e) *Failure of Written Examination.* Within 30 days of the mailing of the notice from the board's executive director that an individual has failed the written examination, the individual may review his or her examination at the office of the board at a time designated by the executive director. The individual shall be allowed not more than three hours for such review and shall not remove the examination from the board's office or make photocopies of any part of the examination.

(1) *Request for Review by the Board.* Within 30 days of individual's review of his or her examination, the individual may request review by the board pursuant to the procedures set forth in paragraph (c) of this rule. The request should set out in detail the area or areas which, in the opinion of the individual, have been incorrectly graded. Supporting information may be filed to substantiate the individual's claim.

(2) *Regarding Subcommittee.* Upon receipt of a request for review of a failed examination, the chair of the Certification Committee shall appoint a subcommittee consisting of at least three members of the Certification Committee. All information shall be submitted to the subcommittee in blind form by the staff. The subcommittee shall re-grade the entire examination and shall make a report and recommendation on whether to change the grade to passing to the panel appointed by the chair of the board to hear the review. The review shall thereafter follow the procedures set forth in paragraph (d) of this rule.

History Note: Adopted October 6, 2004;
Amended effective March 8, 2007.

SECTION .0200. RULES GOVERNING CONTINUING PARALEGAL EDUCATION.

Rule G.0201. Continuing Paralegal Education (CPE).

(1) Each active certified paralegal subject to these rules shall complete 6 hours of approved continuing education during each year of certification.

(2) Of the 6 hours, at least 1 hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

(a) A professional responsibility course or segment of a course shall be devoted to (1) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; (2) the professional obligations of the lawyer to the client, the court, the public, and other lawyers, and the paralegal's role in assisting the lawyer to fulfill those obligations; or (3) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's or a paralegal's professional responsibilities.

(b) A professionalism course or segment of a course shall be devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct that transcend the requirements of the Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

History Note: Statutory Authority G.S. 84-23,
Adopted August 18, 2005.

Rule G.0202. Accreditation Standards.

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(1) An approved activity shall have significant intellectual or practical content and the primary objective of increasing the participant's professional competence and proficiency as a paralegal.

(2) An approved activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of paralegals.

(3) A certified paralegal may receive credit for continuing education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. A minimum of three certified paralegals must register to attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in

the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(4) A certified paralegal may receive credit for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based CLE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(5) Continuing education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(6) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer presentation, computer website, or CD-ROM. A written agenda or outline for a presentation satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(7) Any continuing legal education activity approved for lawyers by the North Carolina State Bar's Board of Continuing Legal Education meets these standards.

(8) In-house continuing legal education and self-study shall not qualify for continuing paralegal education (CPE) credit.

History Note: Statutory Authority G.S. 84-23,
Adopted August 18, 2005; Amended effective March
2, 2006.

Rule G.0203. General Course Approval.

(1) *Approval.* Continuing education activities, not otherwise approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, may be approved upon the written application of a sponsor, or of a certified paralegal on an individual program basis. An application for continuing paralegal education (CPE) approval shall meet the following requirements:

(a) If advance approval is requested by a sponsor, the application and supporting documentation (*i.e.,* the agenda with timeline, speaker information and a description of the written materials) shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by a certified paralegal, the application need not include a complete set of supporting documentation.

(b) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented.

(c) The application shall be submitted on a form furnished by the Board of Paralegal Certification.

(d) The application shall contain all information requested on the form.

(e) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.

(f) The application shall include a detailed calculation of the total continuing paralegal education (CPE) hours and the hours of professional responsibility for the program.

(g) If the sponsor has not received notice of accreditation within 15 days prior to the scheduled date of the program, the sponsor should contact the Board of Paralegal Certification via telephone or e-mail.

(2) *Announcement.* Sponsors who have advance approval for courses from the Board of Paralegal Certification may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the North Carolina State Bar Board of Paralegal Certification for continuing paralegal education credit in the amount of ________ hours, of which ________ hours will also apply in the area of professional responsibility. This course is not sponsored by the Board of Paralegal Certification.

History Note: Statutory Authority G.S. 84-23,
Adopted August 18, 2005.

Rule G.0204. Fees.

Accredited Program Fee. Sponsors seeking accreditation for a particular program (whether or not the sponsor itself is accredited by the North Carolina State Bar Board of Continuing Legal Education), that has not already been approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, shall pay a non-refundable fee of $75.00. The program must be approved in accordance with Rule .0203(1). An accredited program may be advertised by the sponsor in accordance with Rule .0203(2).

History Note: Statutory Authority G.S. 84-23,
Adopted August 18, 2005.

Rule G.0205. Computation of Hours of Instruction.

(1) Hours of continuing paralegal education (CPE) will be computed by adding the number of minutes of actual instruction, dividing by 60 and rounding the results to the nearest one-tenth of an hour.

(2) Only actual instruction will be included in computing the total hours. The following will be excluded:
(a) introductory remarks;
(b) breaks;
(c) business meetings.

(3) *Teaching.* Continuing paralegal education (CPE) credit may be earned for teaching an approved continuing education activity. Three CPE credits will be awarded for each thirty (30) minutes of presentation. Repeat live presentations will qualify for one-half of the credit available for the initial presentation. No credit will be awarded for video replays.

(4) *Teaching at a Qualified Paralegal Studies Program.* Continuing paralegal education (CPE) credit may be earned for teaching a course at a qualified paralegal studies program, which program shall be qualified pursuant to Rule .0119(a) of this subchapter. Two CPE credits will be awarded for each semester credit (or its equivalent) awarded to the course.

History Note: Statutory Authority G.S. 84-23,
Adopted August 18, 2005.

SUBCHAPTER 1H. REGISTRATION OF ATTORNEYS APPEARING

SECTION .0100. REGISTRATION PROCEDURE

Rule H.0100. Registration.

(a) Whenever an out-of-state attorney (the admittee) is admitted to practice *pro hac vice* pursuant to G.S. 84-4.1, it shall be the responsibility of the member of the North Carolina State Bar who is associated in the matter (the responsible attorney) to file with the secretary a complete registration statement verified by the admittee. This registration statement must be submitted within 30 days of the court's order admitting the admittee upon a form approved by the Council of the North Carolina State Bar.

(b) Failure of the responsible attorney to file the registration statement in a timely fashion shall be grounds for administrative suspension from the practice of law in North Carolina pursuant to the procedures set forth in Rule .0903 of subchapter D of these rules.

(c) Whenever it appears that a registration statement required by paragraph (a) above has not been filed in a timely fashion, notice of such apparent failure shall be sent by the secretary to the court in which the admittee was admitted *pro hac vice* for such action as the court deems appropriate.

History Note: Adopted March 2, 2006.

Index to Rules, Regulations and Organization of the North Carolina State Bar

A

ADDICTION.
Lawyer assistance program board.
Standing board, duties, Bar Rule A.0701.
Generally, Bar Rules D.0601 to D.0623.
See STANDING COMMITTEES AND BOARDS.

ADMINISTRATIVE COMMITTEE.
Continuing legal education hearings, Bar Rules D.1001 to D.1011.
See STANDING COMMITTEES AND BOARDS.
Standing committee, duties, Bar Rule A.0701.

ADMINISTRATIVE SUSPENSION OF MEMBERSHIP.
Failure to fulfill obligations of membership, Bar Rule D.0903.

ALCOHOLISM AND DRUG ABUSE.
Lawyer assistance program board.
Standing board, duties, Bar Rule A.0701.
Generally, Bar Rules D.0601 to D.0623.
See STANDING COMMITTEES AND BOARDS.
Professional responsibility courses, Bar Rule D.1602.

ANNUAL MEETING.
Program, Bar Rule A.0105.
Reports, Bar Rule A.0106.

ANNUAL MEMBERSHIP FEE.
Judicial district bars, Bar Rule A.0902.
Adoption of fiscal year, Bar Rule A.0903.

APPEALS.
Continuing legal education, Bar Rule D.1610.

ARBITRATION.
Internal law firm disputes, Bar Rules E.0401 to E.0410.
See ORGANIZATIONS PRACTICING LAW.

ATTORNEY CLIENT ASSISTANCE COMMITTEE.
Standing committee, duties, Bar Rule A.0701.

ATTORNEY LISTS.
Indigent defendants, Bar Rules D.0503, D.0505.

ATTORNEYS ADMITTED PRO HAC VICE.
Registration, Bar Rule H.0101.

ATTORNEYS' FEES.
Letter to complainant.
Local grievance alleges fee dispute and other violations, Bar Rule B.0209.
Local grievance alleges fee dispute only, Bar Rule B.0208.
Model plan for arbitration, Bar Rules D.0801 to D.0808.
See STANDING COMMITTEES AND BOARDS.

AUTHORIZED PRACTICE COMMITTEE.
Standing committee, duties, Bar Rule A.0701.
Generally, Bar Rules D.0201 to D.0208.
See STANDING COMMITTEES AND BOARDS.

B

BANKRUPTCY.
Legal specialty certification standards, Bar Rules D.2201 to D.2207.
Recognized specialty, Bar Rule D.1725.

BAR COUNSEL.
Discipline and disability.
Powers and duties, Bar Rule B.0107.

BOARD OF LAW EXAMINERS.
Admission to practice, Bar Rule C.0103.
Approval of rules and regulations, Bar Rule C.0104.
Election, Bar Rule C.0101.
Examination of applicants for license, Bar Rule C.0102.

BYLAWS.
Judicial district bars, Bar Rule A.0901.
Model bylaws.
See MODEL BYLAWS.

C

CD-ROM.
CLE accreditation for activities in, Bar Rule D.1519.

CERTIFICATION.
Bankruptcy laws specialty, Bar Rules D.2201 to D.2207.
Criminal law specialty, Bar Rules D.2501 to D.2507.
Estate planning and probate, Bar Rules D.2301 to D.2307.
Family law specialty, Bar Rules D.2401 to D.2407.
Legal interns, Bar Rule C.0203.
Legal specialists.
Continuing legal education, Bar Rules D.1901 to D.1908.
See STANDING COMMITTEES AND BOARDS.
Generally, Bar Rules D.1701 to D.1726, D.1801 to D.1806.
See STANDING COMMITTEES AND BOARDS.
Workers' compensation law specialty, Bar Rules D.2701 to D.2707.
See WORKERS' COMPENSATION LAW SPECIALTY.
Paralegals, Bar Rules G.0101 to G.0122.

CERTIFICATION —Cont'd
Real property laws specialty, Bar Rules D.2101 to D.2107.

CLASSES OF BAR MEMBERSHIP, Bar Rule A.0201.

CLE'S.
See CONTINUING LEGAL EDUCATION.

CLIENT ASSISTANCE COMMITTEE.
Fee dispute resolution program, Bar Rules D.0701 to D.0710.
  See FEE DISPUTE RESOLUTION PROGRAM.

CLIENT SECURITY FUND.
Administration.
  Generally, Bar Rules D.1401 to D.1420.
    See STANDING COMMITTEES AND BOARDS.

COMMITTEES.
Judicial district grievance committees, Bar Rules B.0201 to B.0217.
Standing committees and boards, Bar Rule A.0701.

COMPUTER BASED CLE.
Accreditation, Bar Rule D.1611.

CONFIDENTIALITY.
Discipline and disability, Bar Rule B.0129.
Grievances.
  Reporting alleged misconduct of another attorney, Bar Rule B.0111.

CONFLICTS OF INTEREST.
Judicial district grievance committees, Bar Rule B.0207.

CONSULTANTS.
Foreign legal consultants.
  See FOREIGN LEGAL CONSULTANTS.

CONTINUING LEGAL EDUCATION, Bar Rules D.1501 to D.1527, D.1601 to D.1610.
Immigration law specialty, Bar Rule D.2605.
Legal specialists, Bar Rules D.1901 to D.1908.
  See STANDING COMMITTEES AND BOARDS.
Reinstatement of disbarred attorneys, Bar Rule B.0125.
Standing committees generally.
  See STANDING COMMITTEES AND BOARDS.

CONTINUING PARALEGAL EDUCATION, Bar Rules G.0201 to G.0205.

CONVICTIONS.
Discipline and disability.
  Effect of findings of guilt, Bar Rule B.0115.

COUNCIL.
Discipline and disability matters, Bar Rule B.0104.
Meetings, Bar Rules A.0601 to A.0604.
Proposed rule or amendment.
  Action on, Bar Rule A.1403.
Standing committees of the council, Bar Rule A.0701.

COUNCILORS.
Election and appointment.
  Geographical rotation or division of representation, Bar Rule A.0805.
  Nominations, Bar Rule A.0802.
  Notice of election, Bar Rule A.0802.
  Purpose, Bar Rule A.0801.

COUNCILORS —Cont'd
Election and appointment —Cont'd
  Vacancies, Bar Rule A.0804.
  Voting procedures, Bar Rule A.0803.
  When elections held, Bar Rule A.0802.

CRIMINAL LAW.
Recognized specialty, Bar Rule D.1725.
Specialty certification standards, Bar Rules D.2501 to D.2507.

D

DEBILITATING MENTAL CONDITIONS.
Continuing legal education.
  Course approval, Bar Rule D.1602.

DEFINED TERMS.
Discipline and disability rules, Bar Rule B.0103.
Immigration law specialty, Bar Rule D.2602.
Licensee.
  Organizations practicing law, Bar Rule E.0101.
Procedures for ruling on legal ethics, Bar Rule D.0101.
Professional corporations.
  Organizations practicing law, Bar Rule E.0101.
Professional limited liability companies.
  Organizations practicing law, Bar Rule E.0101.
Professional responsibility.
  Continuing legal education, Bar Rule D.1501.

DEGREE FROM APPROVED LAW SCHOOL.
Required, Bar Rule C.0105.

DISASTER RESPONSE PLAN, Bar Rules D.0301 to D.0303.
See STANDING COMMITTEES AND BOARDS.

DISBARMENT.
Obligations of disbarred attorney, Bar Rule B.0124.
Reinstatement, Bar Rule B.0125.

DISCIPLINE AND DISABILITY.
Address of record, Bar Rule B.0126.
Amnesty in illicit drug use case, Bar Rule B.0130.
Confidentiality, Bar Rule B.0129.
Council.
  Member's disqualification due to interest, Bar Rule B.0127.
Counsel.
  Powers and duties, Bar Rule B.0107.
Criminal cases.
  Effect of finding of guilt, Bar Rule B.0115.
Definitions, Bar Rule B.0103.
Disability.
  Appointment of counsel to protect clients' interests, Bar Rule B.0122.
  Findings of incapacity or disability, Bar Rule B.0123.
    Notice to courts, Bar Rule B.0123.
Disability hearings, Bar Rule B.0118.
Disability inactive status.
  Transfer with consent of member, counsel and chairperson, Bar Rule B.0118.
Disbarred or suspended attorneys.
  Obligations, Bar Rule B.0124.
Drug use cases.
  Disciplinary amnesty, Bar Rule B.0130.

DISCIPLINE AND DISABILITY —Cont'd
Drug use cases —Cont'd
  Referral to lawyer assistance board program, Bar Rule B.0112.
Formal hearing, Bar Rule B.0114.
General provisions, Bar Rule B.0101.
Grievance committee.
  Chairperson's powers and duties, Bar Rule B.0105.
  Powers and duties, Bar Rule B.0106.
  Proceedings before committee, Bar Rule B.0113.
  Standing committee, duties, Bar Rule A.0701.
Grievances.
  Form and filing, Bar Rule B.0111.
Hearing commission chairperson.
  Powers and duties, Bar Rule B.0108.
Imposition of discipline, Bar Rule B.0123.
  Notice to courts, Bar Rule B.0123.
Investigations.
  Initial determination, Bar Rule B.0112.
Lawyer assistance program board.
  Referral of respondent.
    Substance abuse or mental health problem, Bar Rule B.0112.
License surrender, Bar Rule B.0117.
Mental health problem.
  Referral to lawyer assistance board program, Bar Rule B.0112.
Notice of dismissal, Bar Rule B.0120.
Notice to complainant, Bar Rule B.0121.
Notice to member of actions, Bar Rule B.0120.
Orders of censure, suspension or disbarment.
  Filing on local judgment docket, Bar Rule B.0123.
PALS committee.
  Illicit drug use referrals, Bar Rule B.0130.
Powers and duties, Bar Rule B.0109.
Powers enforcement, Bar Rule B.0119.
Procedure for discipline, Bar Rule B.0102.
Reciprocal discipline, Bar Rule B.0116.
Reinstatement, Bar Rule B.0125.
Secretary.
  Powers and duties, Bar Rule B.0110.
State bar council.
  Powers and duties, Bar Rule B.0104.
Trust accounts.
  Audits, Bar Rule B.0128.

DISPUTE AS TO FEES.
Fee dispute resolution program, Bar Rules D.0701 to D.0710.
  See FEE DISPUTE RESOLUTION PROGRAM.

DISTRICT BAR FEE ARBITRATION, Bar Rules D.0801 to D.0808.
See STANDING COMMITTEES AND BOARDS.

DISTRICT COURT JUDGESHIPS.
Selection of nominees by district bars.
  Model bylaws, Bar Rule A.1013.

DISTRICT GRIEVANCE COMMITTEES, Bar Rules B.0201 to B.0217.
See JUDICIAL DISTRICT GRIEVANCE COMMITTEES.

DIVISION OF WORK, Bar Rule A.0102.

DRUG ABUSE.
Lawyer assistance board program.
  Referral of respondent with substance abuse problem, Bar Rule B.0112.

DRUG ABUSE —Cont'd
PALS committee, Bar Rules D.0601 to D.0609.
  See STANDING COMMITTEES AND BOARDS.

DRUG USE.
Discipline and disability.
  Illicit drug use cases, Bar Rule B.0130.

E

ELECTIONS.
State bar councilors, Bar Rules A.0801 to A.0805.
  See COUNCILORS.

EMERITUS PRO BONO STATUS.
Class of bar membership, Bar Rule A.0201.

ESTATE PLANNING AND PROBATE.
Recognized specialty, Bar Rule D.1725.
Specialty certification standards, Bar Rules D.2301 to D.2307.

ETHICS.
Ethics committee, duties, Bar Rule A.0701.
Standing committees.
  Procedures for ruling on ethical questions, Bar Rules D.0101 to D.0104.
  See STANDING COMMITTEES AND BOARDS.

EXECUTIVE COMMITTEE.
Proposed rule or amendment.
  Presented to committee prior to publication for comment, Bar Rule A.1401.
  Review, recommendations, Bar Rule A.1402.
Standing committee, duties, Bar Rule A.0701.

F

FAMILY LAW.
Recognized specialty, Bar Rule D.1725.
Specialty certification standards, Bar Rules D.2401 to D.2407.

FEE ARBITRATION.
Model plan, Bar Rules D.0801 to D.0808.
  See STANDING COMMITTEES AND BOARDS.

FEE DISPUTE RESOLUTION PROGRAM, Bar Rules D.0701 to D.0710.
Assignment to mediator to conduct conference, Bar Rule D.0707.
Attendance of conference by attorney, Bar Rule D.0707.
Attorney client assistance committee.
  Program implemented under auspices of, Bar Rule D.0701.
Client assistance committee.
  Jurisdiction, Bar Rule D.0702.
Coordinator, designation, duties, Bar Rule D.0703.
Determining appropriate fee, purpose, Bar Rule D.0701.
Dismissal of request.
  Grounds, report recommending, Bar Rule D.0706.
Disputes excluded from committee jurisdiction, Bar Rule D.0702.
District bar fee dispute resolution.
  Adoption of program by attorneys in district, Bar Rule D.0710.

FEE DISPUTE RESOLUTION PROGRAM —Cont'd
Duties and powers of mediator during conference, Bar Rule D.0707.
Failure to attend conference without good cause, Bar Rule D.0707.
Finalizing the agreement reached in conference, Bar Rule D.0708.
Investigation of request, Bar Rule D.0706.
Jurisdiction of committee, Bar Rule D.0702.
Lawsuits filed by attorney.
  Waiting period after client receives notice of program, Bar Rule D.0706.
Mediated settlement conference, Bar Rule D.0707.
Mediation proceedings generally, Bar Rule D.0707.
Not suitable for resolution.
  Dismissal, grounds, report recommending, Bar Rule D.0706.
Preserving claim.
  Filing lawsuit prior to expiration of notice period, Bar Rule D.0706.
Private communications with participant by mediator, Bar Rule D.0707.
Qualifications for mediators, Bar Rule D.0705.
Record of request, duty of coordinator to keep, Bar Rule D.0709.
Request, Bar Rule D.0706.
Selection of pool of qualified mediators, Bar Rule D.0705.

FEES.
Annual membership, Bar Rule A.0203.
  Judicial bar districts, Bar Rule A.0902.
Arbitration.
  Internal law firm disputes, Bar Rule E.0408.
Bar membership fees.
  Failure to fulfill obligations of membership, Bar Rule D.0903.
  Failure to pay, Bar Rule D.0904.
  Judicial bar districts, Bar Rule A.0902.
Continuing legal education programs, Bar Rule D.1606.
Fee dispute resolution program, Bar Rules D.0701 to D.0710.
Interstate law firms.
  Registration fee, Bar Rule E.0203.
Prepaid legal services plans.
  Registration fee, Bar Rule E.0203.

FINANCE AND AUDIT COMMITTEE.
Standing committee, duties, Bar Rule A.0701.

FISCAL YEAR.
Judicial district bar assessing membership fee.
  Adoption, Bar Rule A.0903.

FOREIGN LAWYERS.
Pro bono practice by out of state lawyers, Bar Rule D.0905.

FOREIGN LEGAL CONSULTANTS.
Appeals, Bar Rule F.0108.
Application fees, Bar Rule F.0111.
Applications, Bar Rule F.0101.
  Denial, Bar Rule F.0113.
  Forms, Bar Rule F.0102.
  Requirements, Bar Rule F.0103.
Burden of proof.
  Moral character and general fitness, Bar Rule F.0104.

FOREIGN LEGAL CONSULTANTS —Cont'd
Disclosures.
  Failure to disclose, Bar Rule F.0105.
Failure to disclose, Bar Rule F.0105.
Fees.
  Application fees, Bar Rule F.0111.
Fitness, Bar Rule F.0104.
Forms.
  Applications, Bar Rule F.0102.
Hearings, Bar Rule F.0109.
Investigation by counsel, Bar Rule F.0106.
Membership and fees committee.
  Appeals from decision, Bar Rule F.0108.
  Recommendations, Bar Rule F.0107.
Moral character.
  Burden of proof, Bar Rule F.0104.
Order of council, Bar Rule F.0110.
Permanent record, Bar Rule F.0112.
Re-application, Bar Rule F.0113.
Recommendation of membership and fees committee, Bar Rule F.0107.
Records.
  Permanent record, Bar Rule F.0112.
Requirements for applicants, Bar Rule F.0103.
Review and order of council, Bar Rule F.0110.

FORM LETTERS.
Judicial district grievance committees, Bar Rules B.0208 to B.0217.
  See JUDICIAL DISTRICT GRIEVANCE COMMITTEES.

FORMS.
Organizations practicing law, Bar Rule E.0106.

FUNDS.
Client security fund.
  Generally, Bar Rules D.1401 to D.1420.
    See STANDING COMMITTEES AND BOARDS.

G

GRIEVANCE COMMITTEE.
Chairperson's powers and duties, Bar Rule B.0105.
Discipline and disability.
  Notice to complainant, Bar Rule B.0121.
  Powers and duties, Bar Rule B.0106.
  Proceedings, Bar Rule B.0113.

GRIEVANCES.
Form and filing, Bar Rule B.0111.
Grievance committee.
  Standing committee, duties, Bar Rule A.0701.
Judicial district grievance committees, Bar Rules B.0201 to B.0217.
  See JUDICIAL DISTRICT GRIEVANCE COMMITTEES.

H

HEARING COMMISSION.
Discipline and disability.
  Chairperson's powers and duties, Bar Rule B.0108.
  Disqualification of member due to interest, Bar Rule B.0127.
  Powers and duties.
    Generally, Bar Rule B.0109.

HEARINGS.
Disability hearings, Bar Rule B.0118.
Discipline and disability.
  Formal hearings, Bar Rule B.0114.
Legal specialist certification, Bar Rules D.1801 to D.1806.
  See STANDING COMMITTEES AND BOARDS.

I

IMMEDIATE PAST PRESIDENT, Bar Rule A.0403.

IMMIGRATION LAW.
Legal specialization, Bar Rules D.2601 to D.2607.
Recognized specialty, Bar Rule D.1725.

IMPAIRED LAWYERS AND JUDGES.
Lawyer assistance program board.
  Standing board, duties, Bar Rule A.0701.
    Generally, Bar Rules D.0601 to D.0623.
      See STANDING COMMITTEES AND BOARDS.

INACTIVE STATUS.
Class of bar membership, Bar Rule A.0201.
Disability inactive status.
  Transfer with consent of member, counsel and chairperson, Bar Rule B.0118.
Membership committee procedures, Bar Rule D.0902.
Transfer to, Bar Rule D.0901.

INTERNATIONAL LAW FIRMS.
Registration, Bar Rules E.0201 to E.0205.

INTERNET.
CLE accreditation for activities using, Bar Rule D.1519.

INTERSTATE LAW FIRMS.
Registration, Bar Rules E.0201 to E.0205.
  See ORGANIZATIONS PRACTICING LAW.

INVESTIGATIONS.
Discipline and disability, Bar Rule B.0112.

IOLTA.
Administration plan, Bar Rules D.1301 to D.1320.
  See STANDING COMMITTEES AND BOARDS.

J

JUDICIAL DISTRICT GRIEVANCE COMMITTEES.
Acknowledgment of grievance.
  Form letter to complainant, Bar Rule B.0213.
Assignment of grievance.
  Form letter to investigating attorney, Bar Rule B.0214.
Completed files.
  Form letter transmitting file to bar, Bar Rule B.0217.
Conflicts of interest, Bar Rule B.0207.
Fee disputes.
  Form letter to complainant, Bar Rules B.0208, B.0209.
Finding of probable cause.
  Letter to complainant, Bar Rule B.0212.
Investigation attorney's letter to complainant, Bar Rule B.0215.

JUDICIAL DISTRICT GRIEVANCE COMMITTEES —Cont'd
Jurisdiction and authority, Bar Rule B.0202.
Meetings, Bar Rule B.0203.
Miscellaneous, Bar Rule B.0206.
No probable cause.
  Letter to complainant respondent, Bar Rule B.0210.
Notice.
  Form letter to respondent attorney, Bar Rule B.0216.
Organization, Bar Rule B.0201.
Probable cause finding.
  Form letter to respondent, Bar Rule B.0211.
Procedure upon institution of grievance, Bar Rule B.0204.
Recordkeeping, Bar Rule B.0205.

JUSTICE SYSTEM COMMITTEE.
Standing committee, duties, Bar Rule A.0701.

L

LAW EXAMINERS.
Board of law examiners.
  Generally, Bar Rules C.0101 to C.0104.
    See BOARD OF LAW EXAMINERS.

LAW STUDENT TRAINING, Bar Rules C.0201 to C.0207.
See LEGAL INTERNS.

LAWYER ASSISTANCE PROGRAM BOARD.
Standing board, duties, Bar Rule A.0701.
  Generally, Bar Rules D.0601 to D.0623.
    See STANDING COMMITTEES AND BOARDS.
Substance abuse or mental health problem.
  Referral to, Bar Rule B.0112.

LEGAL ASSISTANCE FOR MILITARY PERSONNEL (LAMP) COMMITTEE.
Standing committee, duties, Bar Rule A.0701.

LEGAL INTERNS, Bar Rules C.0201 to C.0207.
Activities, Bar Rule C.0206.
Certification as legal intern, Bar Rule C.0204.
Definition, Bar Rule C.0202.
Eligibility, Bar Rule C.0203.
Purpose, Bar Rule C.0201.
Supervision, Bar Rule C.0205.
Use of student's name, Bar Rule C.0207.

LEGAL SERVICES PLANS.
Registration requirements, Bar Rules E.0301 to E.0314.
  See ORGANIZATIONS PRACTICING LAW.

LEGAL SPECIALIZATION.
Bankruptcy law specialty.
  Certification standards, Bar Rules D.2201 to D.2207.
Continuing legal education, Bar Rules D.1901 to D.1908.
  See STANDING COMMITTEES AND BOARDS.
Criminal law.
  Certification standards, Bar Rules D.2501 to D.2507.
Estate planning and probate.
  Certification standards, Bar Rules D.2301 to D.2307.
Family law.
  Certification standards, Bar Rules D.2401 to D.2407.

LEGAL SPECIALIZATION —Cont'd
Hearings on appeals, Bar Rules D.1801 to D.1806.
  See STANDING COMMITTEES AND BOARDS.
Immigration law, Bar Rules D.2601 to D.2607.
Independent certifying organizations.
  Approval by board, Bar Rules D.2001 to D.2006.
Plan.
  Generally, Bar Rules D.1701 to D.1726.
    See STANDING COMMITTEES AND BOARDS.
Real property law specialty.
  Certification standards, Bar Rules D.2101 to D.2107.
Recognized specialties, Bar Rule D.1725.
Social security disability law specialty, Bar Rules D.2801 to D.2807.
Workers' compensation law specialty, Bar Rules D.2701 to D.2707.
  See WORKERS' COMPENSATION LAW SPECIALTY.

LICENSES.
Discipline and disability.
  Surrender of license while under investigation, Bar Rule B.0117.

LOCAL BAR ASSOCIATIONS.
Cooperation with committees, Bar Rule A.0103.
Organization, Bar Rule A.0104.

M

MEDIATION.
Fee dispute resolution program, Bar Rules D.0701 to D.0710.
  See FEE DISPUTE RESOLUTION PROGRAM.

MEETINGS.
Annual meetings, Bar Rule A.0501.
Council meetings.
  Notice of called special meetings, Bar Rule A.0603.
  Quorum, Bar Rule A.0604.
  Regular meetings, Bar Rule A.0601.
  Special meetings, Bar Rule A.0602.
Notice of meetings, Bar Rule A.0503.
Parliamentary rules, Bar Rule A.0505.
Quorum, Bar Rule A.0504.
Special meetings, Bar Rule A.0502.

MEMBERSHIP.
Active members.
  Class of membership, Bar Rule A.0201.
Administrative suspension.
  Class of membership, Bar Rule A.0201.
  Failure to fulfill obligations of membership, Bar Rule D.0903.
Annual fees, Bar Rule A.0203.
Classes of membership, Bar Rule A.0201.
Disciplinary suspension or disbarments.
  Class of membership, Bar Rule A.0201.
Emeritus pro bono status, Bar Rule A.0201.
Failure to fulfill obligations of membership, Bar Rule D.0903.
Inactive status.
  Class of membership, Bar Rule A.0201.
  Reinstatement, Bar Rule D.0902.
  Transfer to, Bar Rule D.0901.

MEMBERSHIP —Cont'd
Obligations of membership.
  Failure to fulfill, Bar Rule D.0903.
Register of members, Bar Rule A.0202.
Reinstatement as active member, Bar Rule D.0902.
Retired or nonpracticing members.
  Class of membership, Bar Rule A.0201.
Suspension.
  Class of membership, Bar Rule A.0201.
  Failure to fulfill obligations of membership, Bar Rule D.0903.
Suspension for nonpayment of fees or assessed cost.
  Compliance after suspension, Bar Rule D.0904.

MEMBERSHIP FEE ASSESSED BY DISTRICT BAR.
Annual fee, Bar Rule A.0902.
Fiscal year adopted by bar assessing, Bar Rule A.0903.

MENTAL HEALTH PROBLEM.
Referral to lawyer assistance board program, Bar Rule B.0112.

MENTAL ILLNESS.
Lawyer assistance program board.
  Standing board, duties, Bar Rule A.0701.
    Generally, Bar Rules D.0601 to D.0623.
      See STANDING COMMITTEES AND BOARDS.

MODEL BYLAWS.
Amendments, Bar Rule A.1012.
Authority, Bar Rule A.1002.
Board of directors, Bar Rule A.1011.
Committees, Bar Rule A.1010.
Councilor, Bar Rule A.1005.
District bar finances, Bar Rule A.1008.
District court judge nominees.
  Selection, Bar Rule A.1013.
Executive committee, Bar Rule A.1011.
Fees.
  Annual membership fee, Bar Rule A.1006.
Finances, Bar Rule A.1008.
Meetings, Bar Rule A.1007.
Membership, Bar Rule A.1003.
Membership fee, Bar Rule A.1006.
Name, Bar Rule A.1001.
Officers, Bar Rule A.1004.
Prohibited activities, Bar Rule A.1009.
Purpose, Bar Rule A.1002.
Standing committees, Bar Rule A.1010.

MODEL PLAN.
District bar fee arbitration, Bar Rules D.0801 to D.0808.
  See STANDING COMMITTEES AND BOARDS.
Indigent defendants.
  Appointment of counsel, Bar Rules D.0501 to D.0510.
    See STANDING COMMITTEES AND BOARDS.

N

NONRESIDENT LAWYERS.
Pro bono practice by out of state lawyers, Bar Rule D.0905.

NOTICE.
Council.
Notice of called special meetings, Bar Rule A.0603.
Discipline and disability.
Notice to complainant, Bar Rule B.0121.
Notice to courts of finding, Bar Rule B.0123.
Notice to member of action or dismissal, Bar Rule B.0120.
Obligations of membership.
Failure to comply in timely fashion, Bar Rule D.0903.

O

OBLIGATIONS OF MEMBERSHIP.
Failure to fulfill, Bar Rule D.0903.

OFFICE OF STATE BAR.
Filing papers with and serving the bar.
When papers are filed, Bar Rule A.1201.
Place of office, Bar Rule A.1101.
Seal, Bar Rule A.1301.

OFFICERS.
Compensation, Bar Rule A.0401.
Designated officers, Bar Rule A.0301.
Elections, Bar Rule A.0304.
Eligibility for office, Bar Rule A.0302.
Nominating committee, Bar Rule A.0305.
Removal from office, Bar Rule A.0307.
Term of office, Bar Rule A.0303.
Vacancies and succession, Bar Rule A.0306.

ORGANIZATIONS PRACTICING LAW.
Authority of regulation, Bar Rule E.0101.
Definitions, Bar Rule E.0101.
Financial matters, Bar Rule E.0104.
Forms, Bar Rule E.0106.
General and administrative provisions, Bar Rule E.0105.
Internal law firm dispute arbitration.
Administration, Bar Rule E.0404.
Authority to adopt amendments and regulations, Bar Rule E.0410.
Confidentiality, Bar Rule E.0409.
Fees and expenses, Bar Rule E.0408.
Jurisdiction, Bar Rule E.0403.
List of arbitrators, Bar Rule E.0406.
Purpose, Bar Rule E.0401.
Selection of arbitrators, Bar Rule E.0407.
Submission to arbitration, Bar Rule E.0402.
Uniform arbitration act, Bar Rule E.0405.
Interstate and international law firm registration.
Certificate of registration, Bar Rule E.0204.
Conditions of registration, Bar Rule E.0202.
Effect of registration, Bar Rule E.0205.
Fee, Bar Rule E.0203.
Required, Bar Rule E.0201.
Management and financial matters, Bar Rule E.0104.
Names of corporations, Bar Rule E.0102.
Prepaid legal services plans.
Registration, Bar Rules E.0301 to E.0314.
Advertising state bar approval.
Prohibition, Bar Rule E.0310.
Amended registration form, submitting, hearing, requesting.
Plan not meeting definition, Bar Rule E.0305.

ORGANIZATIONS PRACTICING LAW —Cont'd
Prepaid legal services plans —Cont'd
Registration —Cont'd
Annual registration, Bar Rule E.0307.
Approval or disapproval of plans by state bar.
Prohibition, Bar Rule E.0301.
Certificate, issuance, Bar Rule E.0305.
Definition, Bar Rule E.0303.
Denial.
Council order, Bar Rule E.0314.
Fee, Bar Rule E.0308.
Filing amendments, time, Bar Rule E.0306.
Hearings before authorized practice committee, Bar Rule E.0313.
Index of registered plans, Bar Rule E.0309.
Procedures for registering, Bar Rule E.0304.
Requirement, Bar Rule E.0302.
Retention of state bar jurisdiction.
Attorneys participating in plans, Bar Rule E.0311.
Revocation, Bar Rule E.0312.
Council order, Bar Rule E.0314.
Rules and regulations of state bar.
Licensed attorneys subject to, Bar Rule E.0311.
Registration, Bar Rule E.0103.
Interstate and international law firms, Bar Rules E.0201 to E.0205.
Prepaid legal services plans, Bar Rules E.0301 to E.0314.
Scope of regulations, Bar Rule E.0101.

OUT OF STATE LAWYERS.
Pro bono practice, Bar Rule D.0905.

P

PARALEGALS.
Continuing education, Bar Rule G.0201.
Accreditation standards, Bar Rule G.0202.
Computation of hours of instruction, Bar Rule G.0205.
Fees, Bar Rule G.0204.
General course approval, Bar Rule G.0203.
Plan for certification.
Administration and distribution of funds, Bar Rule G.0112.
Alternative qualification period, Bar Rule G.0119.
Audit, Bar Rule G.0112.
Board of paralegal certification.
Appointment, nomination, vacancies, removal, Bar Rule G.0105.
Chairperson, Bar Rule G.0109.
Established, jurisdiction, Bar Rule G.0102.
Meetings, Bar Rule G.0113.
Number of members, composition, Bar Rule G.0104.
Operational responsibility, Bar Rule G.0103.
Powers and duties, Bar Rule G.0115.
Report on activities, Bar Rule G.0114.
Succession, Bar Rule G.0108.
Term, Bar Rule G.0106.
Staggered, Bar Rule G.0107.
Vice-chairperson, Bar Rule G.0110.
Certification committee, Bar Rule G.0118.
Continued qualification, evidence of, Bar Rule G.0120.
Education requirements, Bar Rule G.0119.

PARALEGALS —Cont'd
Plan for certification —Cont'd
Examination, Bar Rule G.0119.
Funding, Bar Rule G.0111.
Investment of funds, Bar Rule G.0112.
Lapse, suspension or revocation of certification, Bar Rule G.0121.
Review and appeal, right, Bar Rule G.0122.
Privileges and responsibilities of lawyers not altered, Bar Rule G.0117.
Purpose, Bar Rule G.0101.
Qualified studies program, Bar Rule G.0119.
Retention of jurisdiction by council, Bar Rule G.0116.
Standards for certification, Bar Rule G.0119.
Continued certification, Bar Rule G.0120.
Term of certification, Bar Rule G.0120.

POSITIVE ACTIONS FOR LAWYERS' COMMITTEE.
Standing committees, Bar Rules D.0601 to D.0610.
See STANDING COMMITTEES AND BOARDS.

PREPAID LEGAL SERVICES PLANS.
Registration, Bar Rules E.0301 to E.0314.
Advertising state bar approval.
Prohibition, Bar Rule E.0310.
Amended registration form, submitting, hearing, requesting.
Plan not meeting definition, Bar Rule E.0305.
Annual registration, Bar Rule E.0307.
Approval or disapproval of plans by state bar.
Prohibition, Bar Rule E.0301.
Certificate, issuance, Bar Rule E.0305.
Definition, Bar Rule E.0303.
Denial.
Council order, Bar Rule E.0314.
Fee, Bar Rule E.0308.
Filing amendments, time, Bar Rule E.0306.
Hearings before authorized practice committee, Bar Rule E.0313.
Index of registered plans, Bar Rule E.0309.
Procedures for registering, Bar Rule E.0304.
Requirement, Bar Rule E.0302.
Retention of state bar jurisdiction.
Attorneys participating in plans, Bar Rule E.0311.
Revocation, Bar Rule E.0312.
Council order, Bar Rule E.0314.
Rules and regulations of state bar.
Licensed attorneys subject to, Bar Rule E.0311.

PRESIDENT, Bar Rule A.0402.

PRESIDENT-ELECT, Bar Rule A.0403.

PRO BONO PRACTICE.
Emeritus pro bono status.
Class of bar membership, Bar Rule A.0201.
Out of state lawyers, Bar Rule D.0905.

PROFESSIONAL LIMITED LIABILITY COMPANIES.
Regulation.
Generally, Bar Rules E.0101 to E.0106.
See ORGANIZATIONS PRACTICING LAW.

PROFESSIONAL REGULATION.
Generally, Bar Rules E.0101 to E.0106.
See ORGANIZATIONS PRACTICING LAW.

PRO HAC VICE.
Registration of attorneys admitted pro hac vice, Bar Rule H.0101.

PROPOSED RULE OR AMENDMENT.
Rulemaking procedures, Bar Rules A.1401 to A.1403.

PUBLICATION FOR COMMENT.
Proposed rule or amendment, Bar Rule A.1401.

PURPOSE OF CHAPTER, Bar Rule A.0101.

R

REAL PROPERTY.
Legal specialty certification standards, Bar Rules D.2101 to D.2107.
Recognized specialty, Bar Rule D.1725.

REGISTRATION.
Attorneys admitted pro hac vice, Bar Rule H.0101.
Interstate and international law firms, Bar Rules E.0201 to E.0205.
Prepaid legal services plans, Bar Rules E.0301 to E.0314.
See PREPAID LEGAL SERVICES PLANS.

REINSTATEMENT.
Active member, Bar Rule D.0902.
Continuing legal education program.
Suspension for noncompliance, Bar Rule D.1524.
Discipline and disability, Bar Rule B.0125.

REPORTS.
Annual meeting, Bar Rule A.0106.

RESOLUTION OF FEE DISPUTES.
Fee dispute resolution program, Bar Rules D.0701 to D.0710.
See FEE DISPUTE RESOLUTION PROGRAM.

RULEMAKING PROCEDURES.
Action by council.
Proposed rule or amendment, comments and recommendations, Bar Rule A.1403.
Executive committee.
Proposed rule or amendment.
Presented to prior to publication, Bar Rule A.1401.
Review, recommendations, Bar Rule A.1402.
Publication for comment.
Proposed rule or amendment, Bar Rule A.1401.
Publication of official text.
Proposed rule or amendment adopted by council and approved by supreme court, Bar Rule A.1403.
Review by supreme court.
Proposed rule or amendment, Bar Rule A.1403.

S

SEAL.
Form and custody, Bar Rule A.1301.

SECRETARY, Bar Rule A.0404.
Discipline and disability.
Powers and duties, Bar Rule B.0110.

SOCIAL SECURITY DISABILITY LAW SPECIALTY, Bar Rules D.2801 to D.2807.
Certification and continued certification.
Governed by North Carolina Plan of Legal Specialization, Bar Rule D.2804.

SOCIAL SECURITY DISABILITY LAW SPECIALTY —Cont'd
Certification and continued certification —Cont'd
  Other requirements, applicability, Bar Rule D.2807.
  Period of certification, Bar Rule D.2806.
  Standards, Bar Rule D.2805.
    Continued certification, Bar Rule D.2806.
Competence and qualification.
  Confidential inquiry, consent, Bar Rule D.2805.
Definition, Bar Rule D.2802.
Establishment of specialty field, Bar Rule D.2801.
Examination, Bar Rule D.2805.
Qualification as specialist, Bar Rule D.2803.

SPECIALISTS.
Bankruptcy law specialty.
  Certification standards, Bar Rules D.2201 to D.2207.
Continuing legal education, Bar Rules D.1901 to D.1908.
  See STANDING COMMITTEES AND BOARDS.
Criminal law.
  Certification standards, Bar Rules D.2501 to D.2507.
Estate planning and probate.
  Certification standards, Bar Rules D.2301 to D.2307.
Family law.
  Certification standards, Bar Rules D.2401 to D.2407.
Hearings on appeals, Bar Rules D.1801 to D.1806.
  See STANDING COMMITTEES AND BOARDS.
Immigration law, Bar Rules D.2601 to D.2607.
Independent certifying organizations.
  Approval by board, Bar Rules D.2001 to D.2006.
Plan.
  Generally, Bar Rules D.1701 to D.1726.
    See STANDING COMMITTEES AND BOARDS.
Real property law specialty.
  Certification standards, Bar Rules D.2101 to D.2107.
Recognized specialties, Bar Rule D.1725.
Social security disability law specialty, Bar Rules D.2801 to D.2807.
Workers' compensation law specialty, Bar Rules D.2701 to D.2707.
  See WORKERS' COMPENSATION LAW SPECIALTY.

STANDING COMMITTEES AND BOARDS, Bar Rule A.0701.
Administrative committee.
  Failure to pay membership fees or assessed costs.
    Compliance after suspension, Bar Rule D.0904.
  Inactive status.
    Reinstatement, Bar Rule D.0902.
  Reinstatement hearings, Bar Rules D.1001 to D.1011.
    Hearing generally, Bar Rule D.1006.
    Notice of hearing, Bar Rules D.1001, D.1004, D.1005.
    Order of council, Bar Rule D.1002.
    Panel, Bar Rule D.1007.

STANDING COMMITTEES AND BOARDS —Cont'd
Administrative committee —Cont'd
  Reinstatement hearings —Cont'd
    Place of hearing, Bar Rule D.1001.
    Referrals, Bar Rule D.1003.
    Reports.
      Committee report to council, Bar Rule D.1010.
      Panel reports to committee, Bar Rule D.1010.
    Review of council, Bar Rule D.1002.
    Suspension hearing.
      Generally, Bar Rule D.1008.
    Time of hearing, Bar Rules D.1001, D.1004.
Authorized practice committee.
  Chairperson's powers and duties, Bar Rule D.0205.
  Counsel's powers and duties, Bar Rule D.0207.
  Definitions, Bar Rule D.0203.
  General provisions, Bar Rule D.0201.
  Injunctive relief, suing for, Bar Rule D.0208.
  Powers and duties.
    Generally, Bar Rule D.0206.
  Procedure, Bar Rule D.0202.
  State bar council.
    Powers and duties, Bar Rule D.0204.
Client assistance committee.
  Fee dispute resolution program, Bar Rules D.0701 to D.0710.
    See FEE DISPUTE RESOLUTION PROGRAM.
Client security fund board.
  Annual report, Bar Rule D.1415.
  Applications for reimbursements, Bar Rule D.1417.
    Processing, Bar Rule D.1418.
  Appropriate uses of fund, Bar Rule D.1416.
  Board size, Bar Rule D.1404.
  Chairperson appointment, Bar Rule D.1410.
  Definitions, Bar Rule D.1401.
  Duties, Bar Rule A.0701.
  Fiscal responsibility, Bar Rule D.1413.
  Jurisdiction, Bar Rule D.1402.
  Lay participation, Bar Rule D.1405.
  Meetings, Bar Rule D.1414.
  Membership appointments, Bar Rule D.1406.
  Operational responsibility, Bar Rule D.1403.
  Purpose of fund, Bar Rule D.1401.
  Source of funds, Bar Rule D.1412.
  Staggered terms, Bar Rule D.1408.
  Subrogation for reimbursement, Bar Rule D.1419.
  Succession, Bar Rule D.1409.
  Supreme court's authority, Bar Rule D.1420.
  Terms of office, Bar Rule D.1407.
  Vice chairperson appointment, Bar Rule D.1411.
Continuing legal education board.
  Accreditation of sponsors and program, Bar Rule D.1520.
  Accreditation standards, Bar Rule D.1519.
  Announcement of presentation of program, Bar Rule D.1520.
  Annual report, Bar Rules D.1515, D.1522.
  Appointment of members, Bar Rule D.1506.
  Board size, Bar Rule D.1504.
  CD-ROM, accreditation for activities in, Bar Rule D.1519.
  Chairperson appointment, Bar Rule D.1510.

STANDING COMMITTEES AND BOARDS —Cont'd
Continuing legal education board —Cont'd
  Compliance period, Bar Rule D.1522.
  Confidentiality, Bar Rule D.1525.
  Continuing legal education program, Bar Rule D.1518.
  Credit hours, Bar Rule D.1521.
  Definitions, Bar Rule D.1501.
  Duties, Bar Rule A.0701.
  Effective date, Bar Rule D.1526.
  Exemptions, Bar Rule D.1517.
  Fiscal responsibility, Bar Rule D.1513.
  Funds source, Bar Rule D.1512.
  Internet, accreditation for activities using, Bar Rule D.1519.
  Jurisdiction, Bar Rule D.1502.
  Lay participation, Bar Rule D.1505.
  Meetings, Bar Rule D.1514.
  Noncompliance, Bar Rule D.1523.
  Notification to board.
    Dates and locations of presentations of program, Bar Rule D.1520.
  Operational responsibility, Bar Rule D.1503.
  Powers and duties, Bar Rule D.1516.
  Presumptive approval for accredited sponsors, Bar Rule D.1520.
  Purpose of program, Bar Rule D.1501.
  Regulations, Bar Rule D.1527.
  Session, Bar Rule D.1509.
  Staggered terms, Bar Rule D.1508.
  Suspensions.
    Reinstatement, Bar Rule D.1524.
  Term of office, Bar Rule D.1507.
  Vice chairperson appointment, Bar Rule D.1511.
Continuing legal education program.
  Accredited sponsors, Bar Rule D.1603.
  Authority for appeal, Bar Rule D.1610.
  Computation of credit, Bar Rule D.1605.
  Computer based CLE, Bar Rule D.1604.
    Accreditation, Bar Rule D.1611.
    Verification of attendance, Bar Rule D.1601.
  Course approval, Bar Rule D.1601.
  Course content, Bar Rule D.1602.
  Fees, Bar Rule D.1606.
  General compliance procedures, Bar Rule D.1608.
  Noncompliance procedures, Bar Rule D.1609.
  Nonlegal educational activities.
    Course content, Bar Rule D.1602.
  Prerecorded material, Bar Rule D.1604.
  Simultaneous broadcast, Bar Rule D.1604.
  Special cases and exemptions, Bar Rule D.1607.
Disaster response plan.
  General policy and objectives, Bar Rule D.0302.
  Report, Bar Rule D.0303.
  Response team, Bar Rule D.0301.
Ethical questions.
  Definitions, Bar Rule D.0101.
    Requests, Bar Rule D.0102.
  Formal ethics opinions and ethics decisions, Bar Rule D.0104.
  Informal ethics advisories and ethics advisories, Bar Rule D.0103.
  Inquiries generally, Bar Rule D.0102.
Fee arbitration model plan.
  Appointment of committee members, Bar Rule D.0801.
  Chairperson, Bar Rule D.0802.

STANDING COMMITTEES AND BOARDS —Cont'd
Fee arbitration model plan —Cont'd
  Decisions, Bar Rule D.0806.
  Enforcement of decision, Bar Rule D.0807.
  Jurisdiction, Bar Rule D.0803.
  Proceedings, Bar Rule D.0805.
  Processing requests, Bar Rule D.0804.
  Recordkeeping, Bar Rule D.0808.
Fee dispute resolution program, Bar Rules D.0701 to D.0710.
  See FEE DISPUTE RESOLUTION PROGRAM.
IOLTA board.
  Accounts, Bar Rule D.1316.
  Annual report, Bar Rule D.1315.
  Appointment of members, Bar Rule D.1306.
  Board size, Bar Rule D.1304.
  Certification accounts established and maintained, Bar Rule D.1318.
  Chairperson appointment, Bar Rule D.1310.
  Confidentiality of information regarding accounts, Bar Rule D.1317.
  Duties, Bar Rule A.0701.
  Failure to comply with mandatory provision, Bar Rule D.1319.
  Fiscal responsibility, Bar Rule D.1313.
  Funds sources, Bar Rule D.1312.
  Interest bearing accounts, Bar Rule D.1316.
  Jurisdiction, Bar Rule D.1302.
  Lay participation, Bar Rule D.1305.
  Meetings, Bar Rule D.1314.
  Operational responsibility, Bar Rule D.1303.
  Purpose of plan, Bar Rule D.1301.
  Severability of provisions, Bar Rule D.1320.
  Staggered terms, Bar Rule D.1308.
  Succession, Bar Rule D.1309.
  Term of office, Bar Rule D.1307.
  Vice chairperson appointment, Bar Rule D.1311.
Lawyer assistance program board.
  Agents of state bar, Bar Rule D.0618.
  Annual meeting, special meetings, notice, quorum, Bar Rule D.0610.
  Annual report of activities, preparation, presentation, Bar Rule D.0611.
  Appointment, Bar Rule D.0605.
  Authority, Bar Rule D.0602.
  Chairperson, appointment, duties, Bar Rule D.0607.
  Confidentiality and privilege of information received, Bar Rule D.0613.
  Consecutive terms, serving, Bar Rule D.0606.
  Evaluations for substance abuse, alcoholism or addiction, Bar Rule D.0621.
    Grounds for compelling, Bar Rule D.0622.
    Noncompliance with order compelling, Bar Rule D.0623.
  Funding of program, source, Bar Rule D.0609.
  Judicial committee.
    Implementation of intervention program for judiciary, members of committee, Bar Rule D.0619.
  Number of members, qualifications, Bar Rule D.0604.
  Powers and duties, Bar Rule D.0612.
  Purpose of program, Bar Rule D.0601.
  Regional chapters, Bar Rule D.0615.
  Rehabilitation contracts with impaired lawyers, Bar Rule D.0620.

STANDING COMMITTEES AND BOARDS —Cont'd
Lawyer assistance program board —Cont'd
- Reinstatement of suspended lawyer, Bar Rule D.0616.
- Removal, Bar Rule D.0605.
- Responsibility for operating program, Bar Rule D.0603.
- Standing committee, duties, Bar Rule A.0701.
- Suspension for impairment, Bar Rule D.0616.
  - Consent to suspension, Bar Rule D.0617.
- Term, Bar Rule D.0606.
- Vice-chairperson, appointment, duties, Bar Rule D.0608.

Legal specialization board.
- Additional standards.
  - Establishment, Bar Rule D.1722.
- Annual report, Bar Rule D.1715.
- Appointment of members, Bar Rule D.1706.
- Board size, Bar Rule D.1704.
- Chairperson appointment, Bar Rule D.1710.
- Continuing legal education.
  - Accreditation of courses, Bar Rule D.1906.
  - Accreditation of sponsor, Bar Rule D.1907.
  - Accreditation standards for lecture type activities, Bar Rule D.1903.
  - Alternatives to lecture type course instruction, Bar Rule D.1905.
  - Computation of, Bar Rule D.1904.
  - Definitions, Bar Rule D.1902.
  - General provisions, Bar Rule D.1901.
  - Showing by applicants, Bar Rule D.1908.
- Duties, Bar Rule A.0701.
- Fiscal responsibility, Bar Rule D.1713.
- Grandfathered specialties, Bar Rule D.1726.
- Hearings on appeals.
  - Additional rules, Bar Rule D.1806.
  - Appeals to council, Bar Rule D.1804.
  - Denial, revocation and suspension of continued certification, Bar Rule D.1802.
  - Failure of appeal, Bar Rule D.1801.
  - Failure of written examination, Bar Rule D.1801.
  - Judicial review, Bar Rule D.1805.
  - Reconsidered applications, Bar Rule D.1801.
- Hearings on suspension or revocation, Bar Rule D.1724.
- Jurisdiction, Bar Rule D.1702.
- Lay participation, Bar Rule D.1705.
- Meetings, Bar Rule D.1714.
- Minimum standards for certification of specialists, Bar Rule D.1720.
- Minimum standards for continuing certification, Bar Rule D.1721.
- Operational responsibility, Bar Rule D.1703.
- Powers and duties, Bar Rule D.1716.
- Privileges and limitations, Bar Rule D.1718.
- Purpose of plan, Bar Rule D.1701.
- Retained jurisdiction of council, Bar Rule D.1717.
- Revocation or suspension.
  - Automatic revocation, discretionary revocation or suspension, Bar Rule D.1723.
- Social security disability law specialty, Bar Rules D.2801 to D.2807.
- Source of funds, Bar Rule D.1712.
- Specialty areas, Bar Rule D.1725.
- Specialty committee, Bar Rule D.1719.
- Staggered terms, Bar Rule D.1708.

STANDING COMMITTEES AND BOARDS —Cont'd
Legal specialization board —Cont'd
- Succession, Bar Rule D.1709.
- Suspension or revocation.
  - Appeals to council, Bar Rule D.1724.
- Term of office, Bar Rule D.1707.
- Vice chairperson appointment, Bar Rule D.1711.
- Workers' compensation law specialty, Bar Rules D.2701 to D.2707.
  - See WORKERS' COMPENSATION LAW SPECIALTY.

Model district bylaws, Bar Rule A.1010.

SUBSTANCE ABUSE AND CHEMICAL DEPENDENCY.
Lawyer assistance program board.
- Standing board, duties, Bar Rule A.0701.
  - Generally, Bar Rules D.0601 to D.0623.
    - See STANDING COMMITTEES AND BOARDS.

Professional responsibility courses, Bar Rule D.1602.

SUBSTANCE ABUSE PROBLEM.
Referral to lawyer assistance board program, Bar Rule B.0112.

SUPREME COURT.
Proposed rule or amendment.
- Review, Bar Rule A.1403.

SUSPENSION OF MEMBERSHIP.
Failure to fulfill obligations of membership, Bar Rule D.0903.

T

TRAINING OF LAW STUDENTS.
General provisions, Bar Rules C.0201 to C.0207.
- See LEGAL INTERNS.

TRUST ACCOUNTS.
Discipline and disability.
- Audits, Bar Rule B.0128.

IOLTA administration plan, Bar Rules D.1301 to D.1320.
- See STANDING COMMITTEES AND BOARDS.

U

UNAUTHORIZED PRACTICE.
Authorized practice committee.
- Standing committee, duties, Bar Rule A.0701.
  - Generally, Bar Rules D.0201 to D.0208.
    - See STANDING COMMITTEES AND BOARDS.

V

VICE PRESIDENT, Bar Rule A.0403.

W

WORKERS' COMPENSATION LAW SPECIALTY, Bar Rules D.2701 to D.2707.
Board certified specialist, entitlement to represent, Bar Rule D.2703.
Continued certification standards, Bar Rule D.2706.

WORKERS' COMPENSATION LAW SPECIALTY —Cont'd
Continuing legal education, Bar Rule D.2705.
Continued certification, Bar Rule D.2706.
Definition of specialty, Bar Rule D.2702.
Designation as field of law for which certification permitted, Bar Rule D.2701.
Other requirements, applicability, Bar Rule D.2707.
Peer review, Bar Rule D.2705.
Continued certification, Bar Rule D.2706.

WORKERS' COMPENSATION LAW SPECIALTY —Cont'd
Plan of legal specialization, applicability, Bar Rule D.2704.
Practice equivalent, Bar Rule D.2705.
Recognized specialty, Bar Rule D.1725.
Standards for certification, Bar Rule D.2705.
Continued certification, Bar Rule D.2706.
Substantial involvement, experience through, Bar Rule D.2705.
Continued certification, Bar Rule D.2706.

THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

Revised effective February 27, 2003,
with amendments effective October 9 2008.

A complete set of all referenced ethics opinions may be obtained from the North Carolina State Bar. Contact Jennifer Eichenberger, Director of Communications, P.O. Box 25908, Raleigh, N.C. 27611.

Preamble and Scope

Rule
0.1. Preamble: A lawyer's professional responsibilities.
0.2. Scope.

Terminology

1.0. Terminology.

Client-Lawyer Relationship

1.1. Competence.
1.2. Scope of representation and allocation of authority between client and lawyer.
1.3. Diligence.
1.4. Communication.
1.5. Fees.
1.6. Confidentiality of information.
1.7. Conflict of interest: Current clients.
1.8. Conflict of interest: Current clients: Specific rules.
1.9. Duties to former clients.
1.10. Imputation of conflicts of interest: General rule.
1.11. Special conflicts of interest for former and current government officers and employees.
1.12. Former judge, arbitrator, mediator, or other third-party neutral.
1.13. Organization as client.
1.14. Client with diminished capacity.
1.15. Safekeeping Property.
1.15-1. Definitions.
1.15-2. General rules.
1.15-3. Records and accountings.
1.15-4. [Reserved].
1.16. Declining or terminating representation.
1.17. Sale of a law practice.
1.18. Duties to prospective client.
1.19. Sexual relations with clients prohibited.

Counselor

2.1. Advisor.
2.2. [Reserved].
2.3. Evaluation for use by third persons.
2.4. Lawyer serving as third-party neutral.

Advocate

3.1. Meritorious claims and contentions.
3.2. Expediting litigation.
3.3. Candor toward the tribunal.
3.4. Fairness to opposing party and counsel.

Rule
3.5. Impartiality and decorum of the tribunal.
3.6. Trial publicity.
3.7. Lawyer as witness.
3.8. Special responsibilities of a prosecutor.
3.9. Reserved.

Transactions with Person Other Than Clients

4.1. Truthfulness in statements to others.
4.2. Communication with person represented by counsel.
4.3. Dealing with unrepresented person.
4.4. Respect for rights of third persons.

Law Firms and Associations

5.1. Responsibilities of partners, managers, and supervisory lawyers.
5.2. Responsibilities of a subordinate lawyer.
5.3. Responsibilities regarding nonlawyer assistants.
5.4. Professional independence of a lawyer.
5.5. Unauthorized practice of law.
5.6. Restrictions on right to practice.
5.7. Responsibilities regarding law-related services.

Public Service

6.1. Reserved.
6.2. Reserved.
6.3. Membership in legal services organization.
6.4. Law reform activities affecting client interests.
6.5. Limited Legal Services Programs.
6.6. Action as a public official.

Information About Legal Services

7.1. Communications concerning a lawyer's services.
7.2. Advertising.
7.3. Direct contact with potential clients.
7.4. Communication of fields of practice and specialization.
7.5. Firm names and letterheads.
7.6. [Reserved].

Maintaining the Integrity of the Profession

8.1. Bar admission and disciplinary matters.
8.2. Judicial and legal officials.
8.3. Reporting professional misconduct.
8.4. Misconduct.
8.5. Disciplinary authority; Choice of law.
Correlation Table 1: Revised Rules of Professional Conduct to 1985 Superseded Rules of Professional Conduct

Rule
Correlation Table 2: 1985 Superseded Rules of Profess ional Conduct to Revised Rules of Professional Conduct

Index follows Rules.

Editor's note. — On February 27, 2003, the North Carolina Supreme Court entered an order approving substantial revisions to the 1997 Revised Rules of Professional Conduct of the North Carolina State Bar.

The 1997 Revised Rules went into effect on July 24, 1997. Prior to the adoption of the 1997 Rules, the professional conduct of North Carolina lawyers was governed by the 1985 Rules of Professional Conduct, which were in effect from January 1, 1986 until July 23, 1997. From January 1, 1974 until the adoption of the 1985 Rules, lawyers were regulated under the North Carolina Code of Professional Responsibility (adopted on April 30, 1973).

The complete text of the 2003 amended version of the Revised Rules and all of the comments thereto, as approved by the North Carolina Supreme Court, follows this note. Correlation tables appear after the 2003 Revised Rules. These tables cross-reference the 2003 and 1997 versions of the Revised Rules with the comparable provisions of the superseded 1985 Rules of Professional Conduct and 1973 Code of Professional Conduct.

Each revised rule is followed by annotations of cases and ethics opinions of the State Bar that apply or interpret the rule. In the annotations, the terms "CPR" and "RPC" designate formal ethics opinions adopted under the superseded 1973 Code of Professional Responsibility and 1985 Rules of Professional Conduct respectively. These opinions still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the 2003 Revised Rules of Professional Conduct. Ethics opinions rendered invalid by subsequent opinion or by the 2003 Revised Rules are generally not included in the annotations. (A CPR opinion may be obtained by calling the ethics department at the State Bar.) An ethics opinion promulgated under the 2003 or 1997 versions of the Revised Rules is designated as a "Formal Ethics Opinion." At the time of the publication of this supplement, no Formal Ethics Opinions had, as yet, been adopted under the 2003 amended version of the Revised Rules.

Editor's note. — For North Carolina court system website, see www.aoc.state.nc.us. For the North Carolina State Bar website, see www.ncbar.com.

PREAMBLE AND SCOPE

Rule 0.1. Preamble: A lawyer's professional responsibilities.

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A

lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

[8] The legal profession is a group of people united in a learned calling for the public good. At their best, lawyers assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers use their education and experience to improve society. It is the basic responsibility of each lawyer to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in, or otherwise support, the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus the profession and government instituted additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs were developed, and programs will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[11] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[12] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of

Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. A lawyer, moreover, should provide zealous but honorable representation without resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the client; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties.

[14] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[15] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

[16] The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[17] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended November 16, 2006.

CASE NOTES

Respect for Other Lawyers. — Where a law firm represented a client for a number of years pursuant to a contingency fee arrangement, the firm should have been notified of its discharge when it became clear that a new attorney was taking over representation of the client. Robinson, Bradshaw & Hinson v. Smith, 129 N.C. App. 305, 498 S.E.2d 841 (1998), review dismissed, 348 N.C. 695, 511 S.E.2d 650 (1998).

Cited in SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616, 2001 U.S. Dist. LEXIS 5893 (W.D.N.C. 2001); In re N.B., 183 N.C. App. 114, 644 S.E.2d 22, 2007 N.C. App. LEXIS 831 (2007).

Rule 0.2. Scope.

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act, or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are

thus partly obligatory and disciplinary, and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[3] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[4] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[5] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[6] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[7] Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.

[8] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in

the original Rules of Professional Conduct (adopted 1985, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended Effective February 5, 2004.

Legal Periodicals. — For article, "Attorney-Client Relationships in Cyberspace: The Peril and the Promise," see 1999 Duke L.J. 147.

CASE NOTES

Violation Not Civil Liability Per Se. — Although a violation of a Rule of Professional Conduct does not constitute civil liability per se, the rules are some evidence of an attorney's duty to his client. Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816, cert. denied, 327 N.C. 426, 395 S.E.2d 674 (1990).

Creation of Attorney-Client Relationship. — An express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties, even in the absence of the payment of fees or the lack of a formal contract. Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

Question of Attorney-Client Relationship. — A genuine issue of material fact was presented as to whether there was an attorney-client relationship where defendant introduced a deposition in which he denied that he had ever represented plaintiff in any transaction and stated that, at one point, plaintiff claimed to defendant that he represented himself, and where plaintiff, on the other hand, presented his affidavit stating that defendant did represent plaintiff in the transaction at issue. Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

An attorney may be held liable for negligence by a non-client third party in the absence of privity of contract. Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

Insurance attorney had authority to move against default judgment although there was no contact with the individual defendant-insured. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, 467 S.E.2d 713 (1996).

Quoted in Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000); Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

TERMINOLOGY

Rule 1.0. Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confidential information" denotes information described in Rule 1.6.

(c) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of North Carolina and has a purpose to deceive.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.

(g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(*l*) "Screened" denotes the isolation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of North Carolina and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to

advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997.

CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence.

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer

would be impractical. Even in an emergency, however, assistance should be limited to that which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Distinguishing Professional Negligence

[7] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

[8] Repeated failure to perform legal services competently is a violation of this rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive, nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Legal Periodicals. — For article, "Attorney-Client Relationships in Cyberspace: The Peril and the Promise," see 1999 Duke L.J. 147.

CASE NOTES

Cited in State v. Rogers, 352 N.C. 119, 529 S.E.2d 671, 2000 N.C. LEXIS 430 (2000); N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

ETHICS OPINION NOTES

99 Formal Ethics Opinion 12 — Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

RPC 198. Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.

RPC 199. Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

Rule 1.2. Scope of representation and allocation of authority between client and lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, or by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Scope of Representation Allocation of Authority Between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is

limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(e) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.2 is substantially similar to Model Rule 1.2. Rule 1.2 is also similar to Rule 7.1 of the superseded (1985) Rules of Professional Conduct, although Rule 1.2(b) has no counterpart in the superseded (1985) Rules.

CASE NOTES

Law Firm as Interested Party. — Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under subsection (a) of this rule to represent him on a limited basis, but could intervene under G.S. 1A-1, Rule 24(a)(2) as an interested party to protect its interests. Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

Cited in In re of J.A.P., — N.C. App. —, 659 S.E.2d 14, 2008 N.C. App. LEXIS 716 (2008); N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

ETHICS OPINION NOTES

99 Formal Ethics Opinion 12 — Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

CPR 110. An attorney may not advise client to seek a Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 267. An attorney may prepare a contractual agreement regarding property for a man and woman who contemplate living together without marriage so long as sexual intercourse is not part of the consideration supporting the agreement.

CPR 285. An attorney may advise his client in custody litigation of the legal consequences and practical effects of her decision to move into an apartment leased by her boyfriend.

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 118. An attorney should not waive the statute of limitations without the client's consent.

RPC 129. Prosecutors and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 145. A lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

RPC 208. A lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

RPC 212. A lawyer may contact an opposing lawyer who failed to file an answer on time to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

RPC 220. A lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

RPC 223. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 240. A lawyer may decline to represent a client on a property damage claim while agreeing to represent the client on a personal injury claim arising out of a motor vehicle accident provided the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 Formal Ethics Opinion 2. Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the

possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule .0122 of Subchapter 1B of the Rules of the North Carolina State Bar (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the clients of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[6] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[7] Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.3 is identical to Model Rule 1.3 and Rule 6(b)(3) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Neglect of Client. — Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008), N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007).

Failure to Seek Appellate Review. — Appointed counsel who failed to seek appellate review in four criminal cases held in violation of the disciplinary rule. In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

Failure to Perfect Appeal. — The failure of the respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of the disciplinary rule. In re Dale, 39 N.C. App. 370, 250 S.E.2d 82, appeal dismissed, 296 N.C. 584, 254 S.E.2d 30 (1979).

Applied in N.C. State Bar v. Key, — N.C. App. —, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

Cited in N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

DISCIPLINARY HEARING NOTES

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public Censure. **77 DHC 13.**

The attorney failed to complete representation of a client in a property transaction by failing to have a final title insurance policy issued. Public Censure. **80 DHC 11.**

The attorney was employed to represent a client's corporation in a civil action. When an action was subsequently filed against his client, the attorney failed to file an answer, causing default judgment to be entered. Although the attorney managed to have the default judgment set aside, his client was barred from asserting its claim due to the attorney's neglect. The attorney was also employed by another client to defend a civil action and prosecute a counterclaim. The attorney failed to file an answer or a counterclaim. Default judgment was entered which the attorney succeeded in having set aside. The attorney admitted neglect in these matters due to alcoholism. Two Year Suspension. **80 DHC 13, 14.**

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. Although the attorney failed to initiate any legal action on behalf of his client, he delivered to the client a document purporting to be an order of the superior court dismissing a petition for a cartway across adjoining land. The document was purportedly signed by a judge, and bore the seal and signature of an assistant clerk, but the document was never actually signed by the named individuals nor was it filed. One Year Suspension. **81 DHC 1.**

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three Year Suspension. **88 DHC 4.**

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public Reprimand. **89 DHC 27.**

The attorney failed to prosecute civil actions on behalf of three different clients within the applicable statutes of limitation. Two Year Suspension, one year stayed, on condition the attorney pay two malpractice judgments obtained by the injured clients. **90 DHC 9.**

Attorney took $1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit $1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five Year Suspension, stayed for one year upon certain conditions. **93 DHC 7.**

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 5 — Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

Rule 1.4. Communication.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will

need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.4 is identical to Model Rule 1.4 and Rule 6(b)(1) and (2) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Effective Representation. — Defendant who was charged with first-degree murder did not show that his court-appointed counsel was not effective because he did not communicate with defendant frequently while he was in pretrial confinement or because he had investigators interview defendant instead of conducting those interviews himself, and the state supreme court found that three trial court judges who heard defendant's pro se motions to remove his counsel did not abuse their discretion by denying defendant's motions. State v. Jones, 357 N.C. 409, 584 S.E.2d 751, 2003 N.C. LEXIS 828 (2003).

Failure to Notify Client of Dates. — The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648, appeal dismissed, 308 N.C. 677, 303 S.E.2d 546 (1983).

Reimbursement of Client's Lost Wages Resulting from Failure to Communicate Change in Hearing Date. — Pursuant to N.C. R. Prof. Conduct 1.4 and 28 U.S.C.S. § 1334, a bankruptcy court ordered an attorney to reimburse a Chapter 7 debtor for wages lost when the debtor showed up at a postponed relief from stay hearing where it was obvious that the attorney had not properly communicated with the client when the attorney failed to return the debtor's phone calls or inform the debtor of the hearing change. In re Newkirk, 297 Bankr. 457, 2002 Bankr. LEXIS 1762 (Bankr. W.D.N.C. 2002).

A lawyer is ethically bound to advise his client of a plea bargain offer. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Trial court did not err in dismissing a client's professional malpractice claims against law firms because there was nothing in the complaint to suggest that the law firms authorized, participated in, or even knew about an attorney's fraudulent conduct; fraud associated with the attorney's, including the failure to keep the client informed about the status of his case and the active concealment of the true state of affairs in violation of N.C. R. Prof. Conduct 1.4, was not in the ordinary course of thelaw firms' business. Goodman v. Holmes & McLaurin, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1622 (Sept. 2, 2008).

Cited in N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

DISCIPLINARY HEARING NOTES

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public Censure. **77 DHC 13.**

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three Year Suspension. **88 DHC 4.**

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public Reprimand. **89 DHC 27.**

The attorney handled a real estate closing in which the sellers provided additional financing to the buyer. The attorney failed to provide the lender with sufficient information about the secondary financing to permit the lender to make an informed decision regarding whether to proceed with the closing. Public Reprimand. **90 DHC 17.**

Attorney took $1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit $1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five Year Suspension, stayed for one year upon certain conditions. **93 DHC 7.**

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 12 — Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits but must inform insurer of insured's wishes.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 99. A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim but must communicate the proposal to both clients.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability but must communicate the proposed to both clients.

RPC 129. Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. Defense attorney must explain the consequences to the client.

RPC 156. An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

COMMENT

Appropriate Fees and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are not clearly excessive under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must not be clearly excessive. A lawyer may seek reimbursement for expenses for in-house services, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, an understanding will have ordinarily evolved concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, a written understanding as to fees and expenses should be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided this does not

involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer.

[6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[7] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. A lawyer may divide a fee with an out-of-state lawyer who refers a matter to the lawyer if the conditions of paragraph (e) are satisfied. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[11] If fee dispute resolution is requested by a client, the lawyer must participate in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, et seq. The lawyer should fully set forth his or her position and support that position by appropriate documentation.

[12] A lawyer may petition a tribunal for a legal fee if allowed by applicable law or, subject to the requirements for fee dispute resolution set forth in Rule 1.5(f), may bring an action against a client to collect a fee. The tribunal's determination of the merit of the petition or the claim is reached by an application of law to fact and not by the application of this Rule. Therefore, a tribunal's reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule and is not admissible in a disciplinary proceeding brought under this Rule.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective May 4, 2000; Amended February 27, 2003.

Editor's note. — Rule 1.5 corresponds to Model Rule 1.5. The Model Rule prohibits the collection of an unreasonable fee while Rule 1.5 prohibits a clearly excessive fee. Both Rule 1.5(d) and Model Rule 1.5(d) prohibit contingent fees in criminal cases. In civil cases, the Model Rule specifically prohibits such fees only in domestic matters while Rule 1.5(d) condemns contingent fee contracts whenever they are prohibited by law. Rule 1.5(e) and Model Rule 1.5(e) are identical. Rule 1.5(f) has no corresponding provision in the Model Rules.

Rule 1.5 is similar to Rule 2.6 of the superseded (1985) Rules of Professional Conduct, except that the superseded rule does not require that the basis or rate of the fee be communicated at the onset of representation.

Legal Periodicals. — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For article, "Nonrefundable Retainers Revisited," see 72 N.C.L. Rev. 1 (1993).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

CASE NOTES

Entitlement to Reasonable Value of Services. — An attorney discharged by his client is entitled to recover the reasonable value of the services he has already rendered. The reasonable value of such services is determined by the totality of the circumstances of each case. O'Brien v. Plumides, 79 N.C. App. 159, 339 S.E.2d 54, cert. improvidently allowed, 318 N.C. 409, 348 S.E.2d 805 (1986).

Plaintiff attorney brought an action to recover a contingent fee in a personal injury case where the client had discharged the attorney after he had begun working on the client's case. The Court held that the attorney was entitled to the reasonable value of the services rendered before his discharge by the client. Covington v. Rhodes, 38 N.C. App. 61, 247 S.E.2d 305 (1978), cert. denied, 296 N.C. 410, 251 S.E.2d 468 (1979).

Determination of Reasonable Fees. — Reasonable counsel fees may be determined in part by the amount of the verdict obtained in a condemnation proceeding in light of proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consideration in determining the amount of his fee. Redevelopment Comm'n v. Hyder, 20 N.C. App. 241, 201 S.E.2d 236 (1973).

The court refused to issue a temporary restraining order where lawyer in fee dispute with client failed to follow the procedures of this section and there was a state court action pending. Parker v. United States, 948 F. Supp. 24 (E.D.N.C. 1996).

Contingent Fee Contracts in Domestic Cases. — A contingent fee contract for legal services in a divorce, alimony or child support proceeding is void. Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984), rev'd on other grounds, 313 N.C. 313, 328 S.E.2d 288 (1985).

Contingent Fee Contracts in Obtaining Equitable Distribution. — A contingent fee contract for an attorney's services in obtaining an equitable distribution is valid if the contract does not compensate the attorney for securing a divorce for the same client. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent Contract Held Void. — Fee contract which provided that the attorney would receive 20% of the total amount recovered in an action for alimony and child support was void as against public policy. Townsend v. Harris, 102 N.C. App. 131, 401 S.E.2d 132, appeal dismissed, 328 N.C. 734, 404 S.E.2d 877, cert. denied, 502 U.S. 919, 112 S. Ct. 329 116 L.Ed.2d 270 (1991).

Applied in In re Carolina Premier Med. Group, P.A., — Bankr. —, 2001 Bankr. LEXIS 1845 (Bankr. M.D.N.C. Aug. 20, 2001).

Quoted in Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815, 2000 N.C. App. LEXIS 812 (2000).

Cited in West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995); N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003); Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003); N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

DISCIPLINARY HEARING NOTES

Attorney who was administrator of estate authorized payment of a fee from estate account to attorney's partners for legal services rendered to the estate without first obtaining a court order or approval of all of the heirs of the estate. Public Censure. **89 DHC 21.**

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

Attorney assisted former in-house counsel to Firestone Tire & Rubber Company to engage in conflict of interest by accepting assistance of the former in-house counsel in preparing complex products liability action against Firestone. Attorney also improperly divided settlement proceeds with the former in-house counsel. Disbarred. **96 DHC 16.**

Attorney told client that attorney could get murder charge pending against client dismissed on payment of $10,000 fee, concealing fact that District Attorney had already decided to dismiss charge for lack of evidence. After client discovered deception and demanded return of fee, attorney threatened to reveal confidential communications of client. Attorney engaged in criminal and fraudulent conduct, implied ability to influence government official and collected excessive fee. Disbarred. **97 DHC 12.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 1 — Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

CPR 11. An attorney may accept an interest in land as a fee for title examination and representation in an action to clear title.

CPR 37. An attorney may charge interest on delinquent accounts.

CPR 47. A Legal Aid Society may receive fees awarded by the court.

CPR 54. An attorney may submit a fee schedule to a savings and loan association.

CPR 79. An attorney serving as a trustee in bankruptcy or as a fiduciary in state proceedings may receive legal fees for acting as his own attorney.

CPR 129. An attorney may accept payment of legal fees by credit card.

CPR 217. An attorney appointed to represent an indigent may not receive compensation from any source other than the court.

CPR 250. An attorney charging a flat fee may have his client sign a confession of judgment and file it with the clerk of court.

CPR 312. Contingent fees may be charged in equitable distribution cases.

CPR 375. An attorney may agree for his fee to be the interest earned on an amount escrowed at a loan closing to guarantee completion of repairs.

RPC 2. Contingent fees may be charged to collect liquidated amounts of past due child support.

RPC 7. An attorney may employ a collection agency to collect a past due fee so long as the fee agreement out of which the account arose was permitted by law and by the Rules of Professional Conduct; the lawyer, at the time underlying the fee agreement was made, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services; the legal services giving rise to the fee out of which the account arose have been completed so that the lawyer has no further responsibilities as the client's attorney; there is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness; and the lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means to collect the account.

RPC 35. An attorney may not charge an elevated contingent fee to collect "med-pay" or any other claim with respect to which liability is clear and there is no real dispute as to the amount due.

RPC 50. A lawyer may charge nonrefundable retainers that are reasonable in amount.

RPC 52. Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly from the client.

RPC 106. Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 107. A lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves about legal fees.

RPC 141. An attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.

RPC 148. A lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

RPC 155. An attorney may charge a contingent fee to collect delinquent child support.

RPC 158 (Third Revision). A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 166. A lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client to cut his losses or to coerce a higher fee.

RPC 174. A legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

RPC 190. A lawyer who agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.

RPC 196. A law firm may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.

RPC 205. A lawyer may receive a fee for referring a case to another lawyer provided that, by written agreement with the client, both lawyers assume responsibility for the representation and the total fee is reasonable.

RPC 222. Prior to the completion of legal services for a client, a lawyer may not obtain a confession of judgment from a client to secure a fee.

RPC 231. A lawyer may not collect a contingent fee on the reimbursement paid to the client's medical insurance provider in addition to a contingent fee on the gross recovery if the total fee received by the lawyer is clearly excessive.

RPC 235. A lawyer may charge a client an hourly rate, or a flat rate, for his or her services plus a contingent fee on the client's recovery provided the ultimate fee paid by the client is not clearly excessive and the client is given an honest assessment of the potential for recovery.

97 Formal Ethics Opinion 4. Opinion provides that flat fees may be collected at the beginning of a representation, treated as presently owed to the lawyer, and deposited into the lawyer's general operating account or paid to the lawyer but that if a collected fee is clearly excessive under the circumstances of the representation a refund to the client of some or all of the fee is required.

98 Formal Ethics Opinion 3. Opinion rules that, subject to the requirements of law, a lawyer may add a finance charge to a client's account if the client fails to pay the balance when due as agreed with the client.

98 Formal Ethics Opinion 9. Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

98 Formal Ethics Opinion 14. Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long

as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the client's confidences when the client's purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information acquired during the representation. Paragraph (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information acquired during the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[18] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[19] The duty of confidentiality continues after the client lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyer's Assistance Program

[20] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional client-lawyer relationship.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.6 is similar to Model Rule 1.6 and Rule 4 of the superseded (1985) Rules of Professional Conduct. However, there are some important differences between the revised rule and the Model Rule. The Model Rule permits disclosure of confidential information to prevent a crime likely to result in imminent death or substantial bodily harm, whereas Rule 1.6 permits disclosure of information necessary to prevent any crime. Rule 1.6 also permits disclosure to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used. Neither the Model Rule nor Rule 4 of the superseded (1985) Rules of Professional Conduct contains this provision. Finally, the Model Rules do not expressly prohibit a lawyer from using confidential information for his or her own advantage or for the advantage of a third person as does Rule 1.6(c)(3). The Model Rules only condemn use of such information to the disadvantage of the client or former client. See Model Rules 1.8(b) and 1.9(c).

Legal Periodicals. — For article, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds," see 64 N.C.L. Rev. 443 (1986).

For article, "Incriminating Physical Evidence: The Defense Attorney's Dilemma and the Need for Rules," see 64 N.C.L. Rev. 897 (1986).

For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

For comment, "To Speak or Not to Speak, That Is the Question: The Impact of Attorney-Client Privilege in Prosecuting the Death of Dr. Eric Miller," 25 Campbell L. Rev. 235 (2003).

For note, "Not-So-Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington," see 83 N.C. L. Rev. 1591 (2005).

CASE NOTES

Disclosure Authorized. — Retirees in a declaratory judgment class action impliedly authorized disclosure of confidential information pursuant to N.C. Rev. R. Prof. Conduct 1.6(a) because representations of the named retirees indicated an implied understanding that some of their confidential information may be provided to the union. Trull v. Dayco Prods, LLC, 214 F.R.D. 394, 2003 U.S. Dist. LEXIS 7647 (W.D.N.C. 2003).

Statement to Insurance Adjuster. — The attorney-client privilege does not cover a statement made to an insurance adjuster, not in the presence or at the request of counsel, and even before an attorney-client relationship exists. Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (M.D.N.C. 1990).

Law firm was disqualified from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. Robert Woodhead, Inc. v. Datawatch Corp., 934 F. Supp. 181 (E.D.N.C. 1995).

Applied in SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616, 2001 U.S. Dist. LEXIS 5893 (W.D.N.C. 2001).

Quoted in Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Stated in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996)

Cited in Mayfield v. Parker Hannifin, 174 N.C. App. 386, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

DISCIPLINARY HEARING NOTES

The attorney revealed confidential information of a client by disclosing to a creditor of the client that the attorney's law firm was holding funds belonging to the client. Public censure. **89 DHC 4.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 11 — Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

CPR 284. An attorney who in the course of representing one spouse obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose such information.

CPR 299. An attorney, with the consent of the client, may utilize the services of a letter writing service in collection matters.

CPR 300. An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

CPR 313. An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

CPR 362. An attorney may not disclose the perjury of his partner's client.

CPR 374. Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

RPC 12. An attorney may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

RPC 21. An attorney may send a demand letter to an adverse party without identifying the client by name.

RPC 23. An attorney does not need the consent of the client to file Form 1099 including confidential information with the IRS incident to a real estate transaction since such is required by law.

RPC 33. An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw.

RPC 62. An attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

RPC 77. A lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

RPC 113. A lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

RPC 117. An attorney may not reveal confidential information concerning a client's contagious disease without the client's consent.

RPC 120. An attorney may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

RPC 133. A law firm may make its waste paper available for recycling.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent but in so doing the lawyer may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose confidential information which led her to conclude the client is incompetent.

RPC 175. A lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

RPC 179. A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement.

RPC 195. The attorney who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.

RPC 206. A lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

RPC 209. Opinion provides guidelines for the disposal of closed client files.

RPC 215. When using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

RPC 230. A lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence. (But see Rule 3.3(d).)

RPC 244. Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 Formal Ethics Opinion 5. Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 Formal Ethics Opinion 10. Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 Formal Ethics Opinion 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

98 Formal Ethics Opinion 20. Opinion rules that, subject to a statute prohibiting the withholding of such information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days.

Rule 1.7. Conflict of interest: Current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29] to this rule.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.19.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents

different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom

the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. See Comment [15]. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an

organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.7 is similar to Model Rule 1.7 and Rule 5.1(a), (b), and (c) of the superseded (1985) Rules of Professional Conduct. In addition to prohibiting the representation of interests that are directly adverse to those of another client as does the Model Rule, Rule 1.7 also condemns a representation that "is likely to be" directly adverse. Rule 1.7(c) expands upon Model Rule 1.9(c) to state clearly the lawyer's continuing obligation to a former client to avoid the use of confidential information.

CASE NOTES

Conflict of Interest Not Shown. — A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing minority shareholders of the company in a derivative action against the company's directors. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181 (1979).

No evidence in the record indicated that an attorney's representation of several of a testatrix's children involved a concurrent conflict of interest or that he failed to have the necessary informed consent from his clients regarding an aggregate settlement in violation of N.C. R. Prof. Conduct 1.7(a) or 1.8(g); however, the attorney's letters to the court, his attempts to reopen virtually all of the points of contention that had been laid to rest during the settlement negotiations, and his behavior at hearings provided ample support a conclusion that the attorney violated N.C. R. Prof. Conduct 8.4(d). Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Defendant's rights under the Sixth Amendment and N.C. Const., Art. I, §§ 19 and 23 were not violated by the denial of defense counsel's motion to withdraw since an inquiry was conducted into counsel's allegation that counsel had a conflict of interest under N.C. Rev. R. Prof. Conduct 1.7(a) because a former client was called as a witness against defendant; there was no conflict since: (1) counsel had represented the witness three years prior to defendant's trial and was no longer representing the witness; (2) counsel had no recollection as to specifics of the witness's case aside from the fact that the witness had been convicted; (3) counsel's statement that counsel would review counsel's file to see if counsel had any information to help defendant proved that counsel was committed to defendant's case; and (4) counsel made significant inroads to undermine the witness's credibility. State v. Thomas, — N.C. App. —, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

In a suit regarding coverage between a primary and a secondary insurer, where the secondary insurer settled a dram shop lawsuit without the primary insurer's participation, and where the primary insurer refused to contribute to the settlement, the secondary insurer's lawyer was not disqualified under N.C.R. Prof. Conduct 1.7 because there was no conflict of interest with his client. Ohio Cas. Ins. Co. v. Firemen's Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12360 (E.D.N.C. Feb. 13, 2008).

Conflict of Interest Shown. — The attorneys for the plaintiffs could not represent the receivers of a group of corporations who were appointed to preserve assets of all the corporations when the plaintiffs were seeking to have assets transferred from some corporations in the group to other corporations. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, aff'd in part, rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977), rev'd, 570 F.2d 1187 (4th Cir.), cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

Counsel was properly disqualified and a finding of a conflict of interest was properly made where competent evidence showed that counsel engaged in a civil conspiracy, maintenance, and champerty in his involvement in a lawsuit by his client against a development company and the attorney that owned that development company. Oliver v. Bynum, 163 N.C. App. 166, 592 S.E.2d 707, 2004 N.C. App. LEXIS 304 (2004).

Underinsured Motorist Carrier Could Appear as Unnamed Defendant Without Conflict of Interest. — On a motion by an underinsured motorist carrier to be allowed to appear in the liability phase of an action against its insured as an unnamed defendant, the court rejected the contention that an impermissible conflict of interest would arise if the carrier's attorney were to represent to the jury that he represented the interests of the tortfeasor. Church v. Allstate Ins. Co., 143 N.C. App. 527, 547 S.E.2d 458, 2001 N.C. App. LEXIS 315 (2001).

Consent Procured Without Advice of Disinterested Counsel. — The consent of an individual litigant to representation by counsel with a potential conflict of interest cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977), rev'd, 570 F.2d 1187 (4th Cir.), cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

Potential Conflict Not Sufficient to Interfere with Right of Counsel. — A potential conflict of interest, as distinguished from an actual conflict of interest, is not sufficient to warrant the State's interference with the constitutionally guaranteed right of a criminal defendant to retain and be represented by counsel of his choice. State v. Yelton, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Although defendant claimed that the joint representation of two accomplices created a conflict of interest between their attorney and the public's interest in the fair administration of justice due to what he labeled as the artificial conformity of the testimony of the accomplices, defendant's interests were not sufficient to overcome the accomplices' rights to representation by counsel of their choice where defendant failed to show that the potential conflict of interest prejudiced his rights. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Hearing on Conflict of Interest. — Once a motion by the State or the defense, or the court on its own motion, raises a possible conflict of interest in a dual representation situation, the trial court must conduct a hearing. State v. Yelton, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Because defendant did not waive her right to conflict free counsel, she argued that she claimed possession of the heroin and the paraphernalia to protect her boyfriend, and because he was represented by defense counsel's boss, there was a potential for a conflict under N.C. R. Prof. Conduct 1.7(a); thus, a hearing should have been held.

Lawyer's Conduct in Serious Question. — First partner's motion to disqualify defense counsel was granted, as the first partner's allegations that the second partner, along with defense counsel, made false statements to the first partner to induce the first partner to settle an underlying state court claim called into question defense counsel's probity and dictated that defense counsel be disqualified in the first partner's current suit regarding those false statements, especially since the second partner would not be prejudiced because other counsel was competent to represent the second partner. George v. McClure, 266 F. Supp. 2d 413, 2001 U.S. Dist. LEXIS 25274 (M.D.N.C. 2001).

Applied in Chappell v. Roth, 141 N.C. App. 502, 539 S.E.2d 666, 2000 N.C. App. LEXIS 1392 (2000).

Quoted in Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992); State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993).

Stated in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996)

Cited in Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995); Cunningham v. Sams, 161 N.C. App. 295, 588 S.E.2d 484, 2003 N.C. App. LEXIS 2038 (2003).

DISCIPLINARY HEARING NOTES

The attorney accepted employment to represent individuals against a company in which he owned an interest without disclosing his interest to his client. Private Reprimand. **79 DHC 26.**

The attorney provided legal services to two clients regarding the purchase and development of real property owned by the attorney and the clients, despite the fact that the attorney's judgment was likely to be impaired by his own personal, financial and business interests respecting the property. One Year Suspension. **89 DHC 14.**

Among other things, the attorney hired his girlfriend to do work for a client and permitted his girlfriend to charge the client excessively. One Year Suspension, stayed on certain conditions. **92 DHC 5.**

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a $165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself $150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-Year Suspension. **92 DHC 16.**

Attorney, who obtained a judgment on a debt, purchased property at the execution sale on the judgment through a corporation controlled by attorney without the informed consent of the attorney's client. Six Month Suspension, stayed on certain conditions. **93 DHC 15.**

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice. Disbarred. **95 DHC 13.**

ETHICS OPINION NOTES

I. GENERAL CONFLICTS.

99 Formal Ethics Opinion 14 — Opinion rules that when an insured fails to cooperate with the defense, as required by the insurance contract, the insurance defense lawyer may follow the instructions of the insurance carrier unless the insured's lack of cooperation interferes with the defense or presenting an effective defense is harmful to the interests of the insured.

2000 Formal Ethics Opinion 2 — Opinion rules a lawyer who represented a husband and wife on a joint Chapter 13 bankruptcy petition may not continue to represent only one of the spouses after the other spouse disappears or becomes unresponsive.

CPR 9. An attorney may not give a title opinion to an individual and then represent another person in a boundary dispute against that individual.

CPR 15. A lawyer/guardian may not give a title opinion to the purchaser of his ward's property.

CPR 46. Once it is determined that attorneys from same firm have undertaken to represent adverse parties, one must withdraw and the other may continue only with the consent of all involved.

CPR 55. An attorney appointed as examiner of title is not prohibited from representing petitioners or respondents in actions unrelated to the Torrens proceeding.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 171. A part-time county attorney may not serve as guardian ad litem if official duties include advising Department of Social Services.

CPR 179. An attorney may not represent a municipality and a distributee of an estate suing the municipality.

CPR 216. An attorney may not serve as receiver and as attorney for a judgment creditor.

CPR 249. An attorney who owns an insurance agency may not represent claimants against persons insured by companies his agency represents.

CPR 255. An attorney who is employed by an insurer to defend its insureds on a regular basis represents the insurer and the insureds and, if a conflict develops between the insurer and an insured, the attorney has a duty to advise the insured to seek independent counsel. The attorney may represent a plaintiff against the insurer, but he or she should notify the insurer and have the informed consent of plaintiff.

CPR 281. An attorney may sue another attorney for malpractice on behalf of a client even though the attorney for the plaintiff owns stock in the defendant's liability insurance company.

CPR 286. An attorney may participate in a mediation service with marriage counselors but should not later represent either party in domestic litigation.

CPR 317. An attorney appointed to represent a state official or agency may not represent other clients in a suit against the same official or agency, another official or agency under the jurisdiction of that same official or agency or another official or agency with authority over the official or agency. Nor should an attorney represent one official or agency while representing other clients against another official or agency if both of the officials or agencies are under the jurisdiction of the same official or agency.

CPR 323. An attorney may not act as a friend and attempt to mediate a domestic problem and later represent the wife in domestic litigation.

CPR 344. An attorney for a school board is not automatically disqualified from representing criminal defendants despite the school board's interest in fines and forfeitures.

RPC 18. An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

RPC 22. An attorney may not represent the administratrix officially and personally where her interests in the two roles are in conflict without the consent of the heirs.

RPC 24. An attorney may not purchase his client's property at an execution sale on his own account.

RPC 28. An attorney may represent the estate of pilot and the estate of passenger in a wrongful death case against the airplane manufacturer if attorney is convinced that there was no pilot negligence and if the representatives of both estates consent.

RPC 53. A lawyer may sue a municipality his partner serves as a member of its governing body. (But see RPC 160.)

RPC 54. A lawyer who represents a criminal defendant from whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local school board.

RPC 55. A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 56. A lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

RPC 59. A lawyer may represent an insurer and its insured as co-plaintiffs in a declaratory judgment action.

RPC 60. Subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

RPC 65. The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

RPC 72. An attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a tribal court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the tribal police force.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 95. An assistant district attorney may prosecute cases while serving on the school board.

RPC 100. An attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 105. A public defender may represent criminal defendants while serving on the school board.

RPC 109. An attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer, and the attorney employed by the liability insurer may not take a position on behalf of the insurer which is adverse to the insured.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

RPC 123. An attorney may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

RPC 131. An attorney employed to represent a county in appellate matters may also sue the county's department of social services if the county and the plaintiffs consent.

RPC 140. There is no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

RPC 151. Where an insurance company and its policyholder are both parties to an action, a lawyer who is a full-time employee of the insurance company may not represent both the insurance company and the policyholder because of the "diluted responsibility" to the policyholder created by the employment relationship between the lawyer and the insurance company.

RPC 154. An attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

RPC 160 (Second Revision). A lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client.

RPC 168. A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 170. A lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

RPC 177. A lawyer may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

RPC 207 (Second Revision). A lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

RPC 228. A lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 251. A lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative, gives informed consent to the representation and the lawyer does not advocate against the interest of any client in the division of the insurance proceeds.

II. REAL PROPERTY CONFLICTS.

99 Formal Ethics Opinion 1 Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

99 Formal Ethics Opinion 8 — Opinion rules that a lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

CPR 100. (See also RPC 210 and 97 Formal Ethics Opinion 8.) In the usual residential loan transaction:

(a) A lawyer may ethically represent both the borrower and the lender.

(b) If the lawyer intends not to represent both the borrower and the lender, he must give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.

(c) If the lawyer does not give such notice, he shall be deemed to represent both the borrower and the lender.

(d) If the lawyer represents only the borrower, he may nevertheless ethically provide the title and lien priority assurances required by the lender as a condition of the loan.

(e) The lawyer shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.

(f) If the lawyer does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.

(g) If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before, during or after the closing.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and not secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

It is not unethical for the lawyer representing the borrower, the lender and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee's title insurance policy, the premium for which is normally paid by the borrower.

CPR 107. An attorney/trustee in a foreclosure proceeding which is not contested by the owner-borrower may represent the lender in resisting a tenant's suit to restrain foreclosure. (But see RPC 82.)

CPR 137. An attorney/trustee in a foreclosure proceeding may not represent the lender when the foreclosure is contested by the borrower. (But see RPC 82.)

CPR 166. An attorney/trustee cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. In the absence of controversy the trustee may present, on behalf of the lender, the evidence necessary to support the clerk's findings essential to a foreclosure order. Even if the proceeding is adversary, he may ethically perform for himself such legal services as are necessary to the performance of his fiduciary duties. (See also RPC 82.)

CPR 201. When an attorney/trustee learns that a foreclosure will be contested, he may resign as trustee and represent the lender. (See also RPC 82.)

CPR 220. An attorney's secretary may not be trustee if the attorney wishes to represent the lender at a contested foreclosure.

CPR 264. After initiating foreclosure, an attorney/trustee may not represent the lender in defense of the borrower's suit for injunctive relief. (See also RPC 82.)

CPR 275. An attorney who is part owner of a mortgage brokerage firm may certify title to real property with respect to which the mortgage broker has arranged financing.

CPR 297. An attorney/trustee cannot represent a husband-debtor in a partition action against his wife-debtor, but he may resign as trustee and then represent the husband. (See also RPC 82.)

CPR 305. An attorney/trustee cannot represent the lender in bankruptcy court in seeking relief from an automatic stay in order to commence foreclosure. (See also RPC 82.)

RPC 3. An attorney/trustee is not prohibited from continuing to serve as trustee in a contested foreclosure if he represented the seller at the closing. (See also RPC 82.)

RPC 40. For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. (See also RPC 41.)

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 46. An attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding. (See also RPC 82.)

RPC 49. Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, and such attorneys may not close transactions brokered by the real estate firm.

RPC 64. A lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser. (See also RPC 82.)

RPC 78. A closing attorney cannot make conditional delivery of trustee account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

RPC 82. This opinion comprehensively revises the ethical responsibilities of the attorney-trustee.

RPC 83. The significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

RPC 86. Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller. (See also RPC 191.)

RPC 88. A lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

RPC 90. A lawyer who as a trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. (See also RPC 82.)

RPC 121. A borrower's lawyer may render a legal opinion to the lender.

RPC 185. A lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

RPC 188. A lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

RPC 201. Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

RPC 210. Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

RPC 248. A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

97 Formal Ethics Opinion 8. Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

98 Formal Ethics Opinion 10. Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 Formal Ethics Opinion 11. Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

Rule 1.8. Conflict of interest: Current clients: Specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift, is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary, or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of the client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i), that applies to any one of them shall apply to all of them.

COMMENT

Note: See Rule 1.19 for the prohibition on client-lawyer sexual relationships.

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilitys services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representa-

tion to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a)

protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7 are satisfied. Specifically, the lawyer must reasonably believe that the representation will not be adversely affected after taking into account the possibility that the acquisition of a proprietary interest in the client's cause of action or any res involved therein may cloud the lawyer's judgment and impair the lawyer's ability to function as an advocate. The lawyer must also disclose the risks involved prior to obtaining the client's consent. Prior to initiating a foreclosure on property subject to a lien securing a legal fee, the lawyer must notify the client of the right to require the lawyer to participate in the mandatory fee dispute resolution program. See Rule 1.5(f).

[17] The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Imputation of Prohibitions

[18] Under paragraph (j), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.8 is similar to Model Rule 1.8 except that Rule 1.8(b) has no counterpart in the Model Rules. Rule 1.8(a) is similar to Rule 5.4(a) of the superseded (1985) Rules of Professional Conduct. The provisions of Rule 1.8(b) through (j) correspond to Rules 5.4(c), 5.5, 5.4(b), 5.3(b), 5.6, 5.7, 5.8, 5.9 and 5.3(a) of the superseded (1985) Rules of Professional Conduct, respectively.

Legal Periodicals. — For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

CASE NOTES

A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against the directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181 (1979).

Agreement Limiting Law Firm's Liability for Malpractice. — Although a law firm that represented a client included language in an agreement that limited its liability for malpractice, in violation of former N.C. R. Prof. Conduct 5.8 [see now Rule 1.8], that violation did not create civil liability as a matter of law. (decided under former law). Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C. App. 397, 594 S.E.2d 44, 2004 N.C. App. LEXIS 401 (2004), cert. denied, 359 N.C. 190, 607 S.E.2d 275 (2004).

Release Exonerating Attorney. — The attorney violated the Code of Professional Responsibility by having his client sign a release in an attempt to exonerate himself from malpractice. North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648, appeal dismissed, 308 N.C. 677, 303 S.E.2d 546 (1983).

Obligation to Pay Expert. — When a lawyer hiring an expert to help on a case says or does nothing to indicate that the obligation to pay is not his, the expert can reasonably assume that the lawyer is the contracting party, rather than the client. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, disc. rev. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

Lending Money to Clients. — The State Bar's hearing committee's finding adequately supported its conclusion that the defendant violated Rules of Professional Responsibility 5.3(B) and 1.2(A) where the undisputed facts were that: (1) the defendant kept $ 20,000.00 in his trust account for several years which came from his brother's company, and (2) he loaned this money to three clients to pay for one client's surgery; another client's rent and payments on a car note; and a third client's surgical, medical and travel expenses. North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

Liability for Costs of Class Action. — Where class representative plaintiffs agreed with their counsel that counsel — rather than the class members or class representatives — would bear ultimate liability for the costs and expenses of litigation the arrangement was ethical and in no way impacted upon the adequacy of counsel under Federal Rules of Civil Procedure Rule 23(a)(4). In re Southeast Hotel Properties Ltd. Partnership Investor Litig., 151 F.R.D. 597 (W.D.N.C. 1993).

Attorney Not Ultimately Liable to Pay Costs of Medical Copies. — Attorney's action against a medical records copier, which alleged that the copier charged excessive fees for records obtained on behalf of personal injury clients, was properly dismissed where it was held that the attorney was not the real party in interest pursuant to G.S. 1A-1, N.C. R. Civ. P. 17(a) and G.S. 1-57 because he was not ultimately liable for the costs thereof pursuant to the dictates of N.C. Rev. R. Prof. Conduct 1.8, and accordingly, he lacked standing to bring the action in his own name; he was not entitled to substitute his clients as the proper parties because no request to do so was made in a timely fashion. Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

No Conflict of Interest Found. — Because a union local agreed to finance a declaratory class action suit by 800 retirees to enforce the terms of their collective bargaining agreement, there was no conflict of interest under N.C. Code Prof. Resp. DR 1.8(f)(3) between the law firm's representation of the class of retirees and the union local because at least two representations of the retirees indicated an implied understanding that some information may be provided to the Union and any action by the retiree class against the union was time barred under the six month statute of limitations found in 29 U.S.C.S. § 160(b). Trull v. Dayco Prods, LLC, 214 F.R.D. 394, 2003 U.S. Dist. LEXIS 7647 (W.D.N.C. 2003).

No evidence in the record indicated that an attorney's representation of several of a testatrix's children involved a concurrent conflict of interest or that he failed to have the necessary informed consent from his clients regarding an aggregate settlement in violation of N.C. R. Prof. Conduct 1.7(a) or 1.8(g); however, the attorney's letters to the court, his attempts to reopen virtually all of the points of contention that had been laid to rest during the settlement negotiations, and his behavior at hearings provided ample support a conclusion that the attorney violated N.C. R. Prof. Conduct 8.4(d). Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Where a bankruptcy trustee brought an adversary proceeding against a former officer of the bankruptcy debtor, and the trustee previously communicated with the officer in relation to another bankruptcy and other matters, there was no violation of N.C. R. Prof. Conduct 1.8(b) to warrant disqualification of the trustee, since nothing in the communications between the trustee and the officer was related to personal information of the officer or other parties in the proceeding. Peavey v. Bradley (In re Heritage Med. Assocs., P.A.), 362 B.R. 235, 2007 Bankr. LEXIS 581 (Bankr. E.D.N.C. 2007).

Cited in Baxley v. Jackson, 179 N.C. App. 635, 634 S.E.2d 905, 2006 N.C. App. LEXIS 2055 (2006).

DISCIPLINARY HEARING NOTES

The attorney accepted compensation from someone other than his client without the knowledge or consent of his client. Private Reprimand. **79 DHC 26.**

Among other things, the attorney invested the proceeds from a wrongful death action in a corporation in which the attorney owned a 90% interest, without the knowledge or consent of his client.

Attorney also attempted to exonerate himself or limit his liability for malpractice by presenting his client with a document entitled "Release" and procuring his client's signature. Eighteen Month Suspension. **80 DHC 16.**

In addition to other misconduct, the attorney required the client to sign a release form exonerating the attorney from liability for malpractice before turning over the client's files. One Year Suspension. **81 DHC 4.**

The attorney certified title to 77 acres of his client's land. A dispute ensured over 47 acres. The attorney advised the client that it would cost $5,000 to settle the dispute. The client could not afford this amount so the attorney offered to purchase all the property for $2800. The client sold the property to the attorney for $3550. The attorney did not pay fair market value for the property and later sold the property for $30,000. Eighteen Month Suspension. **85 DHC 7.**

The attorney entered into a contract with a client to purchase property of the client which proved ultimately to be unfair to the client. Six Month Suspension, stayed three years upon certain conditions. **89 DHC 41.**

The attorney had a client sign an agreement prospectively limiting the attorney's malpractice liability to the client, at a time when the client was not represented by independent counsel and without advising her to obtain such counsel. One Year Suspension, stayed for three years upon conditions. **90 DHC 23.**

Attorney purchased house from 81-year-old client for less than fair market value without fully disclosing risks of transaction and without advising client to seek independent counsel. One Year Suspension, stayed for three years and order to reconvey property to client. **92 DHC 8.**

Among other things, attorney borrowed money from client funds on deposit in his trust account without evidencing these transactions by promissory notes or other documentation. One Year Suspension, stayed for three years upon certain conditions. **93 DHC 20.**

Attorney borrowed $10,000 of insurance proceeds from a disabled widow without securing the loan, without providing for the payment of interest and without advising the widow to consult independent counsel. Two Year Suspension, one year stayed upon certain condition. **93 DHC 35.**

ETHICS OPINION NOTES

98 Formal Ethics Opinion 17 Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

CPR 11. An attorney may contract to receive an interest in real property as a contingent fee for legal representation in an action to clear title to the subject property.

CPR 121. It is permissible for the defendant in an uncontested divorce to pay the plaintiff's attorney.

CPR 135. It is not improper for a legal aid society to request clients to donate unused trust funds to the society.

CPR 157. An attorney handling a personal injury case may advance the cost of the client's medical examination if such is actually an expense of litigation for which the client remains ultimately liable.

CPR 241. An attorney may practice law and sell insurance but must keep the law practice and the insurance business separate in all respects. The attorney should not sell insurance to clients for whom he has provided legal services involving estate planning.

CPR 291. An attorney who has procured a judgment for a client that has not been collected by the ninth year may purchase the judgment if the client does wish to renew it, but this practice is not encouraged.

CPR 295. An attorney who refers a client-creditor to a collection agency may accept payment only from the client for legal services rendered to the client.

CPR 346. An attorney may represent a defendant employee of a city and accept payment of his fee from the city even though the employee may cross-claim against city.

CPR 364. An attorney may not purchase a judgment even though the client needs money immediately.

RPC 11. Full disclosure and clients' consent are necessary only when both spouses personally participate as counsel.

RPC 24. An attorney may not purchase his client's property at an execution sale on his own account.

RPC 76. A lawyer may advance his client's fine.

RPC 80. A lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

RPC 124. An attorney may not agree to bear the costs of federal class action litigation.

RPC 134. An attorney may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.

RPC 167. A lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.

RPC 173. A lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

RPC 186. A lawyer who represents a client in a pending domestic action may take a promissory note secured by a deed of trust as payment for the lawyer's fee even though the deed of trust is on real property that is or may be the subject of the domestic action.

RPC 187. A lawyer may not ask a client for authorization to instruct the clerk of court to forward the client's support payments to the lawyer in order to satisfy the client's legal fees.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law related service, such as financial planning, if the law related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

98 Formal Ethics Opinion 14. Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

Rule 1.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

History Note: Amended July 23, 1999; Amended February 27, 2003.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997.

Editor's note. — Rule 1.9 is substantially similar to Model Rule 1.9. Rule 1.9(a) is essentially the same as Rule 5.1(d) of the superseded (1985) Rules of Professional Conduct. Rule 1.9(b) corresponds to Rule 5.11(b) of the superseded (1985) Rules of Professional Conduct and Rule 1.9(c) has no counterpart in the superseded Rules.

CASE NOTES

Conflict of Interest Shown. — The defendant's motion to disqualify the plaintiff's lead attorney and his law firm from representing the plaintiff, under this rule, was granted where although attorney claimed never to have provided legal advice on the scope of defendant's license agreement during the five years that he was their lead counsel, and although the litigation in which he was involved concerned infringement of defendant's patents for cable use, not the direct-to-home or satellite field of use at issue, he had crucial knowledge of the parties' course of conduct under the license agreement, which he could reference in cross-examination of witnesses, and he could even be called as a potential witness. SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616, 2001 U.S. Dist. LEXIS 5893 (W.D.N.C. 2001).

Counsel was properly disqualified and a finding of a conflict of interest was properly made where competent evidence showed that counsel engaged in a civil conspiracy, maintenance, and champerty in his involvement in a lawsuit by his client against a development company and the attorney that owned that development company. Oliver v. Bynum, 163 N.C. App. 166, 592 S.E.2d 707, 2004 N.C. App. LEXIS 304 (2004).

In a patent infringement suit regarding an insulating structure that allowed access to attics while minimizing heat loss, defendants' attorney was disqualified under N.C. R. Prof. Conduct 1.9 because he had previously been a partner in a law firm that filed a patent reissue application, and although he did not actually work on the reissue application or acquire confidential information relating to it, his name appeared on the application and other supporting document and he personally benefitted from legal fees paid to his firm by plaintiff. Attic Tent, Inc. v. Copeland, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 57601 (W.D.N.C. Aug. 14, 2006).

Conflict of Interest Not Shown. — There was no conflict of interest involved where the attorney for the plaintiff in an action to impress a trust had represented a defendant in a divorce action against her former husband, her co-defendant in this action. In this case the former client had consented to the attorney's representation of the current client, her foster mother, who knew of the prior representation. Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

Where a bankruptcy trustee brought an adversary proceeding against a former officer of the bankruptcy debtor, and the trustee previously represented in bankruptcy an entity of which the officer was also a principal, there was no violation of N.C. R. Prof. Conduct 1.9(a) to warrant disqualification of the trustee, since the prior bankruptcy case was not substantially related to the instant case. Peavey v. Bradley (In re Heritage Med. Assocs., P.A.), 362 B.R. 235, 2007 Bankr. LEXIS 581 (Bankr. E.D.N.C. 2007).

In a suit regarding coverage between a primary and a secondary insurer, where the secondary insurer settled a dram shop lawsuit without the primary insurer's participation, and where the primary insurer refused to contribute to the settlement, the secondary insurer's lawyer was not disqualified under N.C.R. Prof. Conduct 1.9; there was no conflict of interest with a former client since the attorney did not represent the primary insurer in settling the dram shop suit, but instead represented the secondary insurer, which had a distinct and individual interest in the dram shop lawsuit. Ohio Cas. Ins. Co. v. Firemen's Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12360 (E.D.N.C. Feb. 13, 2008).

Refusal to Disqualify Counsel. — In a derivative action in which the defendant waited 22 months before moving to disqualify the plaintiffs' counsel on the ground of prior representation of the defendant by the attorney who referred the derivative action to the plaintiffs' counsel, the trial court did not abuse its discretion in refusing to disqualify counsel. Lowder v. All Star Mills Inc., 60 N.C. App. 275, 300 S.E.2d 230, aff'd in part, rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Law firm was disqualified from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. Robert Woodhead, Inc. v. Datawatch Corp., 934 F. Supp. 181 (E.D.N.C. 1995).

Disqualification of Attorney Proper. — Disqualification of an attorney from representing a pharmacy in a case brought against it by plaintiff was proper where plaintiff had consulted with another lawyer in the attorney's firm about the criminal charges which were the basis of the later case against the pharmacy; the firm failed to show that information about plaintiff was not shared with other firm members. Ferguson v. DDP Pharm., Inc., 174 N.C. App. 532, 621 S.E.2d 323, 2005 N.C. App. LEXIS 2492 (2005).

Cited in Cunningham v. Sams, 161 N.C. App. 295, 588 S.E.2d 484, 2003 N.C. App. LEXIS 2038 (2003).

DISCIPLINARY HEARING NOTES

Attorney assisted former in-house counsel to Firestone Tire & Rubber Company to engage in conflict of interest by accepting assistance of the former in-house counsel in preparing complex products liability action against Firestone. Attorney also improperly divided settlement proceeds with the former in-house counsel. Disbarred. **96 DHC 16.**

ETHICS OPINION NOTES

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 119. It is improper for a judgement creditor's attorney or his partner or his lay employee to serve as a referee in supplemental proceedings.

CPR 140. It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 159. It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

CPR 169. An attorney may represent the defendant in a lawsuit after having been first approached by the plaintiff if no attorney-client relationship was formed.

CPR 195. An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

CPR 243. An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

CPR 273. An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

RPC 32. An attorney who represented a husband and wife in certain matters may not later represent the husband in an action for alimony and equitable distribution.

RPC 45. An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

RPC 53. A lawyer may sue a municipality although his partner serves as a member of its governing body. (But see RPC 160.)

RPC 137. An attorney who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

RPC 144. A lawyer having undertaken to represent two clients in the same matter may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

RPC 168. A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 244. Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

Rule 1.10. Imputation of conflicts of interest: General rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong

political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.10 is identical to Model Rule 1.10 and substantially similar to Rule 5.11(a), (c), and (d) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Disqualification of Attorney Proper. — Disqualification of an attorney from representing a pharmacy in a case brought against it by plaintiff was proper where plaintiff had consulted with another lawyer in the attorney's firm about the criminal charges which were the basis of the later case against the pharmacy; the firm failed to show that information about plaintiff was not shared with other firm members. Ferguson v. DDP Pharm., Inc., 174 N.C. App. 532, 621 S.E.2d 323, 2005 N.C. App. LEXIS 2492 (2005).

Cited in Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

ETHICS OPINION NOTES

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

99 Formal Ethics Opinion 3 Opinion rules that lawyers in different field offices of Legal Services of North Carolina may represent clients with materially adverse interests provided confidential client information is not shared by the lawyers with the different field offices.

CPR 96. When different attorneys in the same firm are employed to represent conflicting interests in related cases (estate in wrongful death case and criminal defendant in homicide case), both must withdraw.

CPR 158. An attorney whose partner represented the wife in domestic litigation which resulted in parties holding real property as co-tenants cannot subsequently represent the husband in a partition proceeding.

CPR 274. Attorneys who merely share office space are not automatically disqualified.

RPC 45. An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

RPC 49. Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, but the attorneys and other members of their law firm may not close transactions brokered by the real estate firm.

RPC 55. A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 65. The public defender's office should be considered as a single law firm and staff attorneys may not represent co-defendants with conflicting interests unless both consent and can be adequately represented.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants if a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 248. A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

Rule 1.11. Special conflicts of interest for former and current government officers and employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(B) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client under Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement nor do they specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely significantly to injure the client, a reasonable delay may be justified.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a law-

yer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended October 6, 2004.

Editor's note. — Rule 1.11 is identical to Model Rule 1.11. Rule 1.11 also closely follows Rule 9.1 of the superseded (1985) Rules of Professional Conduct. However, Rule 1.11 permits members of a law firm which employs a former government lawyer to represent a party adverse to the lawyer's former employer, without the consent of the government agency, provided the former government lawyer is "screened" from any involvement with the case and does not receive any fee therefrom. Under superseded Rule 9.1, no member of a disqualified lawyer's firm may participate unless the adverse government party consents.

CASE NOTES

No Per Se Disqualification. — Government employment as a district attorney by an attorney formerly in private practice does not create a per se disqualification of all the other government attorneys on his staff from prosecuting or appearing at any time against his former clients of the attorney who left private practice. State v. Reid, 104 N.C. App. 334, 410 S.E.2d 67 (1991), cert. granted, 331 N.C. 121, 414 S.E.2d 765 (1992), rev'd on other grounds, 334 N.C. 551, 434 S.E.2d 193 (1993).

Stated in State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993)

ETHICS OPINION NOTES

CPR 208. A former U.S. attorney may represent criminal defendants and civil plaintiffs against the United States so long as he did not participate in substantially related matters while with the government.

CPR 245. A former assistant district attorney may not act as private prosecutor in a case he was handling before he left the district attorney's office.

CPR 306. A former district attorney who prepared bills of indictment and requests for extradition in a criminal case may not privately prosecute that case.

CPR 341. Members of a former assistant district attorney's current law firm may not represent a criminal defendant with respect to whom the former assistant district attorney sought indictment, unless the district attorney consents.

Rule 1.12. Former judge, arbitrator, mediator, or other third-party neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge

did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.12 is identical to Model Rule 1.12 and Rule 9.2 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 113. An attorney may not represent either party in a domestic case after having signed a consent judgment in the matter as a judge.

RPC 138. A partner of a lawyer who represents a party to an arbitration should not act as an arbitrator.

Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign or withdraw in accordance with Rule 1.16.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employer, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under these Rules, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization may be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of the law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer reasonably believes that disclosure of information protected by Rule 1.6 is necessary to prevent the commission of a crime by an organizational client, for example, disclosure is permitted by Rule 1.6(b)(2).

If the lawyer's services are being or have been used by an organizational client to further a crime or fraud by the organization, Rule 1.6(b)(4) permits the lawyer to disclose confidential information to prevent, mitigate, or rectify the consequences of such conduct. In such circumstances, Rule 1.2(d) may be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws in circumstances that require or permit the lawyer to take action under these Rules, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended March 2, 2006.

Editor's note. — Rule 1.13 is identical to Model Rule 1.13. Rule 1.13 generally corresponds to Rule 5.10 of the superseded (1985) Rules of Professional Conduct. Unlike the superseded rule, Rule 1.13 contains additional guidance for a lawyer who learns of improper conduct by a constituent of the organization that is inconsistent with the best interests of the organization.

ETHICS OPINION NOTES

CPR 154. Because the town attorney owes allegiance to the town and not to particular employees of the town, he must disclose to any inquiring member of the town's board of commissioners the subject of a town business meeting involving town officials and other interested persons despite contrary instructions from the mayor.

CPR 185. A staff attorney for a member-owned corporation may provide legal advice to members and nonmembers as long as their interests are not in conflict with those of the corporation.

CPR 227. The retained attorney for a religious organization cannot represent citizens who want wills leaving property to the organization.

CPR 228. A retained attorney for a religious organization cannot represent employees of the organization in drawing wills.

CPR 235. An attorney may not offer to draw wills free for church members who agree to contribute a certain amount to the church.

CPR 271. An attorney who drafted a partnership agreement cannot later represent some of the partners against the partnership.

RPC 97. Counsel for a condominium association may represent the association against a unit owner.

97 Formal Ethics Opinion 7. After a corporation files a Chapter 7 bankruptcy petition and at the request of the bankruptcy trustee, a lawyer who previously represented the corporation may continue to represent the corporation's bankruptcy estate and the bankruptcy trustee in a civil action provided the lawyer understands that the trustee is responsible for making decisions about the representation and the representation is not adverse to a former client of the lawyer.

Rule 1.14. Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any

protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.14 is identical to Model Rule 1.14. There is no corresponding rule in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 Formal Ethics Opinion 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 Formal Ethics Opinion 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

Rule 1.15. Safekeeping Property.

Rule 1.15-1. Definitions.

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank, savings and loan association, or credit union chartered under North Carolina or federal law.

(b) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(c) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(d) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(e) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(f) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(g) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(h) "General trust account" denotes any trust account other than a dedicated trust account.

(i) "Item" denotes any means or method by which funds are credited to or debited from an account; for example: a check, substitute check, remotely created check, draft, withdrawal order, automated clearinghouse (ACH) or electronic transfer, electronic or wire funds transfer, electronic image of an item and/or information in electronic form describing an item, or instructions given in person or by telephone, mail, or computer.

(j) "Legal services" denotes services rendered by a lawyer in a client-lawyer relationship.

(k) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(*l*) "Trust account" denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(m) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

History Note: Statutory Authority G.S. 84-23, Amended May 4, 2000; Amended February 27, 2003; Amended March 6, 2008.

Rule 1.15-2. General rules.

(a) *Entrusted property.* All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.

(b) *Deposit of trust funds.* All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer. Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term. General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Section .1300.

(c) *Deposit of fiduciary funds.* All fiduciary funds received by or placed under the control of a lawyer shall be promptly deposited in a fiduciary account or a general trust account of the lawyer.

(d) *Safekeeping of other entrusted property.* A lawyer may also hold entrusted property other than fiduciary funds (such as securities) in a fiduciary account. All entrusted property received by a lawyer that is not deposited in a trust account or fiduciary account (such as a stock certificate) shall be promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping. The lawyer shall disclose the location of the property to the client or other person for whom it is held. Any safe deposit box or other place of safekeeping shall be located in this state, unless the lawyer has been otherwise authorized in writing by the client or other person for whom it is held.

(e) *Location of accounts.* All trust accounts shall be maintained at a bank in North Carolina or a bank with branch offices in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank that does not have offices in North Carolina or at a financial institution other than a bank in or outside of North Carolina. A lawyer may maintain a fiduciary account at any bank or other financial institution in or outside of North Carolina selected by the lawyer in the exercise of the lawyer's fiduciary responsibility.

(f) *Segregation of lawyer's funds.* No funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in currently or conditionally to the lawyer.

(g) *Mixed funds deposited intact.* When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) *Items payable to lawyer.* Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item the client balance on which the item is drawn. Any item that does not capture this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) *No bearer items.* No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by means of a debit card.

(j) *No personal benefit.* A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(k) *Bank directive.* Every lawyer maintaining a trust account or fiduciary account at a bank shall file with the bank a written directive requiring the bank to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank that does not agree to make such reports.

(*l*) *Notification of receipt.* A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(m) *Delivery of client property.* A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(n) *Property received as security.* Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject to the rules governing legal fees or business transactions between a lawyer and client.

(o) *Duty to report misappropriation.* A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

(p) *Interest on deposited funds.* Except as authorized by Rule 1.15-4, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account.

(q) *Abandoned property.* If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-18 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

History Note: Statutory Authority G.S. 84-23, Amended May 4, 2000; Amended February 27, 2003; Amended March 6, 2008.

CASE NOTES

Misappropriation of Funds. — By withdrawing client funds from his trust account and using those funds for his own benefit without his clients' consent, an attorney committed a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer, in violation of N.C. Rev. R. Prof. Conduct 8.4(b), engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c), and failed to hold client and/or fiduciary funds in trust in violation of N.C. Rev. R. Prof. Conduct 1.15-2; the attorney was suspended and disbarred for three years in North Carolina and reciprocally disciplined in South Carolina. In re Crosland, 353 S.C. 54, 577 S.E.2d 214, 2003 S.C. LEXIS 31 (2003).

Failure to Maintain Sufficient Sums in Trust Account. — By failing to maintain a balance in the trust account at all times, sufficient to cover all sums owed to his clients, an attorney failed to hold client funds in trust in violation of N.C. Rev. R. Prof. Conduct 1.15-2; the attorney was suspended and disbarred for three years in North Carolina and reciprocally disciplined in South Carolina. In re Crosland, 353 S.C. 54, 577 S.E.2d 214, 2003 S.C. LEXIS 31 (2003).

Applied in N.C. State Bar v. Talford, 356 N.C. 626, 576 S.E.2d 305, 2003 N.C. LEXIS 38 (2003).

Cited in N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006); N.C. State Bar v. Gilbert, — N.C. App. —, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Rule 1.15-3. Records and accountings.

(a) *Check Format.* All general trust accounts, dedicated trust accounts, and fiduciary accounts must use business-size checks that contain an Auxiliary On-Us field in the MICR line of the check.

(b) *Minimum records for accounts at banks.* The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all records listing the source and date of receipt of any funds deposited in the account including, but not limited to, bank receipts, or deposit slips and wire and electronic transfer confirmations, and, in the case of a general trust account, all records also listing the name of the client or other person to whom the funds belong;

(2) all canceled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each item is drawn, provided, that:

(A) digital images must be legible reproductions of the front and back of the original items with no more than six items images per page and no images smaller than 1-3⁄16 x 3 inches; and

(B) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original items or records related thereto upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any item drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(c) *Minimum records for accounts at other financial institutions.* The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all records listing the source and date of receipt of all funds deposited in the account including, but not limited to, depository receipts, deposit slips and wire and electronic transfer confirmations;

(2) a copy of all checks or other items drawn on the account, or printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account (including electronic transfers or debits) or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any instrument drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(d) *Reconciliations of general trust accounts.*

(1) *Quarterly Reconciliations.* At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole. The lawyer shall retain all records pertaining to the quarterly reconciliations of the general trust account for a period of six years.

(2) *Monthly Reconciliations.* Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account.

(3) The lawyer shall retain a record of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) *Accountings for trust funds.* The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(f) *Accountings for fiduciary property.* Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(g) *Minimum record keeping period.* A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for at least the six (6) year period immediately preceding the lawyer's most recent fiscal year end.

(h) *Audit by state bar.* The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying in North Carolina upon request by the State Bar.

COMMENT

[1] The purpose of a lawyer's trust account or fiduciary account is to segregate the funds belonging to others from those belonging to the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer's creditors or place the funds in the lawyer's estate in the event of the lawyer's death or disability.

Property Subject to These Rules

[2] Any property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15. The minimum records to be maintained for accounts in banks differ from the minimum records to be maintained for accounts in other financial institutions (where permitted), to accommodate brokerage accounts and other accounts with differing reporting practices.

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Client funds must be promptly deposited into the trust account. Client funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:

a) The amount of the funds to be deposited;

b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c) The rates of interest or yield at financial institutions where the funds are to be deposited;

d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;

f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

When regularly reviewing the trust accounts, the lawyer shall determine whether changed circumstances require further action with respect to the funds of any client. The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment. A law firm with offices in another state may send a North Carolina client's funds to a firm office in another state for centralized processing provided, however, the funds are promptly deposited into a trust account with a bank that has branch offices in North Carolina, and further provided, the funds are transported and held in a safe place until deposited into the trust account. If this procedure is followed, client consent to the transfer of the funds to an out-of-state office of the firm is not required. However, all such client funds are subject to the requirements of these rules. Funds delivered to the lawyer by the client for payment of future fees or expenses should never be used by the lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

[4] This rule does not prohibit a lawyer who receives an instrument belonging wholly to a client or a third party from delivering the instrument to the appropriate recipient without first depositing the instrument in the lawyer's trust account.

Property from Professional Fiduciary Service

[5] The phrase "professional fiduciary service," as used in this rule, is service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law."

[6] Property held by a lawyer performing a professional fiduciary service must also be segregated from the lawyer's personal property, properly labeled, and maintained in accordance with the applicable provisions of this rule.

[7] When property is entrusted to a lawyer in connection with a lawyer's representation of a client, this rule applies whether or not the lawyer is compensated for the representation. However, the rule does not apply to property received in connection with a lawyer's uncompensated service as a fiduciary such as a trustee or personal representative of an estate. (Of course, the lawyer's conduct may be governed by the law applicable to fiduciary obligations in general, including a fiduciary's obligation to keep the principal's funds or property separate from the fiduciary's personal funds or property, to avoid self-dealing, and to account for the funds or property accurately and promptly).

[8] Compensation distinguishes professional fiduciary service from a fiduciary role that a lawyer undertakes as a family responsibility, as a courtesy to friends, or for charitable, religious or civic purposes. As used in this rule, "compensated services" means services for which the lawyer obtains or expects to obtain money or any other valuable consideration. The term does not refer to or include reimbursement for actual out-of-pocket expenses.

Property Excluded from Coverage of Rules

[9] This rule also does not apply when a lawyer is handling money for a business or for a religious,

civic, or charitable organization as an officer, employee, or other official regardless of whether the lawyer is compensated for this service. Handling funds while serving in one of these roles does not constitute "professional fiduciary service," and such service is not "customary to the practice of law."

Burden of Proof

[10] When a lawyer is entrusted with property belonging to others and does not comply with these rules, the burden of proof is on the lawyer to establish the capacity in which the lawyer holds the funds and to demonstrate why these rules should not apply.

Prepaid Legal Fees

[11] Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be place in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

Abandoned Property

[12] Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer should contact the escheat officer at the Office of the North Carolina State Treasurer in Raleigh, North Carolina.

Disputed Funds

[13] A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as the State Bar's program for fee dispute resolution. See Rule 1.5(f). The undisputed portion of the funds shall be promptly distributed.

[14] Third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claim is resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Responsibility for Records and Accountings

[15] It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule. The required record retention period of six years set forth in this rule does not preclude the State Bar from seeking records for a period prior to the retention period and, if obtained, from pursuing a disciplinary action based thereon if such action is not prohibited by law or other rules of the State Bar.

[16] Many businesses are now converting paper checks to automated clearinghouse (ACH) debits to decrease costs and increase operating efficiencies. When a check is converted, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). If a check drawn on a trust account is converted to ACH, the lawyer will not receive either the physical check or a check image. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit).

[17] To prevent conversion of a check to ACH without authorization, a lawyer is required to use checks with an "Auxiliary On-Us field." A check will not be eligible for conversion to ACH if it contains an Auxiliary On-Us field, which is an additional field that appears in the left-most position of the MICR (magnetic ink character recognition) line on a business size check. The lawyer should confirm with the lawyer's financial institution that the Auxiliary On-Us field is included on the lawyer's trust account checks. Including an Auxiliary On-Us field on the check will require using checks that are longer than six inches. As with the other information in the MICR line of a check, the routing, account and payment numbers, the financial institution issuing the check determines the content of the Auxiliary On-Us field.

[18] Authorized ACH debits that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

[19] The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a month, the lawyer must reconcile the current bank statement balance with the balance shown for the entire account in the lawyer's records, such as a

check register or its equivalent, as of the date of the bank statement. At least once a quarter, the lawyer must reconcile the individual client balances shown on the lawyer's ledger with the current bank statement balance. Monthly reconciliation will help to uncover unauthorized ACH transactions promptly. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

Bank Notice of Overdrafts

[20] A properly maintained trust account should not have any items presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000; Amended February 27, 2003; Amended October 6, 2004; Amended March 6, 2008.

Rule 1.15-4. [Reserved].

(Deleted in its entirety, effective March 6, 2008.)

Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client, or:

(2) the client knowingly and freely assents to the termination of the representation; or

(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the client insists upon taking action that the lawyer considers repugnant, imprudent or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud; or

(6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the State for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.16 is similar to Model Rule 1.16, except the Model Rule permits a lawyer to retain client papers to the extent permitted by law. By contrast, Rule 1.16 requires the lawyer to deliver all papers to the client upon termination of the representation. Rule 1.16 is similar to Rule 2.8 of the superseded (1985) Rules of Professional Conduct. Rule 1.16, however, explicitly permits a lawyer to withdraw from the representation of a client, without cause and without the consent of the client, subject to the authority of the court to require continued representation, provided the withdrawal can be accomplished without material prejudice to the client. The superseded rule permits withdrawal only for cause.

CASE NOTES

Inadequate Notice of Withdrawal. — An attorney did not withdraw from representation when he sent his client a letter stating that he believed he could not handle the client's case and that the client should visit the office for further discussion. North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L.Ed.2d 338 (1985).

Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008), N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007).

Even after considering any evidence from which conflicting inferences could have been drawn, a disciplinary order's findings of fact adequately supported the Disciplinary Hearing Commission's conclusion that an attorney violated N.C. Rev. R. Prof. Conduct 1.16(c) by failing to seek the court's permission before effectively concluding his representation of a client. N.C. State Bar v. Key, — N.C. App. —, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

Duty of Attorney to Withdraw. — Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Duty to Represent Client. — Substantial evidence showed that an attorney's conduct by not representing a client at a probation hearing, after the attorney made a general appearance on the client's behalf and obtained a continuance, violated N.C. Rev. R. Prof. Conduct 1.16; the attorney, who stated that the client was not paying him, refused to represent the client when confronted with his ethical and legal obligations by the trial judge. In re Key, — N.C. App. —, 643 S.E.2d 452, 2007 N.C. App. LEXIS 799 (2007), cert. denied, 361 N.C. 428, 648 S.E.2d 506 (2007).

Withdrawal Proper. — Defendants were entitled to summary judgment as to a claim of legal negligence or malpractice, as N.C. R. Prof. Conduct 1.16(a) states that an attorney was required to withdraw from the representation of a client if the lawyer's physical or mental condition materially impaired the lawyer's ability to represent the client, and defendants filed their motion to withdraw based on an attorney's heart attack more than seven weeks prior to the scheduled trial date; thus, the motion to withdraw did not breach the duty owed to plaintiff. Wilkins v. Safran, 185 N.C. App. 668, 649 S.E.2d 658, 2007 N.C. App. LEXIS 1952 (2007).

Applied in In re Carolina Premier Med. Group, P.A., — Bankr. —, 2001 Bankr. LEXIS 1845 (Bankr. M.D.N.C. Aug. 20, 2001).

Cited in State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003); N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003); State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007).

DISCIPLINARY HEARING NOTES

The attorney was employed and paid in advance by an incarcerated client to pursue post-conviction relief. When the attorney failed to act on the client's behalf, the client discharged the attorney and demanded a refund. The attorney refused to refund the client any portion of the fee and refused to answer the State Bar's request for explanation. Two Year Suspension. **82 DHC 10, 11.**

Attorney refused to withdraw from case or return client's file when directed to do so by client. Attorney failed to respond to discovery requests and did not appear at disciplinary hearing. One Year Suspension. **88 DHC 7.**

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

Attorney required client to sign a release before turning over the client's file to her. Suspended One Year, stayed three years upon certain conditions. **90 DHC 23.**

Among other things, the attorney failed to refund unearned fees in two cases. Six Month Suspension and an order of restitution. **91 DHC 24.**

ETHICS OPINION NOTES

CPR 3. A client is entitled to his file upon withdrawal of his attorney.

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 186. It is permissible for an attorney to withdraw after giving notice of appeal when the client agrees that an appeal would be fruitless and the client assumes responsibility for retaining another attorney. The Rules of Court determine whether the tribunal's permission is required.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

CPR 315. An attorney must give an indigent client the transcript provided by the State after disposition of the appeal.

CPR 322. After completion of custody litigation, an attorney must release a "home study" report to a client unless such is precluded by statute or court order.

RPC 8. An attorney employed by an insurer to represent an uninsured motorist may not withdraw after settlement between insurer and the claimant until the court gives permission and the attorney takes steps to minimize prejudice to his client.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 58. Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 79. A lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

RPC 106. Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 153. In cases of multiple representation, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 158 (Third Revision). Any portion of a sum of money paid by a client in advance to secure payment of a fee that is unearned at the time the lawyer is discharged must be refunded to the client.

RPC 169. A lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

RPC 178. Opinion examines the obligation to deliver the file to the client upon the termination of the representation when a lawyer represents multiple clients in a single matter.

RPC 227. A former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

RPC 233. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 234. An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 245. A lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

98 Formal Ethics Opinion 9. Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

Rule 1.17. Sale of a law practice.

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may work for the purchaser as an independent contractor and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) The entire practice, or the entire area of practice, is sold one or more lawyers or law firms;

(c) Written notice is sent to each of the seller's clients regarding:

(1) the proposed sale, including the identity of the purchaser;

(2) the client's right to retain other counsel and to take possession of the client's files prior to the sale or at any time thereafter; and

(3) the fact that the client's consent to the transfer of the client's files and legal representation to the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice.

(d) If the seller or the purchaser identifies a conflict of interest that prohibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel.

(e) If a client cannot be given notice, the files and the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary for the court to decide whether to issue the order. In the event the court fails to grant a substitution of counsel in a matter, that matter shall not be included in the sale and the sale otherwise shall be unaffected.

(f) The fees charged clients shall not be increased by reason of the sale.

(g) The seller and purchaser may agree that the purchaser does not have to pay the entire sales price for the seller's law practice in one lump sum. The seller and purchaser may enter into reasonable arrangements to finance the purchaser's acquisition of the seller's law practice without violating Rules 1.5(e) and 5.4(a). The seller, however, shall have no say regarding the purchaser's conduct of the law practice.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as an independent contract lawyer for the purchaser. Permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentoring to new lawyers. The requirement that the seller cease private practice also does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business. Similarly, the Rule allows the seller to provide *pro bono* representation to indigent persons on his own initiative and to provide legal representation to family members without charge.

[4] The Rule permits a sale attendant upon discontinuing the private practice of law from an office that is within a one-hundred (100) mile radius of the purchased practice. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another part of North Carolina or to another state.

Sale of Entire Practice or Entire Area of Practice

[5] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of a less than the entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[6] Written notice of the proposed sale must be sent to all clients who are currently represented by the seller and to all former clients whose files will be transferred to the purchaser. Although it is not required by this rule, the placement of a notice of the proposed sale in a local newspaper of general circulation would supplement the effort to provide notice to clients as required by subpart (c) of the rule.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the

sale of the practice. The notice to clients must advise clients that they have a right to retain a lawyer other than the purchaser. In addition, the notice must inform clients that their right to counsel of their choice continues after the sale even though they consent to the transfer of the representation to the purchaser.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts which can be agreed to (see Rule 1.7) regarding conflicts and Rules 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules1.6 and 1.9).

[12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by the Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended November 16, 2006.

Editor's note. — Rule 1.17 is similar to Model Rule 1.17. Model Rule 1.17, however, provides that consent to the transfer of the client's matter to the purchaser of the law practice will be presumed 90 days after receipt of notice whereas Rule 1.17 requires only 30 days notice. Rule 1.17 also permits the transfer of matters in different practice areas to different purchasers and requires notice to the client of any conflict of interest. There is no counterpart to Rule 1.17 in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

98 Formal Ethics Opinion 6. Opinion rules that the requirements set forth in Rule 1.17 relative to the sale of a law practice to a lawyer who is a stranger to the firm do not apply to the sale of a law practice to lawyers who are current employees of the firm.

Rule 1.18. Duties to prospective client.

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15. For the special considerations when a prospective client has diminished capacity, see Rule 1.14.

History Note: Amended February 27, 2003

CASE NOTES

Appearance of Impropriety. — In a patent infringement suit regarding an insulating structure that allowed access to attics while minimizing heat loss, plaintiff's attorney was recused under N.C. R. Prof. Conduct 1.18 because he had previously discussed the patent issue and defendants' financial condition with defendants, and the fact that during this conversation he recorded plaintiff's patent number supported the contention that he discussed confidential information concerning the design and construction of the product that was central to the lawsuit. Attic Tent, Inc. v. Copeland, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 57601 (W.D.N.C. Aug. 14, 2006).

Rule 1.19. Sexual relations with clients prohibited.

(a) A lawyer shall not have sexual relations with a current client of the lawyer.

(b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.

(c) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.

(d) For purposes of this rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

COMMENT

[1] Rule 1.17, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability competently to represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that a sexual relationship with a client is damaging to the lawyer-client relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that lead the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] A sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer violates one of the most basic ethical obligations, i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. See Rule 1.6 and Rule 1.8.

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. The existence of a sexual relationship between lawyer and client under the circumstances proscribed by this rule presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A sexual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship.

No Prejudice to Client

[5] The prohibition upon representing a client with whom a sexual relationship develops applies regardless of the absence of a showing of prejudice to the client and regardless of whether the relationship is consensual.

Prior Consensual Relationship

[6] Sexual relationships that predate the lawyer-client relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual relationship exists prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is having a sexual relationship is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 1.18 has no counterpart in either the Model Rules or the superseded (1985) Rules of Professional Conduct. The text of Rule 1.18 is derived from similar rules in other states. The comment to Rule 1.18 draws heavily from the text of ABA Formal Opinion 92-364, "Sexual Relations with Clients," adopted by the ABA Standing Committee on Ethics and Professional Responsibility on July 6, 1992.

DISCIPLINARY HEARING NOTES

Attorney engaged in unwanted touching of client in violation of superseded Rule 1.2(b) and (d), prohibiting criminal conduct and conduct prejudicial to the administration of justice. Three Year Suspension, six months active and thirty months stayed upon certain conditions. **94 DHC 1.**

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice in violation of superseded Rules 5.1 and 1.2, respectively. Disbarred. **95 DHC 13.**

94 DHC 1. — Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice in violation of superseded Rules 5.1 and 1.2, respectively. Disbarred. **95 DHC 13.**

COUNSELOR

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 2.1 is identical to Model Rule 2.1. Rule 2.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

Rule 2.2. [Reserved].

Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client so requests or the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

Definition

[1] An evaluation may be performed at the client's direction for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[5] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 2.3 closely follows Model Rule 2.3. Rule 2.3 has no counterpart in the superseded (1985) Rules of Professional Conduct.

Rule 2.4. Lawyer serving as third-party neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission and the North Carolina Canons of Ethics for Arbitrators.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

History Note: Amended February 27, 2003.

ADVOCATE

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits

within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 3.1 is identical to Model Rule 3.1 and similar to Rule 7.2(a)(1) and (2) of the superseded (1985) Rules of Professional Conduct.

DISCIPLINARY HEARING NOTES

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

CASE NOTES

Concealment of Material Facts. — Vicarious ethical liability was not imposed upon a district attorney and an assistant district attorney, who allegedly knowingly failed to disclose all the terms of an immunity agreement for a witness to testify against a criminal defendant, for the State of North Carolina's conduct of the defense of the criminal defendant's motion for appropriate relief proceedings. N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

Conduct Reflected an Objectively Reasonable Course of Action and Was Not Deficient. — Under N.C. R. Prof. Conduct 3.1, cmt. 2, it was not unethical for an attorney to have filed a suppression motion even if the chances of prevailing were slim so long as there was a legal basis for the motion. However, once the government indicated that it would seek to add an additional firearm charge unless the inmate withdrew the motion, the attorney conducted further research and made a strategic decision to advise the inmate to withdraw the motion and plead guilty rather than face additional years of imprisonment; thus, her conduct reflected an objectively reasonable course of action and was not deficient. Owens v. United States, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 21888 (E.D.N.C. Mar. 17, 2008).

ETHICS OPINION NOTES

CPR 122. An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

CPR 321. It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

CASE NOTES

Applied in In re N.B., 183 N.C. App. 114, 644 S.E.2d 22, 2007 N.C. App. LEXIS 831 (2007).

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 3.2 is identical to Model Rule 3.2. Rule 3.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 321. It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by

the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. See Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's action must also be seasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately, however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate's only option may be to make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person,

including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Constitutional Requirements

[13] The general rule that an advocate must reveal the existence of perjury with respect to a material fact—even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. These provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

[14] A practical time limit on the obligation to rectify false evidence or false statements of material fact or law has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when no matters in the proceeding are still pending before the tribunal or the proceeding has concluded pursuant to the rules of the tribunal such as when a final judgment in the proceeding is affirmed on appeal, a bankruptcy case is closed, or the time for review has passed.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[16] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 3.3 is identical to Model Rule 3.3. Comment [10] to Rule 3.3, however, clarifies that the lawyer may, but is not required to disclose client perjury, whereas comment [10] to Model Rule 3.3 implies that disclosure is required. Rule 3.3 generally corresponds to Rule 7.2 of the superseded (1985) Rules of Professional Conduct. The superseded rule requires a lawyer who learns of a client's perjury, to withdraw from the litigation if the client refuses to rectify the fraud, but does not permit disclosure of client perjury. In a significant departure from the superseded (1985) Rules, Rule 3.3 requires a lawyer in an ex parte proceeding to inform the court of all material facts known to the lawyer, even those adverse to the client's position.

Legal Periodicals. — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

CASE NOTES

Preparation of Witness. — It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979).

Client Perjury. — Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Although defense counsel believed that defendant's testimony at trial would be false, it was up to the jury to assess witness credibility since Rule 3.3(a)(3) did not permit a lawyer to refuse to offer the testimony of such a client if the lawyer reasonably believed but did not know that the testimony would be false; unless the lawyer knew the testimony would be false, the lawyer had to honor a client's decision to testify. State v. Colson, — N.C. App. —, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007), review denied, 362 N.C. 89, 656 S.E.2d 280 (2007), State v. Colson, — N.C. App. —, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007).

Preventing Witness Perjury. — The defense counsel's decision to exclude an individual from the witness list was "well within the range of professionally reasonable judgments" where counsel believed he would perjure himself. State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201, 2001 N.C. App. LEXIS 138 (2001).

Concealment of Material Facts. — Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Where creditors and their attorney willfully violated the discharge injunction by pursuing a state court collection action against a Chapter 7 debtor, the attorney failed miserably to meet the attorney's duties of candor, both to the state court and to the bankruptcy court, was found to be in civil contempt of court, and was ordered to pay damages, including punitive damages. In re Bock, 297 Bankr. 22, 2001 Bankr. LEXIS 2125 (Bankr. W.D.N.C. 2001).

Failure to Inform Court of Opposing Party's Address. — An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Quoted in Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Cited in State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007); Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006).

DISCIPLINARY HEARING NOTES

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. **81 DHC 2.**

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed the client's case with the former judge. Censure. **92 DHC 3.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 16 Opinion rules that a lawyer may not participate in the presentation of a consent judgment to a court if the lawyer knows that the consent judgment is based upon false information.

CPR 92. An attorney who knows that criminal clients gave arresting officers fictitious names should call upon the clients to disclose their true identities to the court and, if they refuse, seek to withdraw.

CPR 122. An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

RPC 33. If an attorney's client testifies falsely regarding a material matter, such as his or her name or criminal record, the attorney must call upon the client to correct the testimony. If the client refuses, the attorney must seek to withdraw in accordance with the rules of the tribunal.

RPC 203. Dismissal of an action alone is not sufficient to rectify the perjury of a client in a deposition and the lawyer must demand that the client inform the opposing party of the falsity of the deposition testimony or, if the client refuses, withdraw from the representation.

Revised 98 Formal Ethics Opinion 1. Opinion rules that a lawyer representing a client in a social security disability hearing is not required to inform the administrative law judge of material adverse facts known to the lawyer.

98 Formal Ethics Opinion 5. Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 Formal Ethics Opinion 20. Opinion rules that, subject to a statute prohibiting the withholding of such information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days.

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules, however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

[5] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure

requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, Terminology, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[6] To bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[7] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. See also Rule 4.2.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended November 16, 2006.

Editor's note. — Rule 3.4 is substantially similar to Model Rule 3.4. Rule 3.4 generally corresponds to provisions of Rules 7.2(a)(7), 7.6 and 7.9 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Interjection of Personal Opinion. — Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

Although opening statement of tortfeasor's defense counsel and closing argument of tortfeasor's different defense counsel were improper because they both characterized the injured party's case as "nonsense," the statements were not so prejudicial as to entitle the injured party to a new trial since the trial court sustained the injured party's objections to both comments and the injured party did not request that a curative instruction be given. Smith v. Hamrick, 159 N.C. App. 696, 583 S.E.2d 676, 2003 N.C. App. LEXIS 1500 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 674 (2003).

No Injection of Personal Opinion. — Prosecutor's closing arguments to the jury, in which the prosecutor advocated that the jury return a binding recommendation of death, did not express the prosecutor's personal desires, opinions, or beliefs, but were well within the "wide latitude" of what was permissible. State v. Murrell, — N.C. —, — S.E.2d —, 2008 N.C. LEXIS 688 (Aug. 27, 2008).

Interjection of Unsupported Knowledge and Belief. — Counsel may not, by agreement or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

Preparation of Witness. — It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979).

Informing a potential witness to plead the U.S. Const., Amend. V or to stay away from court unless subpoenaed is not unethical. Certainly no rule prevents an attorney from informing a potential witness of his legal rights. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Ethical transgressions by trial counsel do not always constitute legal error. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L.Ed.2d 392 (1981).

Argument Containing Personal Belief. — The defendant contended on appeal that the prosecutor's argument to the jury contained the prosecutor's personal belief as to the defendant's guilt in violation of the Code. The court held that the statements could be interpreted in several ways, but that even if the prosecutor's argument had contained such a statement, the violation did not entitle the defendant to a new trial. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Argument That Testifying Officers Could Be Prosecuted If They Lied. — A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. State v. Potter, 69 N.C.

App. 199, 316 S.E.2d 359, disc. rev. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

Interference with Prosecuting Witness. — Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused, which called for his client to pay for damages to a car and a hospital bill in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a case. State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

Failure to Inform Court of Opposing Party's Address. — An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Interference with Prosecuting Witness. — Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused which called for his client to pay for damages to the witness' car and the witness' hospital bills in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The defendant attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a named case. State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

Prosecutor's questioning of capital murder defendant's mother about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however, such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions, and the mother testified that she was not afraid of her son. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Romantic Relationship With Opposing Counsel. — North Carolina Disciplinary Hearing Commission's decision to admonish attorney one and to issue a warning letter to attorney two did not have a rational basis, as asking an opposing client to admit that she had been involved in a personal or romantic relationship with opposing counsel did not violate N.C. R. Prof. Conduct 3.4(d) and N.C. R. Prof. Conduct 8.4(d) as it was relevant to an abuse of process claim that the attorneys intended to file; determining whether the opposing client and counsel had a personal relationship was relevant to explain the opposing counsel's dogged pursuit of a lawsuit for the client who was not paying for counsel's services, despite the client's ability to do so. N.C. State Bar v. Rossabi, — N.C. App. —, 645 S.E.2d 387, 2007 N.C. App. LEXIS 1173 (2007).

Cited in State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001); In re Bock, 297 Bankr. 22, 2001 Bankr. LEXIS 2125 (Bankr. W.D.N.C. 2001).

DISCIPLINARY HEARING NOTES

The attorney advised a potential State's witness that his client would not testify against him if he did not testify against his client and also counseled the witness that he could plead the U.S. Const., Amend. V. Public Censure. **79 DHC 10.**

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. **81 DHC 2.**

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 121. If a defendant is not represented, the attorney for the plaintiff in a divorce action may send the defendant a copy of the complaint, and a summons for acceptance of service; but may not send a prepared answer or a consent order.

CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

CPR 340. An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

RPC 225. The lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

Rule 3.5. Impartiality and decorum of the tribunal.

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(2) communicate *ex parte* with a juror or prospective juror except as permitted by law;

(3) communicate *ex parte* with a judge or other official except:

(A) in the course of official proceedings;

(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(C) orally, upon adequate notice to opposing party; or

(D) as otherwise permitted by law.

(4) engage in conduct intended to disrupt a tribunal; including:

(A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) communicate with a juror or prospective juror after discharge of the jury if:

(A) the communication is prohibited by law or court order;

(B) the juror has made known to the lawyer a desire not to communicate; or

(C) the communication involves misrepresentation, coercion, duress or harassment.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a juror or a prospective juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a prospective juror, or by another toward a juror, a prospective juror or a member of a juror or a prospective juror's family.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. The rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, jurors and prospective jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with prospective jurors prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a prospective juror about the case.

[3] After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] Vexatious or harassing investigations of jurors or prospective jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or prospective jurors should act with circumspection and restraint.

[5] Communications with, or investigations of, members of families of jurors or prospective jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, jurors or prospective jurors.

[6] Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

[8] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counselor to the adverse party if unrepresented. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private impor-

tunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[10] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 3.5 generally follows Model Rule 3.5, except that Rule 3.5 imposes additional restrictions concerning ex parte communications with judges and communications with a juror's family members. Provisions in Rule 3.5 correspond to provisions of Rules 7.6, 7.8, and 7.10 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

The trial judge did not abuse his discretion in removing a juror and substituting an alternate juror when the original juror contacted defense counsel at his home during the weekend recess and persisted in discussing matters of a personal nature, including counsel's marital status. Although there was no evidence that any matter which related to the trial of the defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of the defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Ethical transgressions by trial counsel do not always constitute legal error. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L.Ed.2d 392 (1981).

Prosecutor's ex parte communication with trial court clerk. — Although, given the provisions of N.C. R. Prof. Conduct 3.5(a)(3), a prosecutor should not have given a document to a court clerk without giving defense counsel a copy, in light of the overwhelming evidence that established the defendants' commission of second-degree trespass, the conduct was harmless error. State v. Marcopolos, 154 N.C. App. 581, 572 S.E.2d 820, 2002 N.C. App. LEXIS 1518 (2002).

Argument That Testifying Officers Could Be Prosecuted If They Lied. — A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. State v. Potter, 69 N.C. App. 199, 316 S.E.2d 359, disc. rev. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

The intentional act of soliciting someone to disrupt a criminal trial by an attorney representing a defendant was not a felony, but would support an order of disbarment. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), cert. denied, 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Quoted in State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

Cited in Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006); State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007).

DISCIPLINARY HEARING NOTES

Attorney illegally contacted a juror to discuss a case. Three Year Suspension. **78 DHC 5.**

ETHICS OPINION NOTES

98 Formal Ethics Opinion 13 Opinion restricts informal written communication with a judge or judicial official relative to a pending matter.

98 Formal Ethics Opinion 20 — Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

CPR 16. A lawyer or group of lawyers may contribute to a judge's campaign in a reasonable amount.

CPR 183. An attorney who represents a judge may not appear before the judge.

CPR 225. It is permissible for an attorney to appear before his brother judge if the lawyer for the adverse party and his client consent.

CPR 226. Although an attorney may not appear before his brother judge without the consent of the parties, his partners and associates may.

CPR 283. The fact that a law firm's secretary is the spouse of a magistrate does not disqualify members of the law firm from practicing criminal law before the magistrate.

CPR 318. The fact that an attorney's spouse is a judge's secretary does not disqualify the attorney from practicing before the judge.

CPR 337. After a jury trial, an attorney may communicate with jurors as to why they decided issues as they did and their opinions of the attorney's performance, unless such is prohibited by court rule.

RPC 122. A member of the attorney general's staff may not consult ex parte with a trial court judge if it is likely that that attorney or another attorney working in the same division of the attorney general's office will represent the state in the appeal of the case.

RPC 214. A lawyer may not send a jury questionnaire directly to prospective members of the jury but, if the questionnaire is sent out by the court, such communications are not prohibited.

RPC 237. A lawyer may not communicate with the judge before whom a proceeding is pending to request an ex parte order unless opposing counsel is given adequate notice or unless authorized by law.

97 Formal Ethics Opinion 1. A lawyer may appear in court before a judge the lawyer represents in a personal matter provided there is disclosure of the representation and all parties and lawyers agree that the relationship between the lawyer and the judge is immaterial to the trial of the matter.

97 Formal Ethics Opinion 3. A lawyer may engage in an ex parte communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

97 Formal Ethics Opinion 5. A lawyer must provide the opposing counsel with a copy of a proposed order at the same time that the lawyer submits the proposed order to the judge in an ex parte communication.

98 Formal Ethics Opinion 12. Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

Rule 3.6. Trial publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective

effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates. A lawyer who is subject to the rule must take reasonable measures to insure the compliance of nonlawyer assistants and my not employ agents to make statements the lawyer is prohibited from making. Rule 5.3 and Rule 8.4(a); *see, e.g.,* Rule 3.8(f) (prosecutor's duty to exercise reasonable care to prevent persons assisting prosecutor or associated with prosecutor from making improper extrajudicial statements.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a). Although paragraph (b)(2) allows extrajudicial statements about information in a public record, a lawyer may not use this safe harbor to justify, by means of filing pleadings or other public records, statements prohibited by paragraph (a). *See also* Rule 3.1.

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others. Moreover, when there is sufficient prior notice, a lawyer is encourage to seek judicial intervention to prevent improper extrajudicial to the client and thereby avoid the necessity of a public response.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended effective October 9, 2008.

Editor's note. — Rule 3.6 is similar to Model Rule 3.6. Notably, Model Rule 3.6 specifically permits a lawyer to make an extrajudicial statement to protect a client from the prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Rule 3.6 is silent on this matter. Rule 3.6 corresponds to Rule 7.7 of the superseded (1985) Rules of Professional Conduct. In additional to organizational changes, however, Rule 3.6 contains a more liberal "material prejudice" standard for evaluating when an extrajudicial statement is prohibited.

Legal Periodicals. — For article, "The Difficult

Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice," see 29 Campbell L. Rev. 497 (2007).

CASE NOTES

Cited in Sherrill v. Amerada Hess Corp., 130 N.C. App. 711, 504 S.E.2d 802 (1998).

ETHICS OPINION NOTES

CPR 4. The rule restricting pretrial publicity does not apply when the case is on appeal.

98 Formal Ethics Opinion 4. Opinion examines the restrictions on a lawyer's public comments about a pending civil proceeding in which the lawyer is participating.

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The

problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 3.7 is identical to Model Rule 3.7. Rule 3.7 is also similar to Rule 5.2 of the superseded (1985) Rules of Professional Conduct, except Rule 3.7 limits the disqualification of a testifying lawyer to litigation in which the lawyer is a "necessary" witness. Unlike the superseded rule, Rule 3.7 also permits another lawyer in the testifying lawyer's firm to represent the client at trial although the testifying lawyer is disqualified.

CASE NOTES

Counsel Is Not Incompetent to Testify. — The weight of authority in this country is that while it is a breach of professional ethics for a party's attorney to testify about other than formal matters without withdrawing from the litigation, he is not incompetent to testify. The testimony is admissible if otherwise competent. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

But Is Discouraged from Doing So. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as a witness for his client had previously surrendered his right to participate in the litigation. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Exceptions Where Counsel May Testify for Client. — While the Disciplinary Rules set forth in the Code of Professional Conduct (now replaced by the Rules of Professional Conduct) do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State. It should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions where attorneys may testify on their clients' behalf. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Testimony for Client Before Administrative Board. — There is no compelling reason to extend existing law by holding that evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by such local administrative board. However, attorneys are strongly discouraged from serving as both witnesses and advocates, even before local administrative boards, unless compelling circumstances exist. Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520, cert. denied, 299 N.C. 737, 267 S.E.2d 663 (1980).

Discretion of Trial Judge. — Whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, is in the discretion of the trial judge. State v. Elam, 56 N.C. App. 590, 289 S.E.2d 857, cert. denied, 305 N.C. 461, 292 S.E.2d 577 (1982).

Request by Defendant for Withdrawal of Plaintiff's Counsel. — Defendant's request that counsel for plaintiff be precluded from testifying at trial or that his law firm be disqualified from further representation of plaintiff would be denied, where plaintiff had not yet determined who its witnesses would be. If plaintiff subsequently determined that counsel should be called as a witness at trial, then the court, at the appropriate time, could order his withdrawal, as well as that of his law firm. FDIC v. Kerr, 111 F.R.D. 476 (W.D.N.C. 1986).

This rule only applies to lawyers, not their employees. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

Preference for Other Witnesses. — If other witnesses are available who can provide the information sought, it is not error not to permit an attorney for a party to testify. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

Testimony Not Prejudicial. — Defendant could show no prejudice from defense counsel's testimony during a voir dire hearing on a collateral matter regarding the attorney's handling of evidence. State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

Lawyer Likely to Be Material Witness. — Since the second partner's defense counsel was likely to be a material witness in the current suit brought by the first partner alleging that the second partner and defense counsel made false statements to induce the first partner to settle an underlying state court lawsuit, the first partner's motion to disqualify the second partner's defense counsel was granted. George v. McClure, 266 F. Supp. 2d 413, 2001 U.S. Dist. LEXIS 25274 (M.D.N.C. 2001).

Attorneys' claim that their former client's new lawyer participated in meetings that they held with the client while they represented her in a divorce action was sufficient to show that the new lawyer could provide testimony about services the attorneys provided to the client that was relevant to their claim for unpaid legal fees; the trial court did not abuse its discretion by granting the attorney's motion to disqualify the client's new lawyer from representing her during trial of their lawsuit because they intended to call him as a witness. Cunningham v. Sams, 161 N.C. App. 295, 588 S.E.2d 484, 2003 N.C. App. LEXIS 2038 (2003).

Lawyer Properly Disqualified. — Trial court did not err in disqualifying a client's counsel in a case brought by a law firm against the client to recover fees where, based on the client's deposition, it appeared that the lawyer had relevant information regarding the nature and the value of the fees sought. Robinson & Lawing, L.L.P. v. Sams, 161 N.C. App. 338, 587 S.E.2d 923, 2003 N.C. App. LEXIS 2056 (2003).

Lawyer Not Disqualified. — In a suit regarding coverage between a primary and a secondary insurer, the secondary insurer's lawyer was not disqualified under N.C. R. Prof. Conduct 3.7 because he was not a necessary witness to the lawsuit since he did not possess any evidence that was not otherwise available, and the secondary insurer asserted that it did not intend to call him as a witness. Ohio Cas. Ins. Co. v. Firemen's Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12360 (E.D.N.C. Feb. 13, 2008).

Applied in SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616, 2001 U.S. Dist. LEXIS 5893 (W.D.N.C. 2001).

Stated in Spivey v. United States, 912 F.2d 80 (4th Cir. 1990); H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996)

Cited in Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730 (1990); State ex rel. Long v. American Sec. Life Assurance Co., 109 N.C. App. 530, 428 S.E.2d 200 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del. Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

ETHICS OPINION NOTES

CPR 18. An attorney may testify on behalf of his former client after he has withdrawn, even if he is to be reimbursed for expenses advanced while he was employed from any recovery.

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 162. An attorney may testify as to the value of his services, but may not testify as to his client's emotional condition.

CPR 212. An attorney who is sued may have his partner represent him and may testify in his own behalf without his partner's having to withdraw.

CPR 350. An attorney may continue to serve as administrator C.T.A. even though his secretary may testify as a witness.

RPC 19. An attorney may represent a client even though his secretary must be called as a witness.

RPC 142. A lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. *See* the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. *See, e.g.*, G.S. 15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial hardship to an individual or to the public interest.

[5] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended October 17, 2001; Amended February 27, 2003; Amended November 16, 2006.

Editor's note. — Rule 3.8 is substantially similar to Model Rule 3.8. Rule 3.8 is similar to Rule 7.3 of the superseded (1985) Rules of Professional Conduct, except that Rule 3.8 restricts the circumstances in which a prosecutor may subpoena a lawyer.

Legal Periodicals. — For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

For article, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," see 65 N.C.L. Rev. 693 (1987).

CASE NOTES

Appellate Advocacy. — Supreme Court of North Carolina admonished the State for its conflicting arguments in at least two different cases regarding appeals from probation revocations. State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004).

ETHICS OPINION NOTES

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

Rule 3.9. Reserved.

TRANSACTIONS WITH PERSON OTHER THAN CLIENTS

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Rule 1.6(b)(1) permits a lawyer to disclose information when required by law. Similarly, Rule 1.6(b)(4) permits a lawyer to disclose information when necessary to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 4.1 is similar to Model Rule 4.1, although the Model Rule also requires disclosure when necessary to avoid assisting a criminal or fraudulent act by a client. Rule 4.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

RPC 182. A lawyer must disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client died.

RPC 236. A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

Rule 4.2. Communication with person represented by counsel.

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate, about the subject of the representation with the elected officials who have authority over such government agency or body, even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;
(2) orally, upon adequate notice to opposing counsel; or
(3) in the course of official proceedings.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

[3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having an independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. When a government agency or body is represented with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[8] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in

connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 4.2(a) is similar to Model Rule 4.2 and Rule 7.4(1) of the superseded (1985) Rules of Professional Conduct. Rule 4.2(a), unlike its counterparts in the Model Rules and superseded (1985) Rules, includes a provision permitting a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good faith attempt to resolve the controversy. Rule 4.2(b), setting forth guidelines for communications with represented government officials, has no counterpart in either the Model Rules or the superseded (1985) Rules.

CASE NOTES

This rule does not prevent a person in custody from making inculpatory statements upon waiver of the right to counsel. State v. Romero, 56 N.C. App. 48, 286 S.E.2d 903, disc. rev. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Interview of Plaintiff's Physician by Defense Attorneys. — Defense attorneys may not interview a plaintiff's treating physician privately without the plaintiff's express consent. Defendant must use the statutorily recognized methods of discovery set out in G.S. 1A-1, Rule 26 of the Rules of Civil Procedure. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

Plaintiff's counsel could not rely on defendant's counsel to effect service of a co-defendant. — Delivery of complaint and summons to international union by local union's president or financial secretary did not effect valid service because allowing the employee's counsel to rely on the local union officers to cure the defective service of process was inconsistent with N.C.Rev. R. Prof. Conduct 4.2, which would not allow counsel to communicate with the local union officers. Hoyle v. UAW Local Union 5285, 444 F. Supp. 2d 467, 2006 U.S. Dist. LEXIS 54422 (W.D.N.C. 2006).

Applied in State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Quoted in McCallum v. CSX Transp., Inc., 149 F.R.D. 104 (M.D.N.C. 1993).

DISCIPLINARY HEARING NOTES

During an authorized visit with an adverse party whom attorney knew was represented by another attorney, the attorney exceeded his authority by discussing an aspect of the matter which he did not have the specific permission of opposing counsel to discuss. Private Reprimand. **79 DHC 23.**

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 138. An attorney representing a party may not send copies of motions to another party he knows has counsel.

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 30. A district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent.

RPC 39. An attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

RPC 61. A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 67. An attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

RPC 81. A lawyer may interview an

unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.

RPC 87. A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

RPC 93. Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer.

RPC 128. A lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

RPC 132. A lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

RPC 162. A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 180. A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

RPC 184. The lawyer for opposing party may communicate directly with the pathologist who performed an autopsy on plaintiff's descendent without the consent of the personal representative of the decedent's estate.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 202. An attorney may communicate in writing with the members of an elected body which is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

RPC 219. A lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

RPC 224. Employer's lawyer may not engage in direct communications with the treating physician for an employee with a workers' compensation claim.

RPC 233. A deputy attorney general attorney who represents the state on the appeal of a death sentence should send to the defense lawyer a copy of a letter the deputy attorney general received from the defendant.

RPC 249. A lawyer may not communicate with a child who is represented by a guardian ad litem and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

97 Formal Ethics Opinion 2. A lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

97 Formal Ethics Opinion 10. A prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from

the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 4.3 is similar to Model Rule 4.3 and substantially similar to Rule 7.4(2) and (3) of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 121. If a defendant is not represented, the attorney for the plaintiff in a divorce action may send the defendant a copy of the complaint, and a summons for acceptance of service; but may not send a prepared answer or a consent order.

CPR 296. The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant.

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 165. An attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

RPC 189. The district attorney's staff may not give legal advice about pleas to an unrepresented person charged with a traffic infraction.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 194. In a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff 's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

Rule 4.4. Respect for rights of third persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the original writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. *See* Rule 1.0(o) for the definition of "writing."

[3] Some lawyers may choose to return a writing unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent to the wrong address. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended August 18, 2005.

Editor's note. — Rule 4.4 is identical to Model Rule 4.4. Rule 4.4 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

RPC 181. A lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer.

LAW FIRMS AND ASSOCIATIONS

Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm or legal department of an organization. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm or organization.

[2] Paragraph (a) requires lawyers with managerial authority within a firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or organization will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the partners and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable conse-

quences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 5.1 is substantially similar to Model Rule 5.1. Rule 5.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 5.2 is identical to Model Rule 5.2. Rule 5.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Cited in Daniels v. Lee, 316 F.3d 477, 2003 U.S. App. LEXIS 333 (4th Cir. 2003), cert. denied, 540 U.S. 851, 124 S. Ct. 137, 157 L. Ed. 2d 93 (2003).

Rule 5.3. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[3] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State bar pursuant to Rule 1.15-2(o).

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 5.3 is substantially similar to Model Rule 5.3 and Rule 3.3 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Cited in N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

DISCIPLINARY HEARING NOTES

Attorney failed to monitor clients' funds in his trust account which resulted in misappropriation of funds. Attorney's secretary signed attorney's name or her name to trust account checks and the attorney and his secretary received the benefit of the funds. Attorney did not adequately supervise the secretary with respect to handling client funds and with respect to handling attorney's trust and office account records. Disbarred. **94 DHC 4.**

Attorney's legal assistant had control and authority over attorney's trust, office, and personal bank accounts. Legal assistant stole large amount of client money from attorney's trust account and used it for her and attorney's benefit. Attorney did not monitor his trust and office account records. He also did not supervise legal assistant's handling of client funds in trust account. Disbarred. **95 DHC 17.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 6 Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

CPR 163. An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

CPR 182. A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

CPR 334. An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

RPC 29. An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

RPC 70. A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 139. An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

RPC 152. District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

RPC 176. A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

RPC 183. A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law-related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer or the disbarred lawyer;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to director control the conduct of the lawyers who practice with the firm.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective June 7, 2001; Amended February 27, 2003.

Editor's note. — Rule 5.4 is substantially similar to Model Rule 5.4. Rule 5.4 expands upon the prohibitions in Rule 3.2 of the superseded (1985) Rules of Professional Conduct.

Legal Periodicals. — For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

CASE NOTES

Cited in N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

ETHICS OPINION NOTES

CPR 239. A law firm may set up a profit-sharing plan for firm members and lay employees.

CPR 289. It is improper for an attorney to agree to share a legal fee with a paralegal.

CPR 343. A succeeding attorney may share fee with a disbarred lawyer for services rendered prior to disbarment.

RPC 38. Attorneys in North Carolina may use an attorney placement service which places independent attorneys with other attorneys or firms on a temporary contract basis for a placement fee.

RPC 104. Associate attorneys may be leased back to their firms.

RPC 147. An attorney may not pay a percentage of fees to a paralegal as a bonus.

98 Formal Ethics Opinion 17. Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

Rule 5.5. Unauthorized practice of law.

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);

(B) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice;

(C) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required;

(D) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation; or

(E) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice.

(F) the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and

(i) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(ii) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(iii) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

(iv) is domiciled in North Carolina;

(v) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(vi) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar.

A lawyer acting pursuant to this provision is not subject to the prohibition in paragraph (b)(1), may not provide services for which *pro hac vice* admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(d) A lawyer shall not assist another person in the unauthorized practice of law.

(e) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(f) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

COMMENT

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (c) identifies six situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. See Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraph (c)(2)(A) and (F), nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is a partner, shareholder or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 NCAC 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. Nothing in paragraph (c)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.

[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A)

recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters.

[5] Paragraph (c)(2)(B) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

[6] Paragraph (c)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[7] Paragraph (c)(2)(D) recognizes that association with a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[8] Paragraph (c)(2)(F) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

[9] The definition of the practice of law is established by N.C. Gen. Stat. 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (d) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[10] Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[11] In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for and employ independent judgment in adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with or on behalf of clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

[12] An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossi-

ble for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended November 16, 2006.

Editor's note. — Rule 5.5 is similar to Model Rule 5.5, except that Rule 5.5 contains additional requirements regarding the employment of disbarred lawyers. Rule 5.5 is substantially similar to Rule 3.1 of the superseded (1985) Rules of Professional Conduct.

Legal Periodicals. — For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

DISCIPLINARY HEARING NOTES

Among other things, attorney engaged in the unauthorized practice of law when he performed legal work for residents of Florida and Maryland at a time when he was not licensed to practice in Florida or Maryland and was an inactive member of the Delaware Bar. Disbarred. **93 DHC 33.**

ETHICS OPINION NOTES

99 Formal Ethics Opinion 6 Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

CPR 19. House counsel for an insurance company may not represent an insured in prosecuting a subrogation claim.

CPR 325. House counsel of a savings and loan association may not represent a subsidiary of the savings and loan association acting as trustee for a deed of trust in foreclosure.

CPR 326. House counsel for an insurance company may not represent the insured in defense of a third party claim or in prosecution of a subrogation claim.

RPC 9. House counsel for a mortgage bank which originates loans but has no proprietary interest of its own may not represent borrowers or lenders in closing loans originated by his employer.

RPC 40. For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. See also RPC 41.

RPC 114. Attorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record.

RPC 139. A lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

RPC 151. Although a corporate insurer acting through its employees cannot practice law and appear on behalf of others, a lawyer who is a full-time employee of an insurance company may represent the company in an action where the company is a named party.

98 Formal Ethics Opinion 7. Opinion rules that a law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

98 Formal Ethics Opinion 8. Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a nonlawyer without supervision by a licensed North Carolina lawyer.

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy, but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 5.6 is substantially similar to Model Rule 5.6 and Rule 2.7 of the superseded (1985) Rules of Professional Conduct.

Legal Periodicals. — For comment, "Let's Be Reasonable: Rethinking the Prohibition Against Noncompete Clauses in Employment Contracts Between Attorneys in North Carolina," see 82 N.C.L. Rev. 249 (2003).

ETHICS OPINION NOTES

RPC 13. A retirement agreement may require a lawyer to accept inactive status as a member of the State Bar as a condition of payment of retirement benefits.

RPC 179. A lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

Rule 5.7. Responsibilities regarding law-related services.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENTS

[1] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[2] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[3] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[4] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[5] Law-related services also may be provided through an entity that is distinct from that through

which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[6] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[7] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[8] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[9] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and scrupulously to adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

History Note: Amended February 27, 2003.

PUBLIC SERVICE

Rule 6.1. Reserved.

Rule 6.2. Reserved.

Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 6.3 is identical to Model Rule 6.3. Rule 6.3 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 68. An attorney may serve on the board of a legal aid society and represent a client against a party represented by a legal aid lawyer.

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer concentrating in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 6.4 is identical to Model Rule 6.4. Rule 6.4 has no counterpart in the superseded (1985) Rules of Professional Conduct.

Rule 6.5. Limited Legal Services Programs.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

COMMENTS

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

History Note: Amended February 27, 2003.

Rule 6.6. Action as a public official.

A lawyer who holds public office shall not:

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself, or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client; or

(c) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

COMMENT

[1] Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 6.5 has no counterpart in the Model Rules. Rule 6.5 is identical to Rule 8.1 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 177. An attorney on the county board of health may not represent a client before such board, but he may resign and represent the client if he acquired no relevant confidential information while on the board.

CPR 189. An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness.

CPR 231. An attorney-legislator may represent a criminal defendant when a State highway patrolman is the prosecuting witness.

CPR 233. An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness even if he withdraws from consideration of the budget.

CPR 263. An emergency judge may not practice law.

CPR 290. An attorney who serves as a member of a county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, shall not hear or consider any matter coming before that governing body or entity in which that member or his firm has any direct or indirect interest.

Pursuant to such prohibition, it shall be unethical for that member to attempt to influence in any way, publicly or privately, the actions or decisions of the governing body or entity or its staff with respect to any matter on which his partner or associate is appearing.

If an attorney or his employee serves as a member of a county or municipal governing board, or State or federal legislative body of any entity thereunder, or committee thereof, it shall be unethical for his partner, associate or employer to represent such governing body or entity. (But see: RPC 193.)

It is not unethical as such for an attorney whose spouse or relative is on any county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, to appear before or represent that governing body or entity. However, it is unethical for an attorney to use his relationship to a member of any governing board to gain (or retain) employment or obtain favorable decisions.

CPR 327. An attorney who serves on per diem basis as a hearing examiner for a public agency may not participate in hearings on behalf of clients before other examiners. His partners and associates may not appear before him, but may appear before other hearing examiners. If the attorney-examiner is appointed to the full board he may not appear before the board under any conditions. His partners should abide by CPR 290.

CPR 335. An attorney-magistrate may privately practice law. He may not appear in any criminal case, in any civil case originating in the small claims court in his county, or in any case with which he had any connection as a magistrate.

CPR 360. An attorney may counsel a quasi-judicial board and also act as a hearing examiner rendering decisions appealable to the same board during the same time span, but may not act in both capacities in the same case.

RPC 53. A lawyer may sue a municipality his partner serves as a member of its governing body. (But see RPC 160.)

RPC 63. An attorney may represent the school board while serving as a county commissioner with certain restrictions.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 95. An assistant district attorney may prosecute cases while serving on the school board.

RPC 105. A public defender may represent criminal defendants while serving on the school board.

RPC 130. An attorney may accept employment on behalf of a governing board upon which his or her partner sits if such is otherwise lawful.

RPC 160. A lawyer whose associate is a member of a public hospital's board of trustees may not sue the hospital on behalf of a client.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications concerning a lawyer's services.

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

(b) A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective March 6, 2002; Amended February 27, 2003.

Editor's note. — Rule 7.1 is identical to Model Rule 7.1 and Rule 2.1 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

2000 Formal Ethics Opinion 1 Opinion rules that, in the absence of a full explanation, advertising a lawyer's or a law firm's record in obtaining favorable verdicts is misleading and prohibited.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

RPC 5. An attorney holding a Juris Doctor degree may not on that basis refer to himself or herself as a "Doctor".

RPC 135. An attorney may not participate in a private lawyer referral service which advertises that its participants are "the best".

RPC 161. A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

RPC 164. Television commercials for an attorney's services that depict fictional clients and cases are misleading and prohibited.

RPC 217. A local or remote call forwarding telephone number may not be included in an advertisement for legal services disseminated in a community where the law firm has neither an office nor a lawyer present in the community unless an explanation is included in the advertisement.

RPC 239. A lawyer may display truthful information about the lawyer's legal services on a World Wide Web site accessed via the Internet.

RPC 241. A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

97 Formal Ethics Opinion 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyers services except that a lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this Rule; or

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), or a prepaid or group legal services plan that complies with Rule 7.3(d); and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule, other than that of a lawyer referral service as described in subsection (d), shall include the name and office address of at least one lawyer or law firm responsible for its content.

(d) A lawyer may participate in a lawyer referral service subject to the following conditions:

(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive or misleading name by the referral service;

(2) the referral service is not operated for a profit;

(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;

(4) the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service;

(5) employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients;

(6) the referral service does not collect any sums from clients or potential clients for use of the service; and

(7) all advertisements by the lawyer referral service shall:

(A) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and

(B) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.

COMMENT

[1] To assist the public in obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers may entail the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization. Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized bylaw, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule

only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Any lawyer who participates in a legal services plan or lawyer referral service is professionally responsible for the operation of the service in accordance with these rules regardless of the lawyer's knowledge, or lack of knowledge, of the activities of the service. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. To avoid misrepresentation, paragraph (d)(7)(B) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred. In addition, the lawyer may not allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997.

Editor's note. — Rule 7.2 is similar to Model Rule 7.2. Unlike the Model Rule, Rule 7.2 includes specific regulations governing participation in a lawyer referral service. Rule 7.2 is substantially similar to Rule 2.2 of the superseded (1985) Rules of Professional Conduct. However, some of the requirements for participation in a lawyer referral service are modified.

Legal Periodicals. — For note discussing commercial speech and disciplinary rules preventing attorney advertising and solicitation, see 65 N.C.L. Rev. 170 (1986).

For note discussing the liberalization of attorney commercial speech rights, in light of Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985), see 21 Wake Forest L. Rev. 1019 (1986).

For note on attorney solicitation by targeted, direct-mail advertisements, see 24 Wake Forest L. Rev. 481 (1989).

DISCIPLINARY HEARING NOTES

Attorney engaged in in-person solicitation by participating in a lawyer referral service whose employees engaged in in-person and live telephone solicitation. Attorney also gave value to a person for recommending his services by paying the referral service $100 for each client referred who he agreed to represent. Reprimand. **93 DHC 13.**

ETHICS OPINION NOTES

CPR 14. A lawyer may not perform title examinations and legal work for a developer for free or for a substantially reduced fee as consideration for the developer's promise to recommend the lawyer to prospective purchasers and their lenders.

CPR 39. A lawyer may participate in a call-in radio program and answer legal questions.

CPR 40. It is unethical for lawyers to offer free legal services to employees of a savings and loan association to get title work.

CPR 58. An attorney may write and publish pamphlets of a legal nature and offer them for sale to the public.

CPR 116. An attorney may write legal articles for publication in business journals and be identified.

CPR 336. An attorney may advertise that he or she is also in the securities business and the insurance business.

CPR 359. Attorneys may share the cost of advertising by means of a private lawyer referral service under certain conditions.

RPC 10. Attorney may affiliate with a private lawyer referral service administered by a for-profit business corporation so long as the corporation does not profit from the referrals. (But see Rule 7.2(e)(2).)

RPC 94. A private lawyer referral service must have more than one participating lawyer and all participants must share in the cost of operating the referral service. (But see Rule 7.2 (e)(2).)

RPC 115. A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

RPC 135. An attorney may not participate in a private lawyer referral service unless all advertisements of the service state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and indicate that the service is not operated or endorsed by any public agency or any disinterested organization. (But see Rule 7.2(e)(2).)

RPC 161. A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

RPC 239. A lawyer may display truthful information about the lawyer's legal services on a World Wide Web site accessed via the Internet.

RPC 241. A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

Rule 7.3. Direct contact with potential clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) *Targeted Communications.* Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) subject to the following requirements:

(1) *Written Communications.* Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in font as large or larger than the lawyer's or law firm's name in the letterhead or masthead.

(2) *Electronic Communications.* The advertising notice shall appear in the "in reference" block of the address section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large or larger than the lawyer's or law firm's name in any masthead on the communication.

(3) *Recorded Communications.* The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal services plan subject to the following:

(1) *Definition.* A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of any immediate need for the specified legal service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director, or owner of the plan. A prepaid legal services plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

(2) *Conditions for participation.*

(A) The plan must be operated by an organization that is not owned or directed by the lawyer;

(B) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;

(C) The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;

(2)(D) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;

(E) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and

(F) Notwithstanding the prohibitions in paragraph (a), the plan may use in-person or telephone contact to solicit memberships or subscriptions provided:

(i) The solicited person is not known to need legal services in a particular matter covered by the plan; and

(ii) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.

(e) For purposes of this rule, a potential client is a person with whom a lawyer would like to form a client-lawyer relationship.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of potential clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to potential client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a potential client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a potential client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] Paragraph (c) of this rule requires that all direct mail solicitations of potential clients must be mailed in an envelope on which the statement, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," appears in capital letters. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for direct mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear at the beginning of an enclosed letter or electronic communication in a font that is at least as large as the font used for the lawyer's or law firm's name in the letterhead or masthead. It must also appear in the "in reference to" section of an email communication. The requirement that certain communications

be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.3(d) as well as Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective February 5, 2002; Amended February 27, 2003; Amended October 6, 2004; Amended November 16, 2006; Amended August 23, 2007.

Editor's note. — Rule 7.3 is essentially the same as Model Rule 7.3 and identical to Rule 2.4 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

U.S. Const., Amend. I prohibits states from categorically prohibiting attorneys from soliciting legal business for pecuniary gain by sending truthful letters to potential clients known to face particular legal problems. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

DISCIPLINARY HEARING NOTES

Attorney attempted to solicit fee-generating professional employment through in-person contacts with persons who had influence with the potential client in violation of superseded Rules 1.2(a) and 2.4(a). Six Month Suspension, stayed two years on certain conditions. **96 DHC 3.**

CASE NOTES

Cited in N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

ETHICS OPINION NOTES

CPR 52. It is proper to notify former clients of changes in the law that could affect their wills.

CPR 104. Attorneys may request lenders and title insurance companies to place them on approved lists.

CPR 191. It is improper for an attorney to belong to a "Tip Club" in which members agree to refer business to each other.

CPR 258. In response to a request, an attorney may submit a bid for legal work to the FHA.

CPR 352. It is not improper for an attorney to inform a client with a personal injury claim that the spouse may also have a claim and that the attorney is willing to handle the claim.

RPC 6. An attorney may not solicit employment by corporations. (Decided prior to 1989 amendment to Rule 2.4 permitting targeted direct mail advertising.)

RPC 20. An attorney may not use an intermediary to arrange meetings between prospective business clients and the attorney for the purpose of soliciting legal business, nor may an attorney make "cold calls" upon prospective business clients.

RPC 36. A law firm may hold a seminar concerning automobile accident claims for members of the public who are randomly selected for invitation or who receive invitations through bulk mailing. (Decided prior to 1989 amendment to Rule 2.4 permitting targeted direct mail advertising.)

RPC 57. A lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

RPC 71. An attorney may not accept legal employment by a prepaid legal service plan owned by the attorney's wife or another member of the attorney's immediate family, if the plan will market its services by in-person solicitation.

RPC 98. The opinion construes the term "professional relationship" and explores the circumstances under which solicitation of persons or organizations with whom a lawyer has had business and professional dealings is permissible. Targeted print advertising is also discussed.

RPC 115. A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

RPC 146. A law firm may invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts and may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from the nonclients.

RPC 161. The recorded message which is heard when a television viewer dials a telephone number broadcast during a television advertisement for legal services must include the statement "this is an advertisement for legal services" at the beginning and ending of the recorded message.

RPC 200. The lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.

RPC 242. A lawyer may send a letter describing his services to the incorporators of a new business provided the words "This is an advertisement for legal services" are included in the communication.

97 Formal Ethics Opinion 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

Rule 7.4. Communication of fields of practice and specialization.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer shall not state or imply that the lawyer is certified as a specialist in a field of practice unless:

(1) the certification was granted by the North Carolina State Bar;

(2) the certification was granted by an organization that is accredited by the North Carolina State Bar; or

(3) the certification was granted by an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar; and

(4) the name of the certifying organization is clearly identified in the communication.

COMMENT

[1] The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations are expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. The Rule requires that a representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization accredited by the North Carolina State Bar, or an organization accredited by the American Bar Association under procedures approved by the North Carolina State Bar. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

[2] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation".

[3] Recognition of expertise in patent matters is a matter of long-established policy of the Patent and Trademark Office. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 7.4 is similar to Model Rule 7.4, except Model Rule 7.4 specifically allows a lawyer to state that he or she is a specialist in patent practice and admiralty law. Rule 7.4 does not allow these or other designations as a specialist unless the lawyer is certified as a specialist by the State Bar or an organization approved by the State Bar or the ABA. Rule 7.4 is similar to Rule 2.5 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

U.S. Const., Amend. I prohibits states from categorically prohibiting lawyers from advertising their certification as specialists by bona fide private organizations. Lesser restrictions are available to eliminate any potential confusion caused by such advertisements. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).

ETHICS OPINION NOTES

RPC 43. An attorney who is certified as a specialist by the Board of Legal Specialization may so indicate in an advertisement in any way that is not false, deceptive or misleading.

Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not false or misleading in violation of Rule 7.1. Every trade name used by a law firm shall be registered with the North Carolina State Bar for a determination of whether the name is misleading.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm unless the listing properly identifies the jurisdiction in which the lawyer is licensed and states that the lawyer is not licensed in North Carolina.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing law.

(e) Lawyers may state or imply that they practice in a partnership or other professional organization only when that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. A firm name that includes the surname of a deceased or retired partner is, strictly speaking, a trade name. However, the use of such names, as well as designations such as "Law Offices of John Doe," "Smith and Associates," and "Jones Law Firm" are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law.

[2] This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license such as immigration law, federal tort claims, military law, and the like. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200.

[3] Nothing in these rules shall be construed to confer the right to practice North Carolina law upon any lawyer not licensed to practice law in North Carolina.

[4] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Adopted April 17, 1998; Amended February 27, 2003.

Editor's note. — Rule 7.5 expands upon the restrictions imposed in Model Rule 7.5. Rule 7.5 is essentially the same as Rule 2.3 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 22. Where father and son practice as Doe and Doe, son may, upon father's election to a judgeship, identify himself on his letterhead as Richard Doe, attorney at law-successor to Doe & Doe.

CPR 69. A lawyer may be a partner in more than one law firm.

CPR 111. A law firm which has a member taking temporary leave to work for the State may continue using the absent member's name in the firm name and on its letterhead.

CPR 117. A law firm in City X forming a partnership with Attorney in City Y may not use different names in the two cities.

CPR 197. It is permissible to cross out a partner's name when he becomes a judge without replacing the stationery on hand.

CPR 211. An attorney licensed in both North Carolina and South Carolina who has an office only in South Carolina and a partner licensed only in South Carolina may practice in North Carolina. His firm should use the same name in North Carolina as it uses in South Carolina and its letterhead should show the jurisdictional limitations of its lawyers.

CPR 213. A law firm may share offices with a common reception area with an accounting firm as long as separate telephones are maintained.

CPR 234. A law firm may operate a legal clinic.

CPR 238. An agreement between a North Carolina lawyer and a lawyer licensed in another state to list each other on their letterhead and to refer cases to each other is improper in the absence of a bona fide partnership.

CPR 248. The use of A and B as a firm name is improper when Attorney A employs Attorney B as an associate.

CPR 256. North Carolina firm may not use the name of an out-of-state firm from which it receives referrals where there is no bona fide interstate partnership.

CPR 265. Attorneys who share offices but are not partners may not answer phone as A, B, and C attorneys, but may answer "law offices." If there is a true partnership, partners must use stationery with the firm letterhead.

CPR 274. It is possible for attorneys to share offices and still represent conflicting interests if they maintain separate telephones and have different secretaries.

CPR 307. An attorney who is also a real estate broker may so indicate on his letterhead. He may operate both businesses from same office.

CPR 330. Letterhead of attorneys in realty business may also show the designation, "attorney at law."

CPR 371. An attorney who is unlicensed in North Carolina and who limits his practice to federal tax law may not become a partner of law firm nor be listed on the firm's letterhead. He may be employed and paid a salary. (But see Revised Rule 7.5(c).)

RPC 5. An attorney holding a Juris Doctor degree may not on that basis hold himself out as "Doctor."

RPC 25. It is improper to list an unlicensed attorney on letterhead as "of counsel" or "consulting attorney".

RPC 31. A law firm may not list on its letterhead a "corresponding" attorney in another location.

RPC 34. An attorney licensed in North Carolina and another state who is semi-retired from a law firm in the other state can be "of counsel" to the North Carolina firm so long as he has a close, though not necessarily daily, association with North Carolina firm.

RPC 85. An "of counsel" relationship may exist between lawyers practicing in different towns if the professional relationship is close, regular and personal and the designation is not otherwise false or misleading.

RPC 126. Nonlawyers may be listed as such on the letterhead of lawyers.

Rule 7.6. [Reserved].

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any

event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. Sect. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 8.1 is identical to Model Rule 8.1 and Rule 1.1 of the superseded (1985) Rules of Professional Conduct.

DISCIPLINARY HEARING NOTES

The attorney was convicted in federal court of conspiracy to willfully misapply for his own use monies, funds and credits of a financial institution with intent to injure and defraud. Two Year Suspension. **80 DHC 1.**

The attorney took the LSAT and exchanged answers with another person to credit the other person with the attorney's high LSAT score. One Year Suspension. **83 DHC 1.**

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. **91 DHC 13.**

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty Day Suspension, stayed for thirty days. **93 DHC 6.**

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chairperson that he had responded in two grievances. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred. **93 DHC 33.**

Assistant U.S. Attorney lied to defense counsel about timing of indictment in criminal case and then denied misconduct to the State Bar Grievance Committee. Reprimand. **96 DHC 9.**

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other adjudicatory officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against such unjust criticism.

[4] While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 8.2 is identical to Model Rule 8.2 and substantially similar to Rule 8.2 of the superseded (1985) Rules of Professional Conduct.

Rule 8.3. Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer who is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the conduct of the lawyers who appear before them. Therefore, a lawyer's duty to report may be satisfied by reporting to the presiding judge the misconduct of any lawyer who is representing a client before the court. The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

[3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the North Carolina State Bar unless some other agency or court is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[5] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[6] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. For this reason, Rule 1.6(c) includes in the definition of confidential information any information regarding a lawyer or judge seeking assistance that is received by a lawyer acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court. Because such information is protected from disclosure by Rule 1.6, a lawyer is exempt from the reporting requirements of paragraphs (a) and (b) with respect to such information. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity; for example, conversion of client funds to his or her use.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended December 30, 1998; Amended February 27, 2003.

Editor's note. — Rule 8.3 is substantially similar to Model Rule 8.3 and Rule 1.3 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Knowledge of a Clear Violation. — An allegation that an attorney and a district court judge knew that the plaintiff's attorney failed to perfect an appeal did not support an inference that defendants had "knowledge of a clear violation of DR1-102" which should have been reported to the State Bar, since there are many legitimate reasons why an appeal may not be perfected. Williams v. Council of North Carolina State Bar, 46 N.C. App. 824, 266 S.E.2d 391, cert. denied, 301 N.C. 106 (1980).

Successful Movant Can Seek Attorney Fees. — Inasmuch as the Rules of Professional Conduct of the North Carolina State Bar, including N.C. R. Prof. Conduct 8.3, require attorneys to maintain the integrity of the profession by bringing ethical violations to the attention of the state bar or the court having jurisdiction over the matter, if a movant is successful on a motion for fee disgorgement filed before the U.S. Bankruptcy Court for the Eastern District of North Carolina, Wilmington Division, that party is entitled to file an application for reasonable fees for services rendered in support of the motion to disgorge. In re Sledge, 352 B.R. 742, 2006 Bankr. LEXIS 2795 (Bankr. E.D.N.C. 2006).

DISCIPLINARY HEARING NOTES

The attorney had unprivileged knowledge that his law partner had misappropriated client funds, but failed to report the misconduct to the Bar or other appropriate authority. Reprimand. **89 DHC 5.**

ETHICS OPINION NOTES

CPR 342. An attorney is not obligated to report violations of the law committed by nonlawyers.

RPC 17. An attorney who acquires knowledge of apparent misconduct must report the matter to the State Bar.

RPC 84. An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

RPC 127. An attorney must report information to the State Bar concerning another attorney's disbursement of conditionally delivered settlement proceeds without satisfying all conditions precedent if the disbursement was made in knowing disregard of such conditions and if such information is not confidential.

RPC 243. Opinion analyzes whether conduct "raises a substantial question" as to a lawyer's honesty, trustworthiness, or fitness so as to require reporting to the State Bar.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client or such investigatory personnel, is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyers dishonesty, fraud, deceit or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partners or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation, regardless of whether the victim is the lawyer's employer, partner, law firm, client or a third party.

[3] The purpose of professional discipline for mis-

conduct is not punishment, but to protect the public, the courts and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of Paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown, by clear, cogent and convincing evidence, that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act, although to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honestly, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of Paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), *modified on other grounds*, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. The phrase "conduct prejudicial to the administration of justice" in Paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 8.4 is similar to Model Rule 8.4 and Rule 1.2 of the superseded (1985) Rules of Professional Conduct, except that Rule 8.4 defines as misconduct an activity that intentionally prejudices or damages a client during the course of a professional relationship. Neither the Model Rules nor the superseded (1985) Rules contain this provision.

Legal Periodicals. — For note, "Not-So-Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington," see 83 N.C. L. Rev. 1591 (2005).

CASE NOTES

Concealment of Material Facts. — Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Vicarious ethical liability was not imposed upon a district attorney and an assistant district attorney, who allegedly knowingly failed to disclose all the terms of an immunity agreement for a witness to testify against a criminal defendant, for the State of North Carolina's conduct of the defense of the criminal defendant's motion for appropriate relief proceedings. N.C. State Bar v. Brewer, 183 N.C. App. 229, 644 S.E.2d 573, 2007 N.C. App. LEXIS 1040 (2007).

Misrepresentation as to Opposing Party's Whereabouts. — An attorney clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Conversion of Client's Check. — An attorney's act of forging a client's endorsement on an insurance check received by the attorney and converting the check to personal use constituted conduct involving moral turpitude. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 398, 354 S.E.2d 501 (1987).

Letter to Attorney Representing Former Clients. — Findings by Disciplinary Hearing Commission did not support the Commission's conclusion that the defendant-attorney had engaged in conduct prejudicial to the administration of justice by writing a letter to the attorney representing the defendant-attorney's former clients where the Commission's order did not state whether the letter constituted a threat, the nature of the threat, if any, and how the conduct was prejudicial to the administration of justice. North Carolina State Bar v.

Beaman, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Misappropriation of Funds. — The attorney misappropriated client funds in violation of Rule 1.2(B) of the Rules of Professional Conduct. It was no defense that the attorney intended at all times to return the funds and in fact did so. Evidence sufficient to support a charge of embezzlement also constitutes conduct involving dishonesty in violation of Rule 1.2(C) of the Rules of Professional Conduct. North Carolina State Bar v. Mulligan, 101 N.C. App. 524, 400 S.E.2d 123 (1991).

Review of the whole record showed that the attorney intended to violate professional conduct rules, including N.C. Rev. R. Prof. Conduct 8.4(c), (d),and (g). The attorney's (1) misappropriation of the client's funds, (2) conflicting explanation about the handling of those funds, and (3) deeding of the client's property to the attorney when the client did not intend that the attorney own that property provided sufficient evidence of the attorney's intent to engage in such misconduct. N.C. State Bar v. Ethridge, — N.C. App. —, 657 S.E.2d 378, 2008 N.C. App. LEXIS 283 (2008).

Lending Money to Clients. — The State Bar's hearing committee's finding adequately supported its conclusion that the defendant violated Rules 2.1 and 5.3(B) of Professional Responsibility where the undisputed facts were that: (1) the defendant kept $ 20,000.00 in his trust account for several years which came from his brother's company, and (2) he loaned this money to three clients to pay for one client's surgery; another client's rent and payments on a car note; and a third client's surgical, medical and travel expenses. North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

Conviction of Crime. — Conviction of a crime is not a necessary element in a disciplinary proceeding. North Carolina State Bar v. Rush, 121 N.C. App. 488, 466 S.E.2d 340 (1996).

Communications to Court and Misbehavior at Hearings. — No evidence in the record indicated that an attorney's representation of several of a testatrix's children involved a concurrent conflict of interest or that he failed to have the necessary informed consent from his clients regarding an aggregate settlement in violation of N.C. R. Prof. Conduct 1.7(a) or 1.8(g); however, the attorney's letters to the court, his attempts to reopen virtually all of the points of contention that had been laid to rest during the settlement negotiations, and his behavior at hearings provided ample support a conclusion that the attorney violated N.C. R. Prof. Conduct 8.4(d). Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Romantic Relationship With Opposing Counsel. — North Carolina Disciplinary Hearing Commission's decision to admonish attorney one and to issue a warning letter to attorney two did not have a rational basis, as asking an opposing client to admit that she had been involved in a personal or romantic relationship with opposing counsel did not violate N.C. R. Prof. Conduct 3.4(d) and N.C. R. Prof. Conduct 8.4(d) as it was relevant to an abuse of process claim that the attorneys intended to file; determining whether the opposing client and counsel had a personal relationship was relevant to explain the opposing counsel's dogged pursuit of a lawsuit for the client who was not paying for counsel's services, despite the client's ability to do so. N.C. State Bar v. Rossabi, — N.C. App. —, 645 S.E.2d 387, 2007 N.C. App. LEXIS 1173 (2007).

Willful refusal to appear in court on behalf of a client, in contravention of N.C. Gen. Stat. § 15A-143, violates the Rule of Diligence to a client and amounts to conduct that has a reasonable likelihood of prejudicing the administration of justice, N.C. Rev. R. Prof. Conduct 8.4. N.C. State Bar v. Key, — N.C. App. —, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008).

Termination of Client Representation Without Court Permission. — Clear, cogent, and convincing evidence supported the Disciplinary Hearing Commission's findings and conclusions that the attorney violated N.C. Rev. R. Prof. Conduct Rule 1.16, regarding the termination of representation, Rule 1.3, about neglecting client matters, and Rule 8.4, prejudicing the administration of justice, in violation of an earlier Consent Order of Discipline resulting in the attorney's license suspension. The attorney's conduct violated those rules because the attorney stopped representing the client when the client notified the attorney that she could not pay an additional sum to represent the client on probation violation matters, and the attorney did not obtain permission from the trial court to withdraw from representing her after the attorney had appeared on her behalf. N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007), aff'd on rehearing, 658 S.E.2d 493, 2008 N.C. App. LEXIS 425 (2008), N.C. State Bar v. Key, — N.C. App. —, 654 S.E.2d 55, 2007 N.C. App. LEXIS 2576 (2007).

Cited in North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992); N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

DISCIPLINARY HEARING NOTES

Defense attorney engaged in conduct prejudicial to the administration of justice by facilitating entry of judgment of careless and reckless driving in back hall of courthouse for client who was charged only with driving while impaired. Three year suspension, all but 180 days stayed. **99 DHC 19.**

The attorney used false statements in reports to banks to influence them to grant him loans. Two Year Suspension. **77 DHC 9.**

The attorney was convicted of conspiracy to manufacture, distribute and possess amphetamines. Disbarred. **77 DHC 11.**

The attorney was found guilty of receiving stolen goods. Disbarred. **78 DHC 4.**

The attorney pled guilty to the crime of embracery arising from an illegal contact with a juror in a pending case. Three Year Suspension. **78 DHC 5.**

The attorney was convicted in federal court of conspiracy willfully to misapply for his own use monies, funds and credits of a financial institution with intent to injure and defraud. Two Year Suspension. **80 DHC 1.**

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. The attorney failed to initiate any legal action on behalf of his client but delivered to the client a document which purported to be an Order of the Superior Court dismissing a petition for a cartway. The document, purportedly signed by a judge, and bearing the seal and signature of an assistant clerk, was totally fraudulent. One Year Suspension. **81 DHC 1.**

Among other things, the attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due and perpetrated a fraud upon a Florida court by false testimony. Disbarred. **81 DHC 2.**

The attorney signed someone else's name to a guaranty agreement and falsely represented that the signature was authentic to obtain funds for his personal benefit. The attorney also instructed his wife, whose notary certificate had been revoked, to falsely witness and represent the signature to induce a bank to make funds available to the attorney. One Year Suspension. **82 DHC 1.**

The attorney failed to file an appeal on his client's behalf and later, in a letter to the State Bar concerning the matter, made false statements concerning the trial and his neglect in failing to file the record on appeal. Ninety Day Suspension. **82 DHC 3.**

The attorney failed to perfect an appeal for his client and instead filed a paper writing which purported to dismiss his client's appeal without the client's knowledge or consent and against the client's well-known wishes. Public Censure. **82 DHC 12.**

The attorney took the LSAT and exchanged answers with another person to credit the other person with the attorney's high LSAT score. One Year Suspension. **83 DHC 1.**

The attorney endorsed a client's medical payment draft without the client's authorization, knowledge or consent, deposited the funds in his personal account and converted the funds. Disbarred. **84 DHC 4.**

The attorney, while involved in a series of real estate transactions which required the defendant to deposit funds in a trust account, allowed the trust account balance to fall below the amount necessary to preserve the identity of his client's funds. The attorney used funds of one client to satisfy the obligations of another client and used clients' trust funds to satisfy his personal obligations. Disbarred. **84 DHC 5.**

The attorney was appointed by the court to represent an indigent criminal defendant. After the case was concluded, he sought and accepted payment from the State without disclosing to the court that he had been previously paid by the client's father. Public Censure. **84 DHC 8.**

Through a bank error, the attorney was left with $14,000 in his trust account following a loan closing. The attorney made no attempt to correct the error and used $10,660 for personal obligations. After realizing the seriousness of his actions, attorney took out a personal loan and repaid the funds to the rightful owner. One Year Suspension. **84 DHC 11.**

The attorney was convicted of conspiracy to conduct his judgeship through a pattern of racketeering activity by accepting bribes, and of facilitating an interstate phone call with the intent to carry on the unlawful activity of gambling. Disbarred. **85 DHC 4.**

The attorney attempted to coerce a favorable settlement in a civil case by threatening to expose the adverse party's alleged criminal conduct in an unrelated matter. Public Censure. **86 DHC 6.**

The attorney attempted to induce a witness who had testified against the attorney in a prior disciplinary hearing to sign a false statement recanting his testimony in the prior hearing. Disbarred. **89 DHC 15.**

The attorney prepared a codicil to her father's will when she knew or should have known that he lacked mental capacity to execute the codicil, thereby engaging in conduct prejudicial to the administration of justice and which adversely reflected upon her fitness to practice law, in violation of former DR1-102(A)(5) and DR1-102(A)(6). Public Reprimand. **89 DHC 21.**

The attorney advised a defendant in a drug case, who was already represented by another attorney, that if the defendant hired him, the defendant would serve no active time. The attorney suggested that he could bring about the deal owing to his friendship with the trial judge and an SBI official. The attorney also attempted ex parte communications with the judge about his client's sentencing and asked a law enforcement officer to state falsely that the defendant had rendered substantial assistance to the sheriff's department. Disbarred. **89 DHC 30.**

The attorney asked another attorney to sign a title opinion and other closing documents indicating that a prior loan owed by the first attorney would be paid off, then failed to pay off the loan. The attorney also obtained credit at a bank based upon a deposit of a $10,000 check which the attorney knew or should have known was worthless. Two Year Suspension, stayed for three years on certain conditions, including restitution to banks. **90 DHC 20.**

The attorney misappropriated funds belonging to an estate. Although the embezzlement was motivated in part by the attorney's addiction to cocaine, the attorney's drug use did not prevent him from recognizing the nature of his conduct and therefore did not mitigate his misconduct. Disbarred. **90 DHC 21.**

The attorney had two clients sign deeds, rather than a deed of trust, to secure fees owed to him by the clients. One Year Suspension, stayed one year upon certain conditions. **89 DHC 23.**

The attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing, lied to the State Bar's investigator regarding those false statements, and was untruthful during the disciplinary hearing. Disbarred. **91 DHC 13.**

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. **91 DHC 13.**

The attorney charged an illegal rate of interest on a loan and lied to the debtor's attorney regarding balances owed on the loan. Two Year Suspension. **91 DHC 20.**

Among other things, the attorney failed to file income tax returns between 1985 and 1987. Five Year Suspension, stayed on certain conditions. **91 DHC 22.**

The attorney failed to file state income tax returns in 1988 and 1989. Five Year Suspension, stayed on certain conditions. **91 DHC 23.**

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed that client's case with the former judge. Censure. **92 DHC 3.**

Among other things, the attorney submitted false information on a fee petition in two social security cases. One Year Suspension, stayed on certain conditions. **92 DHC 5.**

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a $165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself $150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three Year Suspension. **92 DHC 16.**

An assistant district attorney engaged in conduct prejudicial to the administration of justice by failing to reveal certain aspects of a plea agreement to the court. Admonition. **92 DHC 18.**

The attorney improperly retained interest earned on client funds and also retained at least $4,671.23 in overpayments on title insurance premiums collected from various clients. Three Year Suspension, stayed 30 months. **92 DHC 19.**

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty Day Suspension, stayed for thirty days. **93 DHC 6.**

Attorney wrote checks to himself totalling $13,000 from an estate for commissions without approval of the clerk and without performing the normal duties of a personal representative. Disbarred. **93 DHC 2.**

Among other things, attorney falsely indicated on clients' ledger cards that monies had been received and fees paid on their behalf. One Year Suspension, stayed for three years upon certain conditions. **93 DHC 20.**

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chairperson that he had responded in two grievances. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

Attorney forged two attorneys' names to title opinions, temporarily misappropriated client funds, misappropriated fees belonging to her former law firm, made material misrepresentations on a resume given to her former law firm, and attempted to persuade a witness to change prior truthful statements the witness had given the State Bar. Disbarred. **93 DHC 29.**

Attorney engaged in a check writing scheme involving writing checks from his trust account, business account, and personal account to cover worthless checks and removed funds from his trust account without the client's consent. Three Year Suspension, stayed Thirty-three months upon certain conditions. **93 DHC 31.**

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred. **93 DHC 33.**

Attorney engaged in unwanted touching of client. Three-year suspension, six months active and thirty months stayed upon certain conditions. **94 DHC 1.**

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice. Disbarred. **95 DHC 13.**

Attorney attempted to solicit fee-generating professional employment through in-person contacts with persons who had influence with the potential client in violation of superseded Rules 1.2(a) and 2.4(a). Six Month Suspension, stayed two years on certain conditions. **96 DHC 3.**

Assistant U.S. Attorney lied to defense counsel about timing of indictment in criminal case and then denied misconduct to the State Bar Grievance Committee. Reprimand. **96 DHC 9.**

Attorney told client that attorney could use influence with prosecutor to get murder charge pending against client dismissed on payment of $10,000 fee, concealing fact that District Attorney had already decided to dismiss charge for lack of evidence. After client discovered deception and demanded return of fee, attorney threatened to reveal confidential communications of client. Attorney engaged in criminal and fraudulent conduct, implied ability to influence government official and collected excessive fee. Disbarred. **97 DHC 12.**

ETHICS OPINION NOTES

98 Formal Ethics Opinion 19 Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

99 Formal Ethics Opinion 2 — Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

CPR 110. An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 168. An attorney may file personal bankruptcy.

CPR 188. An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

CPR 342. An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

CPR 369. An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

RPC 127. An attorney may not deliberately release settlement proceeds which were conditionally delivered without satisfying all conditions precedent.

RPC 136. An attorney may notarize documents which are to be used in legal proceedings in which the attorney appears.

RPC 143. A lawyer who represents or has represented a member of the city council may represent another client before the council provided the lawyer does not attempt improperly to influence the council.

RPC 152. The prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions when the plea is entered in open court.

RPC 159. An attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing board.

RPC 162 (Third Revision). A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 171. A lawyer may tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

RPC 180. A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents to the communication.

RPC 192. A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 221. Absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

RPC 236. A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

98 Formal Ethics Opinion 2. Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

Rule 8.5. Disciplinary authority; Choice of law.

(a) *Disciplinary Authority.* A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction for the same conduct.

(b) *Choice of Law.* In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

Disciplinary Authority

[1] It is longstanding law that conduct of a lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina. Extension of the disciplinary authority of North Carolina to other lawyers who render or offer to render legal services in North Carolina is for the protection of the citizens of North Carolina.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct might involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as

possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing a safe harbor for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule.

[6] If North Carolina and another admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003.

Editor's note. — Rule 8.5 is identical to Model Rule 8.5. Rule 8.5 has no counterpart in the superseded (1985) Rules of Professional Conduct.

Correlation Table 1: Revised Rules of Professional Conduct to 1985 Superseded Rules of Professional Conduct

Revised Rules	Superseded Rules
Rule 1.1	Rule 6(a)
Rule 1.2(a)(1)	Rule 7.1(c)(1)
Rule 1.2(a)(2)	Rule 7.1(a)(1)
Rule 1.2(a)(3)	Rule 7.1(b)(1)
Rule 1.2(b)	none
Rule 1.2(c)	Rule 7.1(b)(3)
Rule 1.2(d)	Rule 7.1(a)(4)
Rule 1.2(e)	Rule 7.1(c)(2)
Rule 1.3	Rule 6(b)(3)
Rule 1.4	Rule 6(b)(1)-(2)
Rule 1.5(a)-(b)	Rule 2.6(a)-(b)
Rule 1.5(c)	none
Rule 1.5(d)-(f)	Rule 2.6(c)-(e)
Rule 1.6(a)-(b)	Rule 4(a)
Rule 1.6(c)	Rule 4(b)
Rule 1.6(d)(1)-(4)	Rule 4(c)(1)-(4)
Rule 1.6(d)(5)	none
Rule 1.6(d)(6)-(7)	Rule 4(c)(5)-(6)
Rule 1.7	Rule 5.1(a)-(c)
Rule 1.8(a)	Rule 5.4(a)
Rule 1.8(b)	Rule 5.4(c)
Rule 1.8(c)	Rule 5.5
Rule 1.8(d)	Rule 5.4(b)
Rule 1.8(e)	Rule 5.3(b)
Rule 1.8(f)	Rule 5.6
Rule 1.8(g)	Rule 5.7
Rule 1.8(h)	Rule 5.8
Rule 1.8(i)	Rule 5.9
Rule 1.8(j)	Rule 5.3(a)
Rule 1.9(a)	Rule 5.1(d)
Rule 1.9(b)	Rule 5.11(b)
Rule 1.9(c)	none
Rule 1.10(a)	Rule 5.11(a)
Rule 1.10(b)-(c)	Rule 5.11(c)-(d)
Rule 1.11	Rule 9.1
Rule 1.12	Rule 9.2
Rule 1.13(a)	Rule 5.10
Rule 1.13(b)-(e)	none
Rule 1.14	none
Rule 1.15-1	Rule 10.1
Rule 1.15-2	Rule 10.2
Rule 1.15-3	Rule 10.3
Rule 1.16(a)(1)	Rule 2.8(b)(2)
Rule 1.16(a)(2)	Rule 2.8(b)(1)
Rule 1.16(a)(3)-(4)	Rule 2.8(b)(3)-(4)
Rule 1.16(b)(1)	Rule 2.8(c)(5)
Rule 1.16(b)(2)	Rule 2.8(c)(1)(G); (c)(1)(B)
Rule 1.16(b)(3)	Rule 2.8(c)(1)(E)
Rule 1.16(b)(4)	Rule 2.8(c)(1)(F)
Rule 1.16(b)(5)	Rule 2.8(c)(1)(D)
Rule 1.16(b)(6)	Rule 2.8(c)(1)(A)

Revised Rules	**Superseded Rules**
Rule 1.16(b)(7)	Rule 2.8(c)(6)
Rule 1.16(c)-(d)	Rule 2.8(a)(1)-(3)
Rule 1.17	none
Rule 1.18	none
Rule 2.1	none
Rule 2.2	none
Rule 2.3	none
Rule 3.1	Rule 7.2(a)(1)-(2)
Rule 3.2	none
Rule 3.3(a)(1)	Rule 7.2(a)(4)
Rule 3.3(a)(2)	*See* Rule 7.2(a)(8)
Rule 3.3(a)(3)	Rule 7.6(b)(1)
Rule 3.3(a)(4)	Rule 7.2(a)(5)-(6); *see also* Rule 7.2(b)
Rule 3.3(b)-(d)	none
Rule 3.4(a)	Rule 7.2(a)(7)
Rule 3.4(b)	Rule 7.9(a)-(c)
Rule 3.4(c)	Rule 7.6(a)
Rule 3.4(d)	none
Rule 3.4(e)	Rule 7.6(c)(1)-(4)
Rule 3.4(f)	Rule 7.9(d)
Rule 3.5(a)(1)	*See* Rule 7.10(a); Rule 7.8
Rule 3.5(a)(2)	Rule 7.8(a)-(b)
Rule 3.5(a)(3)	Rule 7.10(b)
Rule 3.5(a)(4)	Rule 7.6(c)(5)-(8)
Rule 3.5(a)(5)	Rule 7.8(d)
Rule 3.5(b)-(c)	Rule 7.8(f)-(g)
Rule 3.6	Rule 7.7
Rule 3.7(a)	Rule 5.2(a)
Rule 3.7(b)	none
Rule 3.8(a)-(e)	Rule 7.3
Rule 3.8(f)-(g)	none
Rule 4.1	none
Rule 4.2(a)	Rule 7.4(1)
Rule 4.2(b)	none
Rule 4.3	Rule 7.4(2)-(3)
Rule 4.4	none
Rule 5.1	none
Rule 5.2	none
Rule 5.3	Rule 3.3
Rule 5.4(a)(1)	Rule 3.2(a)
Rule 5.4(a)(2)	none
Rule 5.4(a)(3)-(4)	Rule 3.2(b)-(c)
Rule 5.4(b)-(d)	none
Rule 5.5(a)	Rule 3.1(b)
Rule 5.5(b)	Rule 3.1(a)
Rule 5.5(c)-(d)	Rule 3.1(c)-(d)
Rule 5.6	Rule 2.7
Rule 6.1 Reserved	
Rule 6.2 Reserved	
Rule 6.3	none
Rule 6.4	none
Rule 6.5	Rule 8.1
Rule 7.1	Rule 2.1
Rule 7.2(a)-(b)	Rule 2.2(a)-(b)
Rule 7.2(c)	Rule 2.2(e)

Revised Rules	**Superseded Rules**
Rule 7.2(d)(1)	Rule 2.2(c)
Rule 7.2(d)(2)	none
Rule 7.2(e)(1)	Rule 2.2(d)
Rule 7.2(e)(2)	Rule 2.2(c)(3)
Rule 7.2(e)(3)	Rule 2.2(c)(1)-(2)
Rule 7.2(e)(4)	*See* Rule 2.2(c)(3)
Rule 7.2(e)(5)	Rule 2.2(c)(4)
Rule 7.2(e)(6)	none
Rule 7.2(e)(7)(i)	Rule 2.2(c)(5)(B)
Rule 7.2(e)(7)(ii)	none
Rule 7.3	Rule 2.4
Rule 7.4(a)	none
Rule 7.4(b)-(c)	Rule 2.5(a)-(b)
Rule 7.5	Rule 2.3
Rule 8.1	Rule 1.1
Rule 8.2	Rule 8.2
Rule 8.3	Rule 1.3
Rule 8.4(a)-(f)	Rule 1.2
Rule 8.4(g)	none
Rule 8.5	none

Correlation Table 2: 1985 Superseded Rules of Professional Conduct to Revised Rules of Professional Conduct

Superseded Rules	**Revised Rules**
Rule 1.1	Rule 8.1
Rule 1.2	Rule 8.4(a)-(f)
Rule 1.3	Rule 8.3
Rule 2.1	Rule 7.1
Rule 2.2(a)-(b)	Rule 7.2(a)-(b)
Rule 2.2(c)	Rule 7.2(d)(1)
Rule 2.2(c)(1)	Rule 7.2(e)(3)
Rule 2.2(c)(2)	Rule 7.2(e)(3)
Rule 2.2(c)(3)	Rule 7.2(e)(2); *see* Rule 7.2(e)(4)
Rule 2.2(c)(4)	Rule 7.2(e)(5)
Rule 2.2(c)(5)(A)	none
Rule 2.2(c)(5)(B)	Rule 7.2(e)(7)(i)
Rule 2.2(c)(5)(C)	none
Rule 2.2(d)	Rule 7.2(e)(1)
Rule 2.2(e)	Rule 7.2(c)
Rule 2.3	Rule 7.5
Rule 2.4	Rule 7.3
Rule 2.5(a)	Rule 7.4(b)
Rule 2.5(b)(1)-(3)	Rule 7.4(c)(1)-(3)
Rule 2.6(a)-(b)	Rule 1.5(a)-(b)
Rule 2.6(c)	Rule 1.5(d)(1)-(2)
Rule 2.6(d)-(e)	Rule 1.5(e)-(f)
Rule 2.7	Rule 5.6
Rule 2.8(a)(1)	Rule 1.16(c)
Rule 2.8(a)(2)-(3)	Rule 1.16(d)
Rule 2.8(b)(1)	Rule 1.16(a)(2)
Rule 2.8(b)(2)	Rule 1.16(a)(1)
Rule 2.8(b)(3)-(4)	Rule 1.16(a)(3)-(4)
Rule 2.8(c)(1)(A)	Rule 1.16(b)(6)
Rule 2.8(c)(1)(B)	Rule 1.16(b)(2)
Rule 2.8(c)(1)(C)	Rule 1.16(b)(3)
Rule 2.8(c)(1)(D)	Rule 1.16(b)(5)
Rule 2.8(c)(1)(E)	Rule 1.16(b)(3)
Rule 2.8(c)(1)(F)	Rule 1.16(b)(4)
Rule 2.8(c)(1)(G)	Rule 1.16(b)(2)
Rule 2.8(c)(2)-(4)	none
Rule 2.8(c)(5)	Rule 1.16(b)(1)
Rule 2.8(c)(6)	Rule 1.16(b)(7)
Rule 3.1(a)	Rule 5.5(b)
Rule 3.1(b)	Rule 5.5(a)
Rule 3.1(c)-(d)	Rule 5.5(c)-(d)
Rule 3.2(a)	Rule 5.4(a)(1)
Rule 3.2(b)	Rule 5.4(a)(3)
Rule 3.2(c)	Rule 5.4(a)(4)
Rule 3.3	Rule 5.3
Rule 4(a)	Rule 1.6(a)-(b)
Rule 4(b)(1)-(3)	Rule 1.6(c)(1)-(3)
Rule 4(c)(1)-(4)	Rule 1.6(d)(1)-(4)
Rule 4(c)(5)-(6)	Rule 1.6(d)(6)-(7)
Rule 5.1(a)-(c)	Rule 1.7
Rule 5.1(d)	Rule 1.9(a)

Superseded Rules	**Revised Rules**
Rule 5.2(a)	Rule 3.7(a)
Rule 5.2(b)-(c)	none
Rule 5.3(a)	Rule 1.8(j)
Rule 5.3(b)	Rule 1.8(e)
Rule 5.4(a)	Rule 1.8(a)
Rule 5.4(b)	Rule 1.8(d)
Rule 5.4(c)	Rule 1.8(b)
Rule 5.5	Rule 1.8(c)
Rule 5.6	Rule 1.8(f)
Rule 5.7	Rule 1.8(g)
Rule 5.8	Rule 1.8(h)
Rule 5.9	Rule 1.8(i)
Rule 5.10	Rule 1.13(a)
Rule 5.11(a)	Rule 1.10(a)
Rule 5.11(b)	Rule 1.9(b)
Rule 5.11(c)	Rule 1.10(b)
Rule 5.11(d)	Rule 1.10(c)
Rule 6(a)(1)-(2)	Rule 1.1(a)-(b)
Rule 6(b)(1)	Rule 1.4(a)
Rule 6(b)(2)	Rule 1.4(b)
Rule 6(b)(3)	Rule 1.3
Rule 7.1(a)(1)	Rule 1.2(a)
Rule 7.1(a)(2)-(3)	none
Rule 7.1(a)(4)	Rule 1.2(d)
Rule 7.1(b)(1)	Rule 1.2(a)(3)
Rule 7.1(b)(2)	none
Rule 7.1(b)(3)	Rule 1.2(c)
Rule 7.1(c)(1)	Rule 1.2(a)(1)
Rule 7.1(c)(2)	Rule 1.2(e)
Rule 7.2(a)(1)-(2)	Rule 3.1; *see* Rule 1.16(a)(2)
Rule 7.2(a)(3)	none
Rule 7.2(a)(4)	Rule 3.3(a)(1)
Rule 7.2(a)(5)	Rule 3.3(a)(4)
Rule 7.2(a)(6)	Rule 3.3(a)(4)
Rule 7.2(a)(7)	Rule 3.4(a)
Rule 7.2(a)(8)-(9)	*See* Rule 3.3(a)(2)
Rule 7.2(b)	Rule 3.3(a)(4)
Rule 7.3	Rule 3.8(a)-(e)
Rule 7.4(1)	Rule 4.2(a)
Rule 7.4(2)-(3)	Rule 4.3(1)-(2)
Rule 7.5	none
Rule 7.6(a)	Rule 3.4(c)
Rule 7.6(b)(1)	Rule 3.3(a)(3)
Rule 7.6(b)(2)	none
Rule 7.6(c)(1)-(4)	Rule 3.4(e)
Rule 7.6(c)(5)	Rule 3.5(a)(4)(i)
Rule 7.6(c)(6)	Rule 3.5(a)(4)(ii)
Rule 7.6(c)(7)	Rule 3.5(a)(4)(iii)
Rule 7.6(c)(8)	Rule 3.5(a)(4)
Rule 7.7	Rule 3.6
Rule 7.8(a)-(b)	Rule 3.5(a)(2)
Rule 7.8(c)	none
Rule 7.8(d)	Rule 3.5(a)(5)
Rule 7.8(e)	none
Rule 7.8(f)	Rule 3.5(b)

Superseded Rules	**Revised Rules**
Rule 7.8(g)	Rule 3.5(c)
Rule 7.9(a)-(c)	Rule 3.4(b)
Rule 7.9(d)	Rule 3.4(f)
Rule 7.10(a)	*See* Rule 3.5(a)(1)
Rule 7.10(b)	Rule 3.5(a)(3)
Rule 8.1	Rule 6.5
Rule 8.2	Rule 8.2
Rule 9.1	Rule 1.11
Rule 9.2	Rule 1.12
Rule 10.1	Rule 1.15-1
Rule 10.2	Rule 1.15-2
Rule 10.3	Rule 1.15-3

Index to Rules of Professional Conduct

A

ABANDONED PROPERTY.
Entrusted property, ProfCond Rule 1.15-2.

ACCOUNTS.
Deposit of funds, ProfCond Rule 1.15-2.
Records and accountings, ProfCond Rule 1.15-3.

ACTIONS IMPLIEDLY AUTHORIZED.
Disclosure of confidential information, ProfCond Rule 1.6.
Lawyer may take, ProfCond Rule 1.2.

ADMISSION TO BAR.
False statements, failure to disclose, ProfCond Rule 8.1.

ADVERSE INTEREST TO CLIENT.
Acquiring, conflict of interest, ProfCond Rule 1.8.

ADVERTISING, ProfCond Rule 7.2.
Communications of fields of practice, ProfCond Rule 7.4.
Dramatization depicting fictional situation, ProfCond Rule 7.1.
False or misleading communications concerning services, ProfCond Rule 7.1.
Targeted communications, ProfCond Rule 7.3.

ADVISOR, ProfCond Rule 2.1.

AGENT OF LAWYERS' OR JUDGES' ASSOCIATION.
Duty of confidentiality when acting as, ProfCond Rule 1.6.

AGGREGATE SETTLEMENT OR AGREEMENT.
Two or more clients, ProfCond Rule 1.8.

AGREEMENTS RESTRICTING PRACTICE, ProfCond Rule 5.6.

ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER, ProfCond Rule 1.2.

ARBITRATORS.
Former arbitrators.
  Conflict of interest, ProfCond Rule 1.12.
Lawyers serving as third-party neutrals, ProfCond Rule 2.4.

ATTORNEY-CLIENT PRIVILEGE.
Client-lawyer confidentiality, ProfCond Rule 1.6.

AUDIT BY STATE BAR, ProfCond Rule 1.15-3.

AUTOMATED CLEARINGHOUSE (ACH) DEBITS.
Conversion of checks, ProfCond Rule 1.15-3.

B

BANK ACCOUNTS.
Deposit of funds, ProfCond Rule 1.15-2.

BANK ACCOUNTS —Cont'd
Records and accountings, ProfCond Rule 1.15-3.

BANK DIRECTIVE.
Lawyer maintaining trust or fiduciary accounts, ProfCond Rule 1.15-2.

BANK RECEIPTS.
Record requirements, ProfCond Rule 1.15-3.

BANK STATEMENTS.
Record requirements, ProfCond Rule 1.15-3.

BAR ADMISSION.
False statements, failure to disclose, ProfCond Rule 8.1.

BELIEF.
Defined, ProfCond Rule 1.0.

BUSINESS TRANSACTIONS WITH CLIENTS.
Conflict of interest, ProfCond Rule 1.8.

C

CANCELED CHECKS.
Record requirements, ProfCond Rule 1.15-3.

CANDIDATES FOR JUDICIAL OFFICE.
Compliance with code of judicial conduct, ProfCond Rule 8.2.
False statements regarding, ProfCond Rule 8.2.

CANDOR TOWARD TRIBUNAL, ProfCond Rule 3.3.

CAPACITY OF CLIENT DIMINISHED, ProfCond Rule 1.14.

CHECKS.
Canceled checks, copies.
  Record requirements, ProfCond Rule 1.15-3.
Check format.
  Trust accounts, ProfCond Rule 1.15-3.
Conversion to automated clearinghouse (ACH) debits, ProfCond Rule 1.15-3.

CHOICE OF LAW.
Disciplinary authority of North Carolina, ProfCond Rule 8.5.

CLIENT-LAWYER CONFIDENTIALITY, ProfCond Rule 1.6.

CLIENT'S DECISIONS.
Lawyer to abide by, ProfCond Rule 1.2.

CLIENT WITH DIMINISHED CAPACITY, ProfCond Rule 1.14.

COMMUNICATIONS CONCERNING LAWYER'S SERVICES, ProfCond Rule 7.1.

COMMUNICATIONS OF FIELDS OF PRACTICE, ProfCond Rule 7.4.

COMMUNICATIONS WITH CLIENTS, ProfCond Rule 1.4.
Fees and expenses, ProfCond Rule 1.5.

COMMUNICATIONS WITH JUDGE OR JURORS.
Ex parte communications, ProfCond Rule 3.5.

COMMUNICATIONS WITH PERSON REPRESENTED BY COUNSEL, ProfCond Rule 4.2.

COMPENSATION.
Acceptance of compensation from other than client, ProfCond Rule 1.8.
Fees and expenses, ProfCond Rule 1.5.
Law firm.
  Fee sharing with nonlawyer, ProfCond Rule 5.4.
Sale or purchase of practice.
  Increase in fees, ProfCond Rule 1.17.

COMPETENCE TO HANDLE LEGAL MATTER, ProfCond Rule 1.1.

CONCURRENT CONFLICT OF INTEREST, ProfCond Rule 1.7.
Specific rules, ProfCond Rule 1.8.

CONFIDENTIAL INFORMATION, ProfCond Rule 1.6.
Confidential government information.
  Lawyer acquiring as public officer or employee.
    Representing client with interest adverse to information, ProfCond Rule 1.11.
Defined, ProfCond Rule 1.0.
Discussions with prospective clients, ProfCond Rule 1.18.

CONFIRMED IN WRITING.
Defined, ProfCond Rule 1.0.

CONFLICT OF INTEREST.
Current clients, ProfCond Rule 1.7.
  Specific rules, ProfCond Rule 1.8.
Former clients.
  Duties to, ProfCond Rule 1.9.
Former judges, arbitrators, mediators or other third party neutrals, ProfCond Rule 1.12.
Government officers and employees.
  Special conflicts, former and current officers and employees, ProfCond Rule 1.11.
Imputation, ProfCond Rule 1.10.
Lawyer as witness, ProfCond Rule 3.7.
Prospective clients, matters with, ProfCond Rule 1.18.
Sale or purchase of practice, notice, ProfCond Rule 1.17.

CONSENT.
Informed consent.
  Aggregate settlement or agreement for two or more clients, ProfCond Rule 1.8.
  Communicating with client when client's consent required, ProfCond Rule 1.4.
  Defined, ProfCond Rule 1.0.

CONSULTATIONS WITH CLIENT, ProfCond Rule 1.4.

CONTINGENT FEES AND CONTINGENT FEE AGREEMENTS, ProfCond Rule 1.5.

CONTRACTS.
Contingent fee agreements, ProfCond Rule 1.5.
Restriction on practice, ProfCond Rule 5.6.

CRIMINAL CASES.
Abiding by client's decision, ProfCond Rule 1.2.

CRIMINAL CASES —Cont'd
Contingent fees, charging prohibited, ProfCond Rule 1.5.
Meritorious claims and contentions, ProfCond Rule 3.1.
Prosecutors, special responsibilities, ProfCond Rule 3.8.

CRIMINAL CONDUCT.
Client engaging in, remedial measures, ProfCond Rule 3.3.
Lawyer not to counsel client to engage in, ProfCond Rule 1.2.

D

DEALING WITH UNREPRESENTED PERSON, ProfCond Rule 4.3.

DECISIONS OF CLIENT.
Lawyer to abide by, ProfCond Rule 1.2.

DECLINING REPRESENTATION, ProfCond Rule 1.16.

DEDICATED TRUST ACCOUNT.
Defined, ProfCond Rule 1.15-1.
Deposit of trust funds in, ProfCond Rule 1.15-2.

DEFINITIONS, ProfCond Rule 1.0.
Law-related services, ProfCond Rule 5.7.
Potential client, ProfCond Rule 7.3.
Prepaid legal services plan or group services plan, ProfCond Rule 7.3.
Prospective client, ProfCond Rule 1.18.
Safekeeping property, ProfCond Rule 1.15-1.
Sexual relations with clients, ProfCond Rule 1.19.

DEPOSIT OF FIDUCIARY FUNDS, ProfCond Rule 1.15-2.

DEPOSIT OF TRUST FUNDS, ProfCond Rule 1.15-2.

DEPOSIT SLIPS.
Record requirements, ProfCond Rule 1.15-3.

DILIGENCE IN REPRESENTATION, ProfCond Rule 1.3.

DIMINISHED CAPACITY.
Client with, ProfCond Rule 1.14.

DIRECT CONTACT WITH PROSPECTIVE CLIENTS, ProfCond Rule 7.3.

DISBARRED ATTORNEY.
Employing as legal clerk or assistant, ProfCond Rule 5.5.

DISCIPLINARY AUTHORITY OF NORTH CAROLINA.
Choice of law, ProfCond Rule 8.5.
Lawyer admitted to practice in state subject to, ProfCond Rule 8.5.

DISCIPLINARY MATTERS.
False statements, failure to disclose, ProfCond Rule 8.1.

DISCLOSURE OF CONFIDENTIAL INFORMATION, ProfCond Rule 1.6.

DISCOVERY.
Frivolous discovery, ProfCond Rule 3.4.

DISPUTE AS TO FEES.
Lawyer responsibilities, ProfCond Rule 1.5.

DISQUALIFICATION.
Former judge, clerk, arbitrator, mediator or third party neutral, ProfCond Rule 1.12.
Imputed disqualification.
  Principles of, ProfCond Rule 1.10.
Public officers and employees.
  Special conflicts, former and current officers and employees, ProfCond Rule 1.11.

DISRUPTING TRIBUNAL, ProfCond Rule 3.5.

DIVISION OF FEES, ProfCond Rule 1.5.
Lawyer or firm sharing fees with nonlawyer, ProfCond Rule 5.4.

DRAMATIZATION DEPICTING FICTIONAL SITUATION, ProfCond Rule 7.1.

E

ELECTIONS.
Lawyer candidate for judicial office.
  Compliance with Code of Judicial Conduct, ProfCond Rule 8.2.

ELECTRONIC CONTACT WITH POTENTIAL CLIENTS, ProfCond Rule 7.3.

EMPLOYMENT AGREEMENTS.
Restriction on practice, ProfCond Rule 5.6.

ENTITY AS CLIENT.
Representing organization, ProfCond Rule 1.13.

ENTRUSTED PROPERTY, ProfCond Rule 1.15-2.
Defined, ProfCond Rule 1.15-1.

EVALUATION FOR USE BY THIRD PARTIES, ProfCond Rule 2.3.

EVIDENCE.
Altering, destroying or concealing, ProfCond Rule 3.4.
False evidence offered, ProfCond Rule 3.3.
Obstructing party's access to, ProfCond Rule 3.4.
Prohibited acts as to opposing party and counsel, ProfCond Rule 3.4.

EXCESSIVE FEES AND EXPENSES.
Charging client prohibited, factors in determining, ProfCond Rule 1.5.

EX PARTE COMMUNICATIONS WITH JUDGE OR JURORS, ProfCond Rule 3.5.

EX PARTE PROCEEDINGS.
Information to tribunal, ProfCond Rule 3.3.

EXPEDITING LITIGATION, ProfCond Rule 3.2.

EXPLAINING MATTER TO CLIENT, ProfCond Rule 1.4.

EXTRAJUDICIAL STATEMENTS, ProfCond Rule 3.6.

F

FAIRNESS TO OPPOSING PARTY AND COUNSEL, ProfCond Rule 3.4.

FALSE COMMUNICATIONS CONCERNING SERVICES, ProfCond Rule 7.1.

FALSE EVIDENCE OFFERED, ProfCond Rule 3.3.

FALSE OR MISLEADING STATEMENTS.
Bar admission, disciplinary matters, ProfCond Rule 8.1.
Communications concerning services, ProfCond Rule 7.1.
Regarding judges or candidates for judicial office, ProfCond Rule 8.2.
To third persons, ProfCond Rule 4.1.
To tribunal, ProfCond Rule 3.3.

FEES AND EXPENSES, ProfCond Rule 1.5.
Acceptance of compensation from other than client, ProfCond Rule 1.8.
Law firm.
  Fee sharing with nonlawyer, ProfCond Rule 5.4.
Sale or purchase of practice, increase, ProfCond Rule 1.17.

FIDUCIARY FUNDS.
Defined, ProfCond Rule 1.15-1.
Deposit, ProfCond Rule 1.15-2.

FINANCIAL ASSISTANCE TO CLIENT, ProfCond Rule 1.8.

FIRM.
Defined, ProfCond Rule 1.0.
Fee sharing with nonlawyer, ProfCond Rule 5.4.
Forming partnership with nonlawyer, ProfCond Rule 5.4.
Imputation of conflict of interest, ProfCond Rule 1.10.
Names and letterheads, ProfCond Rule 7.5.
Non-lawyer assistants, responsibilities, ProfCond Rule 5.3.
Professional corporation or association.
  Practice in, ProfCond Rule 5.4.
Professional independence of lawyer, ProfCond Rule 5.4.
Responsibilities of partners, managers and supervisory lawyers, ProfCond Rule 5.1.
Restriction on practice, ProfCond Rule 5.6.
Subordinate lawyer, responsibilities, ProfCond Rule 5.2.
Unauthorized practice of law, ProfCond Rule 5.5.

FIRM NAMES AND LETTERHEADS, ProfCond Rule 7.5.

FORFEITURE.
Contingent fee.
  Charging in criminal or civil forfeiture proceeding, ProfCond Rule 1.5.

FORMER CLIENTS.
Duties to, ProfCond Rule 1.9.

FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD PARTY NEUTRALS.
Conflict of interest, ProfCond Rule 1.12.

FRAUD.
Client engaging in fraudulent conduct, remedial measures, ProfCond Rule 3.3.
Defined, ProfCond Rule 1.0.
Lawyer not to counsel client to engage in fraudulent conduct, ProfCond Rule 1.2.

FRIVOLOUS CLAIMS AND CONTENTIONS, ProfCond Rule 3.1.

FRIVOLOUS DISCOVERY, ProfCond Rule 3.4.

G

GENERAL TRUST ACCOUNT.
Defined, ProfCond Rule 1.15-1.
Deposit of trust funds in, ProfCond Rule 1.15-2.

GIFT FROM CLIENT.
Soliciting, ProfCond Rule 1.8.

GOVERNMENT OFFICERS AND EMPLOYEES.
Action as public official, ProfCond Rule 6.6.
Conflict of interest.
  Special conflicts, former and current officers and employees, ProfCond Rule 1.11.

I

IMPARTIALITY AND DECORUM OF TRIBUNAL.
Respecting, ProfCond Rule 3.5.

IMPLIED AUTHORIZATION TO TAKE ACTION, ProfCond Rule 1.2.
Disclosure of confidential informations, ProfCond Rule 1.6.

IMPUTATION OF CONFLICT OF INTEREST, ProfCond Rule 1.10.

IMPUTED DISQUALIFICATION.
Principles of, ProfCond Rule 1.10.

INADVERTENT RECEIPT OF WRITING, ProfCond Rule 4.4.

INDEPENDENT PROFESSIONAL JUDGMENT.
Lawyer to exercise, ProfCond Rule 2.1.

INFLUENCING JUDGE OR JUROR, ProfCond Rule 3.5.

INFORMED CONSENT.
Aggregate settlement or agreement for two or more clients, ProfCond Rule 1.8.
Communicating with client when client's consent required, ProfCond Rule 1.4.
Defined, ProfCond Rule 1.0.

INFORMING CLIENT AS TO STATUS OF MATTER, ProfCond Rule 1.4.

IN-PERSON CONTACT WITH POTENTIAL CLIENTS, ProfCond Rule 7.3.

INTEREST ON TRUST OR FIDUCIARY ACCOUNTS, ProfCond Rule 1.15-2.

J

JUDGES.
Ex parte communications with, ProfCond Rule 3.5.
False statements regarding, ProfCond Rule 8.2.
Former judges.
  Conflict of interest, ProfCond Rule 1.12.
Influencing, ProfCond Rule 3.5.

JURORS.
Communicating with after discharge, ProfCond Rule 3.5.
Ex parte communications with, ProfCond Rule 3.5.
Influencing, ProfCond Rule 3.5.

JURY TRIAL.
Waiver in criminal case.
  Abiding by client's decision, ProfCond Rule 1.2.

K

KNOWINGLY.
Defined, ProfCond Rule 1.0.

KNOWLEDGE AND SKILL.
Competent representation, ProfCond Rule 1.1.

L

LAW FIRM.
Defined, ProfCond Rule 1.0.
Fee sharing with nonlawyer, ProfCond Rule 5.4.
Forming partnership with nonlawyer, ProfCond Rule 5.4.
Imputation of conflict of interest, ProfCond Rule 1.10.
Names and letterheads, ProfCond Rule 7.5.
Non-lawyer assistants, responsibilities, ProfCond Rule 5.3.
Professional corporation or association.
  Practice in, ProfCond Rule 5.4.
Professional independence of lawyer, ProfCond Rule 5.4.
Responsibilities of partners, managers and supervisory lawyers, ProfCond Rule 5.1.
Restriction on practice, ProfCond Rule 5.6.
Subordinate lawyer, responsibilities, ProfCond Rule 5.2.
Unauthorized practice of law, ProfCond Rule 5.5.

LAW REFORM ACTIVITIES AFFECTING CLIENT'S INTEREST, ProfCond Rule 6.4.

LAW-RELATED SERVICES.
Responsibilities regarding, ProfCond Rule 5.7.

LAWYER REFERRAL SERVICE.
Participation, ProfCond Rule 7.2.

LAWYER'S OR JUDGE'S ASSISTANCE PROGRAMS.
Confidentiality when lawyer acting as agent for, ProfCond Rule 1.6.

LEGAL ENTITY AS CLIENT.
Representing, ProfCond Rule 1.13.

LEGAL KNOWLEDGE AND SKILL.
Competent representation, ProfCond Rule 1.1.

LEGAL SERVICES.
Defined, ProfCond Rule 1.15-1.

LEGAL SERVICES ORGANIZATIONS.
Limited legal services programs, ProfCond Rule 6.5.
Membership in, ProfCond Rule 6.3.

LETTERHEADS.
Firm names and letterheads, ProfCond Rule 7.5.

LIMITED LEGAL SERVICES PROGRAMS, ProfCond Rule 6.5.

LIMITING LIABILITY.
Prospective agreement limiting lawyer's liability.
  Prohibition, ProfCond Rule 1.8.

LIMITING SCOPE OF REPRESENTATION, ProfCond Rule 1.2.

LITERARY OR MEDIA RIGHTS.
Negotiating agreement with client, ProfCond Rule 1.8.

LOBBYING.
Lawyer holding public office, ProfCond Rule 6.6.

M

MALPRACTICE.
Agreement limiting lawyer's liability or settling claim, ProfCond Rule 1.8.

MEDIATORS.
Former mediators.
Conflict of interest, ProfCond Rule 1.12.
Lawyers serving as third-party neutrals, ProfCond Rule 2.4.

MENTAL IMPAIRMENT.
Client with diminished capacity, ProfCond Rule 1.14.

MERITORIOUS CLAIMS AND CONTENTIONS, ProfCond Rule 3.1.

MINORITY.
Client with diminished capacity, ProfCond Rule 1.14.

MISAPPROPRIATION OF ENTRUSTED PROPERTY.
Duty to report, ProfCond Rule 1.15-2.

MISCONDUCT, ProfCond Rule 8.4.
Reporting, ProfCond Rule 8.3.

N

NAMES.
Firm names and letterheads, ProfCond Rule 7.5.

NONLAWYERS IN LAW FIRMS.
Responsibility for, ProfCond Rule 5.3.

NOTICE OF SALE OR PURCHASE OF PRACTICE, ProfCond Rule 1.17.

O

OBSTRUCTING PARTY'S ACCESS TO EVIDENCE, ProfCond Rule 3.4.

OPPOSING PARTY AND COUNSEL.
Fairness to, ProfCond Rule 3.4.

ORGANIZATION AS CLIENT.
Representing, ProfCond Rule 1.13.

P

PARTNERSHIPS.
Fee sharing with nonlawyer, ProfCond Rule 5.4.
Firm names and letterheads, ProfCond Rule 7.5.
Forming partnership with nonlawyer, ProfCond Rule 5.4.

PARTNERSHIPS —Cont'd
Imputation of conflict of interest, ProfCond Rule 1.10.
Non-lawyer assistants, responsibilities, ProfCond Rule 5.3.
Partner defined, ProfCond Rule 1.0.
Professional independence of lawyer, ProfCond Rule 5.4.
Responsibilities of partners, managers and supervisory lawyers, ProfCond Rule 5.1.
Restriction on practice, ProfCond Rule 5.6.
Subordinate lawyer, responsibilities, ProfCond Rule 5.2.
Unauthorized practice of law, ProfCond Rule 5.5.

PERSON REPRESENTED BY COUNSEL.
Communications with, ProfCond Rule 4.2.

PLEA IN CRIMINAL CASE.
Abiding by client's decision, ProfCond Rule 1.2.

POLITICAL, ECONOMIC, SOCIAL OR MORAL VIEWS OF CLIENT.
Representation not endorsement, ProfCond Rule 1.2.

POTENTIAL CLIENTS.
Defined, direct contact with, ProfCond Rule 7.3.

PREAMBLE, ProfCond Rule 0.1.

PREPAID OR GROUP LEGAL SERVICES PLANS.
Participation, ProfCond Rule 7.3.

PROFESSIONAL CORPORATION OR ASSOCIATION.
Practice in, ProfCond Rule 5.4.

PROFESSIONAL FIDUCIARY SERVICES.
Defined, ProfCond Rule 1.15-1.

PROFESSIONAL JUDGMENT.
Independent professional judgment, ProfCond Rule 2.1.
Lawyer may exercise, ProfCond Rule 1.2.

PROFESSIONAL MISCONDUCT, ProfCond Rule 8.4.
Reporting, ProfCond Rule 8.3.

PROMPT REPRESENTATION, ProfCond Rule 1.3.

PROPRIETARY INTEREST IN CAUSE ACTION.
Acquiring, ProfCond Rule 1.8.

PROSECUTORS.
Special responsibilities, ProfCond Rule 3.8.

PROSPECTIVE CLIENTS.
Duties to, ProfCond Rule 1.18.

PROTECTIVE ACTION.
Client with diminished capacity, ProfCond Rule 1.14.

PUBLICITY DURING TRIAL, ProfCond Rule 3.6.

PUBLIC OFFICERS AND EMPLOYEES.
Action as public official, ProfCond Rule 6.6.
Conflict of interest.
Special conflicts, former and current officers and employees, ProfCond Rule 1.11.

PURCHASE OF PRACTICE, ProfCond Rule 1.17.

R

REASONABLE.
Defined, ProfCond Rule 1.0.

REASONABLE BELIEF.
Defined, ProfCond Rule 1.0.

REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTATION, ProfCond Rule 1.3.

REASONABLY SHOULD KNOW.
Defined, ProfCond Rule 1.0.

RECORD RETENTION PERIOD, ProfCond Rule 1.15-3.

RECORDS AND ACCOUNTINGS, ProfCond Rule 1.15-3.

REFERRAL SERVICE.
Participation, ProfCond Rule 7.2.

REFORM ACTIVITIES AFFECTING CLIENT'S INTEREST, ProfCond Rule 6.4.

REPORTING PROFESSIONAL MISCONDUCT, ProfCond Rule 8.3.

REQUESTS FOR INFORMATION.
Compliance with client's reasonable request, ProfCond Rule 1.4.

RESPECT FOR THIRD PERSON'S RIGHTS, ProfCond Rule 4.4.

RESTRICTION ON PRACTICE, ProfCond Rule 5.6.

S

SAFEKEEPING PROPERTY, ProfCond Rule 1.15.
Definitions, ProfCond Rule 1.15-1.
General rules, ProfCond Rule 1.15-2.
Records and accounting, ProfCond Rule 1.15-3.

SALE OF PRACTICE, ProfCond Rule 1.17.

SCOPE OF REPRESENTATION, ProfCond Rule 1.2.
Organization as client, ProfCond Rule 1.13.

SCOPE OF RULES, ProfCond Rule 0.2.

SCREENED.
Defined, ProfCond Rule 1.0.

SECURITIES.
Holding in fiduciary account, ProfCond Rule 1.15-2.

SEGREGATION OF LAWYER'S FUNDS, ProfCond Rule 1.15-2.

SETTLEMENTS.
Abiding by client's decision, ProfCond Rule 1.2.
Aggregate settlement for two or more clients, ProfCond Rule 1.8.

SEXUAL RELATIONS WITH CLIENTS, ProfCond Rule 1.19.

SHARING FEES WITH NONLAWYER, ProfCond Rule 5.4.

SOLICITING PROFESSIONAL EMPLOYMENT, ProfCond Rule 7.3.
Advertising, ProfCond Rule 7.2.
Communications of fields of practice, ProfCond Rule 7.4.

SPECIALISTS.
Communications of fields of practice, ProfCond Rule 7.4.

STOCK.
Holding, identification, ProfCond Rule 1.15-2.

SUBSTANTIAL.
Defined, ProfCond Rule 1.0.

SUSPENDED ATTORNEY.
Employing as legal clerk or assistant, ProfCond Rule 5.5.

T

TAMPERING WITH EVIDENCE, ProfCond Rule 3.4.

TARGETED COMMUNICATIONS, ProfCond Rule 7.3.

TELEPHONE CONTACT WITH POTENTIAL CLIENTS, ProfCond Rule 7.3.

TERMINATING REPRESENTATION, ProfCond Rule 1.16.

TERMINOLOGY, ProfCond Rule 1.0.

THIRD PARTIES.
Communications with persons represented by counsel, ProfCond Rule 4.2.
Dealing with unrepresented person, ProfCond Rule 4.3.
Evaluation for use by, ProfCond Rule 2.3.
Respect for third person's rights, ProfCond Rule 4.4.
Truthfulness to third persons, ProfCond Rule 4.1.

THIRD-PARTY NEUTRALS.
Former neutrals.
Conflict of interest, ProfCond Rule 1.12.
Lawyers serving as, ProfCond Rule 2.4.

THOROUGHNESS AND PREPARATION.
Competent representation, ProfCond Rule 1.1.

TRIAL PUBLICITY, ProfCond Rule 3.6.

TRIBUNAL.
Defined, ProfCond Rule 1.0.

TRUST ACCOUNT.
Defined, ProfCond Rule 1.15-1.

TRUST FUNDS.
Accounting, ProfCond Rule 1.15-3.
Defined, ProfCond Rule 1.15-1.
Deposit, ProfCond Rule 1.15-2.
Quarterly reconciliation of accounts, ProfCond Rule 1.15-3.

TRUTHFULNESS IN STATEMENTS TO OTHERS, ProfCond Rule 4.1.

U

UNAUTHORIZED PRACTICE OF LAW, ProfCond Rule 5.5.

UNCLAIMED ENTRUSTED PROPERTY,
ProfCond Rule 1.15-2.

UNREPRESENTED PERSONS.
Dealing with, ProfCond Rule 4.3.

V

VIOLATION OF RULES OF PROFESSIONAL CONDUCT.
Acts constituting professional misconduct, ProfCond Rule 8.4.
Lawyer in firm.
Nonlawyer's violations, ProfCond Rule 5.3.
Responsibility for other lawyer's violations, ProfCond Rule 5.1.
Reporting professional misconduct, ProfCond Rule 8.3.

W

WAIVER OF JURY TRIAL IN CRIMINAL CASE.
Abiding by client's decision, ProfCond Rule 1.2.

WITHDRAWAL FROM REPRESENTATION,
ProfCond Rule 1.16.

WITNESS.
Lawyer as, ProfCond Rule 3.7.

WRITING.
Contingent fee agreements, required, ProfCond Rule 1.5.
Defined, ProfCond Rule 1.0.
Inadvertent receipt of writing, ProfCond Rule 4.4.

WRITTEN COMMUNICATIONS.
Direct contact with potential clients, ProfCond Rule 7.3.

ORDER ESTABLISHING CLIENT SECURITY FUND

Adopted August 29, 1984,
with amendments received through September 10, 1997.

1. A Client Security Fund is hereby established. Each active member of the North Carolina State Bar as of 1 December 1984 shall pay the sum of $50.00 on or before 1 January 1985 and a like sum on or before 1 January of each year thereafter. The money shall be paid to the North Carolina State Bar and shall be placed by it in the Client Security Fund.

2. The Client Security Fund shall be administered by the North Carolina State Bar under rules and regulations adopted by it. Such rules and regulations, and any amendments thereto, shall not be effective until approved by this court.

3. The North Carolina State Bar shall submit annually a report to this court accounting for all monies collected and expended in the administration of the Client Security Fund.

4. To insure collection of payments due to the Client Security Fund by each attorney, the North Carolina State Bar is hereby empowered to use the same powers and procedures used to collect the dues provided for in Chapter 84 of the General Statutes of North Carolina.

5. Jurisdiction over the actions of the North Carolina State Bar in administering the Client Security Fund shall remain with this court for the entry of future orders when and as necessary to accomplish the purposes of the Client Security Fund.

Cross References. — As to the Client Security Fund Board of Trustees, see Art. VI, § 5 *l* of the Rules, Regulations and Organization of the North Carolina State Bar in this Volume.

As to the Rules of Procedure of the Client Security Fund, see Appx. I to the Rules, Regulations and Organization of the North Carolina State Bar in this Volume.

RULES GOVERNING ADMISSION TO PRACTICE OF LAW

Effective February 1, 1976,
with amendments received effective August 26, 2008.

Section .0100. Organization

Rule
.0101. Address.
.0102. Purpose.
.0103. Membership.

Section .0200. General Provisions

.0201. Compliance.
.0202. Definitions.
.0203. Applicants.
.0204. List.
.0205. Hearings.
.0206. Nonpayment of fees.

Section .0300. Reserved

Section .0400. Applications of General Applicants

.0401. How to apply.
.0402. Application form.
.0403. Filing deadlines.
.0404. Fees.
.0405. Refund of fees.
.0406. Bad check policy (Deleted).

Section .0500. Requirements for Applicants

.0501. Requirements for general applicants.
.0502. Requirements for comity applicants.

Section .0600. Moral Character and General Fitness

.0601. Burden of proof.
.0602. Permanent record.
.0603. Failure to disclose.
.0604. Bar candidate committee.
.0605. Denial; Re-application.

Section .0700. Educational Requirements

.0701. General education.
.0702. Legal education.

Section .0800. Protest

.0801. Nature of protest.
.0802. Format.
Rule
.0803. Notification; Right to withdraw.
.0804. Hearing.
.0805. Refusal to license.

Section .0900. Examinations

.0901. Written examination.
.0902. Dates.
.0903. Subject matter.
.0904. Passing score.

Section .1000. Review of Written Bar Examination

.1001. Review.
.1002. Fees.
.1003. Multistate bar examination.
.1004. Scores.
.1005. Board representative.

Section .1100. Rulemaking Procedures Reserved

Section .1200. Board Hearings

.1201. Nature of hearings.
.1202. Notice of hearing.
.1203. Conduct of hearings.
.1204. Continuances; motions for such.
.1205. Subpoenas.
.1206. Depositions and discovery.
.1207. Reopening of a case.

Section .1300. Licenses

.1301. Interim permit for comity applicants (Deleted).
.1302. Licenses for general applicants.

Section .1400. Judicial Review

.1401. Appeals.
.1402. Notice of appeal.
.1403. Record to be filed.
.1404. Wake County Superior Court.
.1405. North Carolina Supreme Court.

Index follows Rules.

SECTION .0100. ORGANIZATION

Rule .0101. Address.

The offices of the Board of Law Examiners of the State of North Carolina are located in the N.C. State Bar Building at 208 Fayetteville Street Mall, Raleigh, N.C. The mailing address is P.O. Box 2946, Raleigh, N.C. 27602. The offices are open from 9:00 a.m. to 5:00 p.m. Monday through Friday, excepting holidays.

History Note: Statutory Authority G.S. 84-24; 150A-60 (see now 150B-60); Eff. February 1, 1976; amended September 4, 1979.

Editor's note. — For North Carolina State Bar website, see www.ncbar.com.

Rule .0102. Purpose.

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Legal Periodicals. — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

Rule .0103. Membership.

The Board of Law Examiners of the State of North Carolina consists of eleven members of the N.C. Bar elected by the council of the North Carolina State Bar. One member of said Board is elected by the Board to serve as chairman for such period as the Board may determine. The Board also employs an executive director to enable the Board to perform its duties promptly and properly. The executive director, in addition to performing the administrative functions of the position, may act as attorney for the Board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977.

SECTION .0200. GENERAL PROVISIONS

Rule .0201. Compliance.

No person shall be admitted to the practice of law in North Carolina unless that person has complied with these rules and the laws of the state.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

Rule .0202. Definitions.

(1) The term "Board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(2) The term "secretary" as used in this chapter refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(3) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail properly addressed to the Board of Law Examiners and bearing sufficient first class postage and postmarked by the United States Postal Service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked after a deadline or which if postmarked on or before a deadline and do not include required fees or which include a check in payment of required fees which is not honored due to insufficient funds will not be considered as timely filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or which answers to the questions are not complete will not be considered filed and will be returned.

(4) As used in these rules, the word "Chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; amended February 3, 1988; amended April 17, 1998.

Rule .0203. Applicants.

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Rule .0204. List.

As soon as possible after each filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

Rule .0205. Hearings.

Every applicant may be required to appear before the board to be examined about any matters pertaining to the applicant's moral character and general fitness, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

Rule .0206. Nonpayment of fees.

Failure to pay the application fees required by these rules shall cause the application not to be deemed filed. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank the application will be deemed not timely filed and will have to be refiled. All checks payable to the Board for any fees which are not honored upon presentment shall be returned to the applicant who shall pay to the Board in cash, cashier's check, certified check or money order any fees payable to the Board including a fee for processing that check.

History Note: This rule was adopted by the Board of Law Examiners on June 23, 1977, and amended August 23, 1977; amended February 3, 1988.

SECTION .0300.

(Reserved for future rule purposes)

Editor's note. — Former Rules .0301 to .0304 were deleted effective February 3, 1988.

SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

Rule .0401. How to apply.

Applications for admission to an examination must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or telephoning the Board's offices.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

Rule .0402. Application form.

(1) The APPLICATION FOR ADMISSION TO TAKE THE NORTH CAROLINA BAR EXAMINATION form requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, mental treatment and bar admission and discipline history. Applicants must list references and submit as part of the application:

—Four Certificates of Moral Character from individuals who know the applicant;
—A recent photograph;
—Two sets of clear fingerprints;
—Two executed informational Authorization and Release forms;
—A birth certificate;
—Transcripts from the applicant's undergraduate schools;
—A copy of all applications to take a bar examination or an attorney's examination or for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;
—A certificate from the proper court or agency of every state in which the applicant is or has been licensed, that the applicant is in good standing and not under pending charges of misconduct;
—Copies of any legal proceedings in which the applicant has been a party.

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who has aptly filed a complete APPLICATION FOR ADMISSION TO TAKE THE NORTH CAROLINA BAR EXAMINATION for a particular bar examination may file a SUPPLEMENTAL APPLICATION on forms supplied by the Board, along with the applicable fees for the next subsequent bar examination. An applicant who has filed a SUPPLEMENTAL APPLICATION as provided by this rule immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a subsequent SUPPLEMENTAL APPLICATION along with the applicable fees for the next bar examination. The SUPPLEMENTAL APPLICATION will update the information previously submitted to the Board by the applicant. Said SUPPLEMENTAL APPLICATION must be filed by the deadline set out in Rule .0403 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; May 5, 1981; February 3, 1988; May 5, 1994.

Legal Periodicals. — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

Rule .0403. Filing deadlines.

(1) Applications shall be filed and received by the secretary at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $200 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application **will not** be allowed to take the Bar Examination designated on the application.

(4) Any applicant who has aptly filed an application to stand the February written bar examination may make application to take the immediately following July bar examination by filing a Supplemental Application with the secretary of the Board at the offices of the Board on or before the first Tuesday in May immediately preceding the July written bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; February 5, 1979; September 4, 1979; February 25, 1980; amended April 17, 1998.

Rule .0404. Fees.

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $600.00.

(2) is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,200.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.

(4) is filing after the deadline set out in Rule .0403(1) shall be accompanied by a late fee of $250.00 in addition to all other fees required by these rules.

History Note: Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976; amended August 29, 1978; September 4, 1979; February 25, 1980; May 4, 1982; August 28, 1984; February 3, 1988; amended July 26, 1990; May 5, 1994; Amended effective February 5, 2002.

Editor's note. — A former subdivision (5) of this section was deleted by amendment February 3, 1988.

Rule .0405. Refund of fees.

No part of the fee required by Rule .0404 (1), (2), (3) of this Chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination in which event not more than one-half of the fee may be refunded to the applicant in the discretion of the Board. No portion of any late fee will be refunded.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; amended February 3, 1988.

Rule .0406. Bad check policy (Deleted).

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976. This rule was deleted by amendment of August 23, 1977.

SECTION .0500. REQUIREMENTS FOR APPLICANTS

Rule .0501. Requirements for general applicants.

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) Possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter both at the time the license is issued and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter;

(2) Possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) Be of the age of at least eighteen (18) years;

(4) Have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) Stand and pass a written bar examination as prescribed in Section .0900 of this Chapter;

(6) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant applies to take, or shall take and pass the Multistate

Professional Responsibility Examination within the twelve (12) month period thereafter. The time limits are tolled for a period not exceeding four (4) years for any applicant who is a servicemember as defined in the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 511, while engaged in active service as defined in 10 U.S.C. § 101, and who provides a letter or other communication from the servicemembers' commanding officer stating that the servicemember's current military duty prevents attendance for the examination, stating that military leave is not authorized for the servicemember at the time of the letter, and stating when the servicemember would be authorized military leave to take the examination.

(7) If the applicant is or has been a licensed attorney, then the applicant be in good standing in every jurisdiction within each state, territory of the United States, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) The applicant is an active or inactive member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) The applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member.

(b) If the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; Amended effective August 23, 1977; September 4, 1979; February 25, 1980; April 8, 1983; August 28, 1984; July 26, 1985; Amended effective February 3, 1988; Amended effective May 5, 1994; Amended effective March 6, 1997; Amended effective February 20, 2004; Amended effective August 26, 2008.

Legal Periodicals. — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

For article, "Improving the Fitness Inquiry of the North Carolina Bar Application," see 81 N.C.L. Rev. 2179 (2003).

CASE NOTES

Consideration of Past Behavior. — In making a proper determination regarding an individual's current moral character, the past behavior of that individual is an appropriate inquiry, because to disallow consideration of past behavior would limit the board's discretion and hinder the effectiveness of a system which exists to ensure the integrity of the legal profession and to protect the public at large. In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

Rule .0502. Requirements for comity applicants.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the Code of Professional Responsibility as Promulgated by the North Carolina State Bar;

(b) That the applicant furnish the following documentation:

i. Certificates of Moral Character from four (4) individuals who know the applicant;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;

vii. A certificate of admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $1,500.00, no part of which may be refunded to the applicant whose application is denied;

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal Service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which applicant is duly licensed; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this state which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(4) Satisfy the Board that the state, or territory of the United States, or the District of Columbia, in which the applicant is licensed and from which he seeks comity will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District of Columbia, without written examination, other than the Multistate Professional Responsibility Examination;

(5) Be in good standing in every jurisdiction within each state, territory of the United States, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active or inactive member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member.

(b) If the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

The applicant must not only be in good standing but also must be an active member of each jurisdiction on which the applicant relies for admission by comity.

(6) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(7) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(8) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application;

(9) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended January 31, 1977; August 23, 1977; February 23, 1978; August 29, 1978; September 4, 1979; February 25, 1980; May 4, 1982; November 10, 1982; April 8, 1983; August 28, 1984; July 26, 1985; February 3, 1988; May 5, 1994; amended April 17, 1998; Amended effective February 20, 2004.

CASE NOTES

Constitutionality. — Comity applicant was properly denied admission to the North Carolina bar because N.C. R. Admis. Prac. Law .0502(3), which required an applicant to practice in a comity state within four of the past six years prior to admission, North Carolina is not discriminating against citizens of other states, rather the state is securing for its citizens an advantage by offering that advantage condition that the other state make a similar grant. Morrison v. Bd. of Law Examiners, 453 F.3d 190, 2006 U.S. App. LEXIS 14695 (4th Cir. N.C. 2006), rev'd, in part, on other grounds, 453 F.3d 190 (4th Cir. N.C. 2006).

Comity applicant had no standing to challenge North Carolina's comity requirement under N.C. R. Admis. Prac. Law .0502(3) because he had no comity barrier to admission; the applicant was already a member of the bars of two states in comity with North Carolina and thus suffered no injury in fact from that requirement. Morrison v. Bd. of Law Exam'rs, 360 F. Supp. 2d 751, 2005 U.S. Dist. LEXIS 3906 (E.D.N.C. 2005).

Board of Law Examiners was justified in denying application submitted pursuant to this section where the applicant did not actively and substantially engage in the practice of law for at least four out of the last six years immediately prior to filing for comity in North Carolina and where her statements showed a lack of candor and had a negative bearing on her character. In re Braun, 352 N.C. 327, 531 S.E.2d 213, 2000 N.C. LEXIS 526 (2000).

Applied in In re Golia-Paladin, 327 N.C. 132, 393 S.E.2d 799 (1990).

SECTION .0600. MORAL CHARACTER AND GENERAL FITNESS

Rule .0601. Burden of proof.

Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

What Character Encompasses. — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Showing Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Each applicant for admission has, pursuant to this rule, the burden of proving his good moral character, and must initially come forward with sufficient evidence to make out a prima facie case. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

When an applicant makes a prima facie showing of good moral character and the board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the board must prove the specific acts by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

The board's brief should be directed to whether the specific findings are supported by the evidence and if so whether they along with other findings of misconduct are sufficient to rebut the applicant's prima facie case. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

The board cannot meet its burden of proving specific acts of misconduct without setting out with specificity what they are and that they have been proved by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Application Denied on Basis of Ethical Violations in Another State. — Board of Law Examiners committed no error in denying petitioner's application for admission to the bar exam and in finding that petitioner failed to carry her burden of establishing that she possessed the requisite qualifications of character and general fitness for an attorney and counselor-at-law, although she could practice law in California, with some restrictions, where she had executed an ALD (Agreement in Lieu of Discipline) admitting that she violated three ethical rules. In re Gordon, 352 N.C. 349, 531 S.E.2d 795, 2000 N.C. LEXIS 525 (2000).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Constitutional Challenge Held Moot. — Action seeking injunctive relief and declaration that bar rules regarding moral character were unconstitutional held moot following plaintiffs' admission to bar. See Nestler v. Board of Law Exmrs., 611 F.2d 1380 (4th Cir. 1980).

Rule .0602. Permanent record.

All information furnished to the Board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

Rule .0603. Failure to disclose.

No one shall be licensed to practice law by examination or comity or be allowed to take the bar examination in this state:

(1) who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

Legal Periodicals. — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

Rule .0604. Bar candidate committee.

Every applicant shall appear before a bar candidate committee, appointed by the chairman of the Board, in the judicial district in which the applicant resides, or in such other judicial district as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a bar candidate committee may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; February 3, 1988.

Rule .0605. Denial; Re-application.

No new application or petition for reconsideration of a previous application from an applicant who has either been denied permission to take the bar examination or has been denied a license to practice law on the grounds set forth in Section .0600 shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the Board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

SECTION .0700. EDUCATIONAL REQUIREMENTS

Rule .0701. General education.

Each applicant must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; February 3, 1988.

Rule .0702. Legal education.

Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the

Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. There shall be filed with the secretary a certificate of the dean, or other proper official of said law school, certifying the date of the applicant's graduation. A list of the approved law schools is available in the office of the secretary.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended September 4, 1979;
February 25, 1980; February 3, 1988.

CASE NOTES

Promulgation of Rule. — A rule requiring a candidate for the bar exam to have graduated from an ABA-accredited law school was properly adopted, even though it was not promulgated as a rule under the Administrative Procedure Act, as this section gives the State Bar Council specific directions on how to adopt rules, and the Council complied with these directions in adopting the rule. Bring v. North Carolina State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998).

SECTION .0800. PROTEST

Rule .0801. Nature of protest.

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

Rule .0802. Format.

A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended February 3, 1988.

Rule .0803. Notification; Right to withdraw.

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

CASE NOTES

Cited in In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

Rule .0804. Hearing.

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination, and the results will be sealed until final disposition of the protest in favor of the applicant.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended February 3, 1988.

Rule .0805. Refusal to license.

Nothing herein contained shall prevent the Board on its own motion from refusing to issue a license to practice law until the Board has been fully satisfied as to the moral character and general fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended September 4, 1979;
February 3, 1988.

SECTION .0900. EXAMINATIONS

Rule .0901. Written examination.

Two written bar examinations shall be held each year for those applying to be admitted to the practice of law in North Carolina.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended February 25, 1980;
February 3, 1988.

Rule .0902. Dates.

The written bar examinations shall be held in the City of Raleigh, Wake County or adjoining counties in the months of February and July on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended February 25, 1980;
amended October 6, 2004.

Rule .0903. Subject matter.

The examination may deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976; amended September 4, 1979;
July 26, 1985.

Cross References. — As to when changes in the educational requirements of the examination become effective, see G.S. 84-24.

Rule .0904. Passing score.

The Board shall determine what shall constitute the passing of an examination.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .1000. REVIEW OF WRITTEN BAR EXAMINATION

Rule .1001. Review.

An unsuccessful applicant to the bar examination may examine the test booklets containing the applicant's essay examination along with such answers to the examination as the Board determines will be of assistance to the applicants and the essay examination in the Board's offices.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976; amended February 3, 1988; amended November 8, 2007.

Rule .1002. Fees.

The Board will furnish an unsuccessful applicant a copy of the applicant's essay examination at a cost to be determined by the secretary not to exceed $20.00. No copies of the Board's grading guide will be made or furnished to the applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988; amended November 8, 2007.

Rule .1003. Multistate bar examination.

There is no provision for review of the Multistate Bar Examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

Rule .1004. Scores.

(1) Upon written request the Board will release to an unsuccessful applicant the applicant's scores on the bar examination.

(2) Upon written request of an applicant, the Board will furnish the Multistate Bar Examination score of said applicant to another Board of bar examiners, or like organization that administers the admission of attorneys into that jurisdiction.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; August 24, 1981; February 3, 1988.

Rule .1005. Board representative.

The secretary of the Board serves as the representative of the Board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

SECTION .1100. RULEMAKING PROCEDURES

(Reserved for future rule purposes)

SECTION .1200. BOARD HEARINGS

Rule .1201. Nature of hearings.

(1) All general applicants may be required to appear before the Board or a Panel at a hearing to answer inquiry about any matter under these rules.

(2) Each comity applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502.

History Note: Statutory Authority G.S. 150A-11 (see now 150B-11); 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

CASE NOTES

The purpose of the hearing before the board is to probe matters set forth in the notice of hearing required by Rule .1202. Such an inquiry must of necessity concern acts which occurred prior to the hearing. The board should first determine whether in fact the applicant committed the prior acts of misconduct. If it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

What Character Encompasses. — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Showing Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Rule .1202. Notice of hearing.

The chairman will schedule the hearings before the Board or Panel and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or the applicant's attorney within a reasonable time before the date of the hearing.

History Note: Statutory Authority G.S. 150B-23; Eff. February 1, 1976; amended August 23, 1977; September 4, 1979; February 3, 1988.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Rule .1203. Conduct of hearings.

(1) All hearings shall be heard by the Board except that the chairman may designate two or more members to serve as a Panel to conduct these hearings.

(2) The Panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The Panel may grant the application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the secretary at the offices of the Board within ten (10) days following receipt of the Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board and shall result in the determination of the Panel becoming final.

(3) The Board or a Panel of the Board may require an applicant to make more than one appearance before the Board or Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations, all at the applicant's expense, pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination but seal the results of that examination until the Board or a Panel has made a final determination that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor at law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 150A-11 (see now 150B-11); Eff. February 1, 1976; amended November 4, 1976; August 23, 1977; September 4, 1979; February 25, 1980; April 8, 1983; February 3, 1988; amended April 17, 1998.

Legal Periodicals. — For article, "Improving the Fitness Inquiry of the North Carolina Bar Application," see 81 N.C.L. Rev. 2179 (2003).

CASE NOTES

Cited in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989).

Rule .1204. Continuances; motions for such.

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the Board and will be granted or denied by the chairman of the Board.

History Note: Statutory Authority G.S. 150A-24 (see now 150B-24); Eff. February 1, 1976; amended August 23, 1977.

Rule .1205. Subpoenas.

(1) The Board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(2) The secretary of the Board is delegated the power to issue subpoenas in the Board's name.

History Note: Statutory Authority G.S. 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977.

Rule .1206. Depositions and discovery.

(1) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The Board may also allow the use of depositions

or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(2) Any party or the Board may submit sworn affidavits as evidence to be considered by the Board in a Board Hearing. The Board will take under consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

History Note: Statutory Authority G.S. 150A-11 (see now 150B-11); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

CASE NOTES

Cited in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989).

Rule .1207. Reopening of a case.

After a final decision has been reached by the Board in any matter, a party may petition the Board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The petition shall be made within a reasonable time and not more than ninety days after the decision of the Board has been entered.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1979; February 3, 1988.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Cited in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

SECTION .1300. LICENSES

Rule .1301. Interim permit for comity applicants (Deleted).

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Rule .1302. Licenses for general applicants.

Upon compliance with the rules of the Board, and all orders of the Board, the secretary, upon order of the Board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1400. JUDICIAL REVIEW

Rule .1401. Appeals.

A general applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, the applicant may appeal from any adverse ruling or determination withholding the applicant's license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying the applicant's application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

Cited in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

Rule .1402. Notice of appeal.

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Rule .1403. Record to be filed.

Within sixty days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County the record of the case, comprising:

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony when taken at the hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981); In re McCarroll, 313 N.C. 315, 327 S.E.2d 880 (1985).

Rule .1404. Wake County Superior Court.

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the Board when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Cited in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

Rule .1405. North Carolina Supreme Court.

Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the Board.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

CASE NOTES

Applied in In re Moore, 308 N.C. 771, 303 S.E.2d 810 (1983).

Cited in In re Elkins, 308 N.C. 317, 302 S.E.2d 215 (1983); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

Index to Rules Governing Admission to Practice of Law

A

APPEALS.
Jurisdiction.
  Wake county superior court, AdmissPrac Rule .1404.
Notice, AdmissPrac Rule .1402.
Records, AdmissPrac Rule .1403.
Right of appeal, AdmissPrac Rule .1401.
Supreme court.
  Appeal from superior court to, AdmissPrac Rule .1405.
Wake county superior court, AdmissPrac Rule .1404.
  Appeal to supreme court from, AdmissPrac Rule .1405.

APPLICANTS.
Burden of proof.
  Good moral character and general fitness, AdmissPrac Rule .0601.
Comity applicants, AdmissPrac Rule .0203.
  Interim permits, AdmissPrac Rule .1301.
  Licenses.
    Issuance, AdmissPrac Rule .1301.
  Qualifications, AdmissPrac Rule .0502.
Education.
  Requirements.
    General education, AdmissPrac Rule .0701.
    Legal education, AdmissPrac Rule .0702.
Fees.
  Comity applicants, AdmissPrac Rule .0502.
  General applicants, AdmissPrac Rule .0404.
    Late filing fee, AdmissPrac Rule .0403.
    Refund of fees, AdmissPrac Rule .0405.
General applicants, AdmissPrac Rule .0203.
  Deadline for filing application, AdmissPrac Rule .0403.
  Fees, AdmissPrac Rule .0404.
    Late filing fee, AdmissPrac Rule .0403.
    Refund of fees, AdmissPrac Rule .0405.
  Form of application, AdmissPrac Rule .0402.
  How to apply, AdmissPrac Rule .0401.
  Licenses.
    Issuance, AdmissPrac Rule .1302.
  Lists, AdmissPrac Rule .0204.
  Qualifications, AdmissPrac Rule .0501.
Good moral character and general fitness.
  Burden of proof, AdmissPrac Rule .0601.
  Requirements, AdmissPrac Rules .0501, .0502.
Information concerning, AdmissPrac Rule .0602.
  Failure to disclose, AdmissPrac Rule .0603.
Protest of application.
  Format, AdmissPrac Rule .0802.
  Hearing, AdmissPrac Rule .0804.
  Nature of protest, AdmissPrac Rule .0801.
  Notice to applicant, AdmissPrac Rule .0803.
  Refusal by board on own motion to license, AdmissPrac Rule .0805.
  Withdrawal by applicant.
    Right to withdraw, AdmissPrac Rule .0803.

APPLICANTS —Cont'd
Qualifications, AdmissPrac Rules .0501, .0502.
Re-application, AdmissPrac Rule .0605.

B

BAR CANDIDATE COMMITTEE, AdmissPrac Rule .0604.

BAR EXAMINATIONS.
Dates, AdmissPrac Rule .0902.
Fees.
  Review of written bar examination, AdmissPrac Rule .1002.
Frequency, AdmissPrac Rule .0901.
Passing score, AdmissPrac Rule .0904.
Review of written bar examinations.
  Board representative, AdmissPrac Rule .1005.
  Fees, AdmissPrac Rule .1002.
  Generally, AdmissPrac Rule .1001.
  Multistate bar examination.
    No provision for review, AdmissPrac Rule .1003.
  Scores.
    Release, AdmissPrac Rule .1004.
Subject matter, AdmissPrac Rule .0903.
Written examinations, AdmissPrac Rule .0901.

BOARD OF LAW EXAMINERS.
Address, AdmissPrac Rule .1010.
Appeals from board.
  See APPEALS.
Chairman, AdmissPrac Rule .0103.
Continuances.
  Hearings, AdmissPrac Rule .1204.
Depositions.
  Use in hearings, AdmissPrac Rule .1206.
Executive secretary, AdmissPrac Rule .0103.
Hearings, AdmissPrac Rule .1201.
  Applicants, AdmissPrac Rule .0205.
  Conduct of hearings, AdmissPrac Rule .1203.
  Continuances, AdmissPrac Rule .1204.
  Depositions, AdmissPrac Rule .1206.
  Discovery, AdmissPrac Rule .1206.
  Notice, AdmissPrac Rule .1202.
    Request by applicant for hearing de novo, AdmissPrac Rule .1203.
  Protest of applications, AdmissPrac Rule .0804.
  Reopening of case, AdmissPrac Rule .1207.
  Subpoenas, AdmissPrac Rule .1205.
Judicial review of board.
  See APPEALS.
Membership, AdmissPrac Rule .0103.
Notice.
  Hearings, AdmissPrac Rule .1202.
    Request by applicant for hearing de novo, AdmissPrac Rule .1203.
Number of members, AdmissPrac Rule .0103.
Office hours, AdmissPrac Rule .0101.
Purpose, AdmissPrac Rule .0102.
Subpoenas.
  Power of board, AdmissPrac Rule .1205.

BURDEN OF PROOF.
Applicants.
  Good moral character, AdmissPrac Rule .0601.

C

COMPLIANCE WITH RULES.
Required, AdmissPrac Rule .0201.

CONTINUANCES.
Board of law examiners.
  Hearings, AdmissPrac Rule .1204.

D

DEFINITIONS, AdmissPrac Rule .0202.

DEPOSITIONS.
Board of law examiners.
  Use in hearings, AdmissPrac Rule .1206.

E

EDUCATION.
Applicants.
  Requirements.
    General education, AdmissPrac Rule .0701.
    Legal education, AdmissPrac Rule .0702.

F

FEES.
Applicants.
  Comity applicants, AdmissPrac Rule .0502.
  General applicants, AdmissPrac Rule .0404.
    Late filing fee, AdmissPrac Rule .0403.
    Refund of fees, AdmissPrac Rule .0405.
Bar examinations.
  Review of written bar examination, AdmissPrac Rule .1002.
Nonpayment, AdmissPrac Rule .0206.

H

HEARINGS.
Board of law examiners, AdmissPrac Rule .1201.
  Applicants, AdmissPrac Rule .0205.
  Conduct of hearings, AdmissPrac Rule .1203.
  Continuances, AdmissPrac Rule .1204.
  Depositions, AdmissPrac Rule .1206.
  Discovery, AdmissPrac Rule .1206.
  Notice, AdmissPrac Rule .1202.
    Request by applicant for hearing de novo, AdmissPrac Rule .1203.
  Protest of applications, AdmissPrac Rule .0804.
  Subpoenas, AdmissPrac Rule .1205.

HEARINGS —Cont'd
Notice.
  Board of law examiners, AdmissPrac Rule .1202.
    Request by applicant for hearing de novo, AdmissPrac Rule .1203.

J

JURISDICTION.
Appeals.
  Wake county superior court, AdmissPrac Rule .1404.

L

LICENSES.
Issuance.
  Comity applicants, AdmissPrac Rule .1301.
  General applicants, AdmissPrac Rule .1302.

N

NOTICE.
Appeals, AdmissPrac Rule .1402.
Board of law examiners.
  Hearings, AdmissPrac Rule .1202.
    Request by applicant for hearing de novo, AdmissPrac Rule .1203.
Hearings.
  Board of law examiners, AdmissPrac Rule .1202.
    Request by applicant for hearing de novo, AdmissPrac Rule .1203.

R

RECORDS.
Appeals, AdmissPrac Rule .1403.

S

SUBPOENAS.
Board of law examiners.
  Power of board, AdmissPrac Rule .1205.

SUPREME COURT.
Appeals.
  Appeal from superior court to, AdmissPrac Rule .1405.

W

WAKE COUNTY SUPERIOR COURT.
Appeals, AdmissPrac Rule .1404.
  Appeal to supreme court from, AdmissPrac Rule .1405.

REGULATIONS GOVERNING CONTINUING LEGAL EDUCATION

With amendments received through September 10, 1997.

Index containing the Regulations Governing Continuing
Legal Education and the Continuing Legal Education
Rules follows these Regulations Governing
Continuing Legal Education

Regulation
1. Organization.
2. General course approval.
3. Accredited sponsors.
4. Accreditation of videotape or other audiovisual programs.
5. Computation of credit.
6. Fees.

Rule
7. Special cases and exemptions.
8. General compliance procedures.
9. Noncompliance procedures.
10. Authority for appeals.

Index follows Rules.

Cross References. — As to Continuing Legal Education Rules, see this Volume.

Regulation 1. Organization.

1.1. *Quorum.* Five members shall constitute a quorum of the Board.

1.2. *The executive committee.* The Executive Committee of the Board shall be comprised of the chairperson, a vice-chairperson elected by the members of the Board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the Board that may arise between meetings of the full Board. In such matters it shall have complete authority to act for the Board.

1.3. *Other committees.* The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

1.4. *Definitions.* As used herein, "Board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "Rules" means the Rules for the Continuing Legal Education Program adopted by the Supreme Court of North Carolina.

Regulation 2. General course approval.

2.1. *Law school courses.* Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Regulation 5.1. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

2.2. *Bar review/refresher course.* Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar examination shall not be approved for CLE credit.

2.3. *Approval.* CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, on an individual program basis or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(a) If advance approval is requested, the application and supporting documentation including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled.

(b) In all other cases the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(c) The application shall be submitted on a form furnished by the Board.

(d) The application shall contain all information requested on the form.

(e) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(f) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

2.4. *Course quality.* The application and materials provided shall reflect that the program to be offered meets the requirements of Rule 19(E). Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

2.5. *Records.* Sponsors, including accredited sponsors, shall within 30 days after the course is concluded:

(a) furnish to the Board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(b) remit to the Board the appropriate sponsor fee.

(c) furnish to the Board a complete set of all written materials distributed to attendees at the course or program.

2.6. *Announcement.* Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

> This course (or seminar or program) has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility and ____ will apply toward the practical skills requirement. This course is not sponsored by the Board.

2.7. *Notice.* Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the Board.

The Board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the Board, or if the Board timely notifies the sponsor the matter has been tabled and the reason therefor.

2.8. *In-house CLE and self-study.* No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the Board under Rule 19(G).

2.9. *Facilities.* Sponsors ordinarily must provide a facility with adequate lighting and temperature control ventilation. For a nonclinical CLE activity, the facility should be set up in classroom or similar style to provide a writing surface for each preregistered attendee or sufficient space for taking notes, and shall provide sufficient space between the chairs in each row to permit easy access to and exit from each seat. Crowding in the facility detracts from the learning process and will not be permitted.

2.10. *Course materials.* In addition to the requirements of sections 2.3 and 2.5 above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the Board a copy of all materials presented and distributed at a CLE course or program.

2.11. *Nonlegal educational activities.* Except in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval: (a) courses within the normal college curriculum such as English, history, social studies and psychology; (b) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life or substance abuse; (c) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing and financial management; and (d) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients.)

A course or segment may be granted credit by the board when a bar organization course trains volunteer attorneys in service to the profession if all or segments of the course are devoted to CLE as defined in Rule 1(B)(5) or professional responsibility (Rule 1(B)(13)), if such course or segment meets the standards of these rules, and if the sponsor represents that such course or segment meets these standards. No more than three hours of professional responsibility will be credited per training course.

Regulation 3. Accredited sponsors.

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule 20(A), the application of the sponsor must meet the following requirements:

(a) the application for accredited sponsor status shall be submitted on a form furnished by the Board.

(b) the application shall contain all information requested on the form.

(c) the application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(d) the application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(e) the application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule 19.

(f) notwithstanding the provisions of (c), (d) and (e) above, any law school which has been approved by The North Carolina State Bar for purposes of qualifying its graduates for the North Carolina Bar examination, may become an accredited sponsor upon application to the Board.

Regulation 4. Accreditation of videotape or other audiovisual programs.

4.1. The Board may permit an active member to receive credit for attendance at, or participation in, videotape presentations or where audio-visual recorded or reproduced material is used.

4.2. An attorney attending such a presentation is entitled to credit hours if:

(a) The presentation from which the program is made would, if attended by an active member, be an accredited course; and

(b) All other conditions imposed by these regulations, or by the Board in advance, are met.

4.3. Unless the entire program has been produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the Board. Board Form 2 may be utilized for this purpose.

4.4. To receive approval for attendance at such programs, the following conditions must be met:

(a) The person or organization sponsoring the program must keep accurate records of attendance, and must forward a copy of the record of attendance of active members to the Board within 30 days after presentation of the videotape program is completed.

(b) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the course from which the program is made must be made available to those persons attending the program who desire to receive credit under these regulations.

(c) Attendance must be verified by a responsible party who is not attempting to earn credit hours by virtue of attendance at that presentation. Proof of attendance may be made by the verifying person on Board Form 5.

(d) A suitable classroom or rooms must be available for viewing the program and taking of notes.

4.5. A minimum of five active members must physically attend the presentation of the program.

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under Regulation 4 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the Board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the Board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held, and approved by the Board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program, unless it is viewed in the presence of a person who is not attending the videotape program for credit, and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions must also be met (i.e., materials available at the original presentation must be available at the videotape presentation, at least five active members must be present, etc.).

Regulation 5. Computation of credit.

5.1. *Computation formula.* CLE and ethics hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totalling 195 minutes would equal 3.25 hours toward CLE.

5.2. *Actual instruction.* Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(a) Introductory remarks;

(b) Breaks;

(c) Business meetings;

(d) Keynote speeches or speeches in connection with meals;

(e) Questions and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length.

5.3. *Teaching.* As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, a presentation of 45 minutes would qualify for 4.5 hours of credit.

Regulation 6. Fees.

6.1. *Sponsor fee.* The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee is set at $1.25 per approved CLE hour per active member of the North Carolina State Bar in attendance.

The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $1.25
x Total Approved CLE hours (6)
x Number of NC Attendees (100)
= Total Sponsor Fee ($750.00)

6.2. *Attendee fee.* The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee is set at $1.25 per approved CLE hour for which the attorney claims credit.

It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit:

Fee: $1.25
x Total Approved CLE hours (3)
= Total of Attendee Fee ($3.75)

6.3. *Fee review.* The fee charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program.

6.4. *Uniform application.* The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

Regulation 7. Special cases and exemptions.

7.1. Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The Board shall review and approve or disapprove such plans on an individual basis and without delay.

7.2. Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the Board on a yearly basis upon written application of the attorney.

7.3. Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The Board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

7.4. Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the Board for an exemption from the practical skills requirement of Rule 18(C). This application must be filed prior to July 31 of the year for which the exemption is initially sought.

Regulation 8. General compliance procedures.

8.1. *Affidavit.* Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of The North Carolina State Bar concerning compliance with the Continuing Legal Education Program for the preceding year.

8.2. *Late filing penalty.* Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. The due date for filing the affidavit for the 1988 reporting year only shall be March 31, 1989. This penalty shall be submitted with the affidavit. An affidavit that is either received by the Board or postmarked on or before February 28 (March 31 in 1989 only) shall be considered to have been timely filed. An attorney who complies with the requirements of the Rules during the probationary period under Rule 23 shall pay a late compliance fee of $125.00.

Regulation 9. Noncompliance procedures.

9.1. *Reinstatement fee.* The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

9.2. *Policy.* Reinstatement will be granted only upon a showing that the member has attended sufficient approved CLE activity to make up his or her previous deficiency.

9.3. *Petition.* The petition for reinstatement shall list the CLE activities according to a form provided by the Board.

Regulation 10. Authority for appeals.

10.1. *Appeals.* Except as otherwise provided, the Board is the final authority on all matters entrusted to it under these Rules. Therefore, any decision by a committee of the Board pursuant to a delegation of authority may be appealed to the full Board.

10.2. *Procedure.* A decision made by the staff of the Board pursuant to a delegation of authority may also be reviewed by the full Board, but should first be appealed to any committee of the Board having jurisdiction on the subject involved. All appeals shall be in writing. The Board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

Index to Regulations for Continuing Legal Education

A

ACCREDITATION STANDARDS.
Program.
  Videotaped or audiovisual programs, CLE Reg 4.

ACCREDITED SPONSORS.
Requirements, CLE Reg 3.

AFFIDAVIT OF COMPLIANCE, CLE Reg 8.
Late filing penalty, CLE Reg 8.

APPEALS, CLE Reg 10.

APPROVAL OF COURSES, CLE Reg 2.

AUDIOVISUAL PROGRAMS.
Accreditation, CLE Reg 4.

B

BAR REVIEW COURSES.
Course approval, CLE Reg 2.

BOARD.
Appeals, CLE Reg 10.
Committees, CLE Reg 1.
Defined, CLE Reg 1.
Executive committee, CLE Reg 1.
Quorum, CLE Reg 1.

C

CLE.
Defined, CLE Reg 1.

COMPLIANCE PROCEDURES.
Affidavit of compliance, CLE Reg 8.
  Late filing penalty, CLE Reg 8.
Noncompliance, CLE Reg 9.

COMPUTATION OF CREDIT, CLE Reg 5.

CONTINUING LEGAL EDUCATION.
Defined, CLE Reg 1.

COURSE APPROVAL, CLE Reg 2.

CREDIT HOURS.
Computation, CLE Reg 5.

D

DEFINITIONS, CLE Reg 1.

E

EXECUTIVE COMMITTEE OF THE BOARD, CLE Reg 1.

EXEMPTIONS FROM RULES, CLE Reg 7.

F

FACILITIES.
Course approval, CLE Reg 2.

FEES.
Attendee's fees, CLE Reg 6.
Reinstatement, CLE Reg 9.
Review of fees, CLE Reg 6.
Sponsors, CLE Reg 6.
Uniform application, CLE Reg 6.

I

IN-HOUSE CONTINUING EDUCATION.
Course approval, CLE Reg 2.

L

LAW SCHOOL COURSES.
Course approval, CLE Reg 2.

M

MATERIALS.
Course approval, CLE Reg 2.

N

NONCOMPLIANCE PROCEDURES.
Reinstatement, CLE Reg 9.

R

REINSTATEMENT, CLE Reg 9.

RULES.
Defined, CLE Reg 1.

S

SELF-STUDY.
Course approval, CLE Reg 2.

SPECIAL CASES, CLE Reg 7.

V

VIDEOTAPED PROGRAMS.
Accreditation, CLE Reg 4.

INDIGENT DEFENSE SERVICES

Adopted July 1, 2001, with amendments through September 19, 2008

Part 1
Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level

Rule
1.1. Coverage and Definitions.
1.2. Entitlement to Counsel.
1.3. Notice of Rights.
1.4. Indigency.
1.5. Appointment Procedure.
1.6. Waiver of Counsel.
1.7. Withdrawal of Appointed Counsel.
1.8. Contracts.
1.9. Payment of Appointed Counsel.
1.10. Supporting Services.
1.11. Recoupment of Fees.

Part 2
Rules for Providing Legal Representation in Capital cases

Subpart 2A. Appointment and Compensation of Trial Counsel in Capital Cases.
2A.1. Coverage of this Subpart.
2A.2. Appointment of Trial Counsel.
2A.3. Waiver of Counsel.
2A.4. Compensation and Recoupment.
2A.5. Conditions of Appointment.
Subpart 2B. Appointment and Compensation of Appellate Counsel in Capital Cases.
2B.1. Coverage of this Subpart.
2B.2. Appointment of Appellate Counsel.
2B.3. Compensation and Recoupment.
2B.4. Conditions of Appointment.
Subpart 2C. Appointment of Post-Conviction Counsel in Capital Cases.
2C.1. Coverage of this Part.
2C.2. Appointment of Post-Conviction Counsel.
2C.3. Compensation and Recoupment.
2C.4. Conditions of Appointment.
Subpart 2D. Appointment and Compensation of Experts and Payment of Other Expenses Related to Legal Representation in Capital Cases.
Rule
2D.1. Initial Application.
2D.2. Confidentiality of Application.
2D.3. Disapproval of Application.
2D.4. Application to Court.
2D.5. Authority to Implement other Programs, Plans, and Contracts. Appx

Appendix to Part 2.
Appendix 2A. Standards for Lead and Associate Trial Counsel in Capital Cases.
2A.1. (App.) Trial Qualifications and Experience.
2A.2. (App.) Applications.
2A.3. (App.) Retention and Eligibility.
Appendix 2B. Standards for Appellate Counsel in Capital Cases.
2B.1. (App.) Appellate Qualifications and Experience.
2B.2. (App.) Applications.
2B.3. (App.) Retention and Eligibility.
Appendix 2C. Standards for State Post-Conviction Counsel in Capital Cases.
2C.1. (App.) State Post-Conviction Qualifications and Experience.
2C.2. (App.) Applications.
2C.3. (App.) Retention and Eligibility.

Part 3
Rules for Providing Legal Representation in Non-Capital Criminal Appeals and Non-Criminal Appeals

3.1. Coverage of this Part.
3.2. Appointment of Appellate Counsel.
3.3. Compensation of Appellate Counsel.
3.4. Standards for Appellate Counsel.
3.5. Substitution of Counsel.
3.6. Removal from Roster.
3.7. Authority to Implement other Programs, Plans, and Contracts.
Indigent Defense Performance Guidelines.

Index follows Rules.

PART 1

RULES FOR THE CONTINUED DELIVERY OF SERVICES IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL

This first part addresses the procedure for appointing and compensating counsel in all cases subject to the oversight of the Office of Indigent Defense Services (IDS Office), except for capital cases, which are covered by Part 2 of these rules, and appellate cases, which are covered by Part 3 of these rules. These rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001.

The principal aim of this first part is to ensure that the system for appointing and compensating counsel at the trial level in non-capital criminal and non-criminal cases is not disrupted. Because of the sheer number of such cases handled by appointed counsel (approximately 120,000 in fiscal year 1999-2000 alone), these rules continue most of the current practices and procedures, allowing the IDS Office to consider and implement changes over time after considering the suggestions and advice of the bar, bench, and other interested persons.

The rules are drawn in large part from the North Carolina General Statutes (G.S.), as revised by the IDS Act, and Section D.0400 and D.0500 of the Rules and Regulations of the North Carolina State Bar (State Bar Rules). That section of the State Bar Rules is no longer effective beginning July 1, 2001, because the authorization for those rules, in former G.S. 7A-459, was repealed effective that date.

Whenever the term "IDS Director" is used in these rules, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001.)

Rule 1.1. Coverage and Definitions.

1. This part applies to all non-capital criminal and non-criminal cases at the trial level. The terms "non-capital criminal case" and "non-criminal case" refer only to such cases in which the IDS Office is responsible for the provision and oversight of legal representation. The term "trial level" includes all cases in district or superior court.

2. Except as otherwise provided in these rules, this part does not apply to capital cases, as defined in Part 2 of these rules, at the trial, appellate, or post-conviction level. The term "capital case" means any case involving a first-degree murder charge or charge in which the degree of murder is undesignated, except cases in which the defendant was under 18 years of age at the time of the offense and not potentially punishable by death, and any non-capital criminal charge brought contemporaneously with or subsequently joined with such murder charge.

3. Except as otherwise provided in these rules, this part does not apply to appellate cases, as defined in Part 3 of these rules. The term "appellate case" means any case in which a person is entitled to representation in the appellate courts pursuant to G.S. 7A-451 and Part 3 of these rules.

4. When these rules describe the functions that a court performs, the term "court" includes clerks of superior court. (Adopted July 1, 2001; Subsection (2) amended May 6, 2005; Commentary to Rule 1.1, subsection (1) amended effective November 4, 2005.)

Authority: G.S. 7A-452(c)(1); 7A-498.3(a)

Commentary:

Subsection (1): G.S. 7A-498.3(a) places virtually all cases in which a person is entitled to counsel at state expense under the oversight of the IDS Office. The cases covered are:

1. cases in which an indigent person is entitled to legal representation under G.S. 7A-451 and G.S.7A-451.1;

2. cases in which the IDS Office is designated by other statutes as responsible for providing legal representation; and

3. cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest, and is entitled by law to legal representation.

Most of the cases in which a person has a right to counsel fall within the first category — that is, cases designated in G.S. 7A-451 and 7A-451.1. Readers should consult those statutes for a complete listing of proceedings.

The General Assembly has recognized a right to counsel in miscellaneous proceedings not covered by G.S. 7A-451 and 7A-451.1, and with respect to most of those proceedings the provision of counsel is subject to the oversight of the IDS Office. The covered cases include:

— cases in which the parent, guardian, or custodian of a juvenile who has run away petitions a court for issuance of a requisition for the juvenile's return, and the juvenile is subsequently brought before a court pursuant to a detention order under G.S. 7B-2804(a);

— cases in which a delinquent juvenile has absconded from probation or parole supervision, or escaped from institutional custody, and the juvenile is subsequently brought before a court pursuant to a detention order under G.S. 7B-2805(a);

— cases in which a law enforcement officer has seized property from an unknown or unapprehended defendant, or from a defendant willfully absent from the jurisdiction, and the lawful owner petitions a court for return of the property pursuant to G.S. 15A-11.1(b);

— cases in which a person is subject to a non-testimonial identification procedure under G.S. 15A-279(d);

— cases in which a material witness appears for a hearing on a motion for an order assuring his or her attendance at a criminal proceeding under G.S. 15A-803(d);

— cases in which a criminal defendant elects to represent himself or herself and the court determines that standby counsel should be appointed pursuant to G.S. 15A-1243;

— cases in which a person is taken or charged on any order of arrest for default of bail, or on surrender of bail, or in execution of arrest for any debt or damages rendered in any action, and such person petitions the court for provisional release pursuant to G.S. 23-30.1; and

— cases in which a minor has been voluntarily admitted to a mental health or substance abuse facility pursuant to G.S. 122C-224.1.

Also included in this second category are cases in which the guardian ad litem program operated by the Administrative Office of the Courts (AOC) has a conflict of interest and is unable to represent a juvenile alleged to be abused, neglected, or dependent. Under G.S. 7B-1202, the court may appoint a private attorney to represent the juvenile. Provision of legal representation in cases in which the court appoints a private attorney is subject to the oversight of the IDS Office; cases in which the AOC's guardian ad litem program provides representation are not subject to IDS oversight.

The third category of cases under IDS oversight are cases in which the courts have recognized a right to appointed counsel. For example, the defendant has a constitutional right to counsel in child support contempt proceedings in which the defendant faces a sentence of actual imprisonment. See McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993) (finding right to counsel whether contempt proceeding is designated as civil or criminal).

Subsections (2) and (3): Capital cases are addressed in a separate part because of the differing treatment of those cases in the IDS Act. In non-capital criminal cases, the court appoints counsel pursuant to rules adopted by the IDS Office. In capital cases, the IDS Director appoints counsel directly. See G.S.7A-452(a) (generally); see also G.S. 7A-451(c) (capital post-conviction cases). Appellate cases are also dealt with separately because of the relatively small number of such cases. The IDS Office is in a position to establish and administer procedures for the appointment and compensation of appellate counsel, relieving trial judges of that burden.

Effective May 6, 2005, subsection (2) was amended to clarify that the term "capital case" refers only to cases in which the defendant is eligible to receive the death penalty, and does not refer to those cases in which life imprisonment without parole is the maximum possible punishment because the defendant was under the age of 18 at the time of the offense. *See* G.S. 14-17; *Roper v. Simmons,* 2005 U.S. LEXIS 2200, 125 S. Ct. 1183 (2005).

Rule 1.2. Entitlement to Counsel.

[No rules adopted; reserved for future use] (Adopted July 1, 2001.)

Commentary:

Under revised G.S. 7A-452(a), the court continues to determine whether a person is entitled to counsel at state expense. In making this determination, the court must decide, first, whether the person is indigent, although in some matters, such as juvenile delinquency proceedings, the person is presumed to be indigent. Second, the court must determine whether the person is entitled to counsel in the particular proceeding. Rule 1.4, below, governs the first inquiry concerning indigency. The IDS Office has not adopted rules concerning the second inquiry, the right to counsel in particular proceedings, because the IDS Act did not change the extent of a person's rights under the United States and North Carolina constitutions, statutes, and case law; it only transferred to the IDS Office the authority to oversee the provision of legal representation in such cases. For a list of cases subject to IDS Office oversight, see commentary to Rule1.1, above. In cases subject to this part, once the court determines that a person is indigent and has a right to counsel, appointment of counsel is governed by Rule 1.5, below.

In some instances, North Carolina law authorizes someone other than a judge to make at least a preliminary determination of indigency and entitlement to counsel. The IDS Act did not materially change those provisions, although it did provide that appointment of counsel is subject to rules adopted by the IDS office. For example, G.S. 7A-452(c) continues to authorize the clerk of court to determine whether a person is indigent and entitled to counsel, subject to review by a judge. See also G.S. 122C-269(b) (describing clerk's responsibilities in involuntary commitment proceedings). In counties with a public defender office, G.S. 7A-452(a) continues to provide that the Public Defender may make this determination preliminarily and may assign himself or herself or an assistant public defender to represent the person, subject to review by the court.

Rule 1.3. Notice of Rights.

(a) *Generally.* [No rules adopted; reserved for future use]

(b) *Responsibilities of Public Defenders and Clerks for In-Custody Defendants.* In counties with a public defender office, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the Public Defender. The Public Defender shall make a preliminary determination of the person's entitlement to his or her services and shall proceed accordingly, including notifying the court of the person's status or appointing himself or herself to represent the person pending a determination of the court. The court shall make the final determination. In counties without a public defender office, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court, who shall proceed accordingly, including bringing the person's situation to the attention of a district court judge for determination of the right to counsel and review of pretrial release conditions. (Adopted July 1, 2001.)

Authority: G.S. 7A-452; 7A-453

Commentary:

Subsection (a): A number of statutes obligate judicial officials to notify individuals of their right to counsel, describing the timing and basic content of the notice. In criminal cases, for example, see G.S. 15A-511 (notice by magistrate at initial appearance); G.S. 15A-603 (notice by district court judge at first appearance in felony case); G.S. 15A-942 (notice by superior court judge at arraignment); G.S. 15A-1101 (procedure for trial of misdemeanors in district court is in accordance with trial procedure in superior court, including requirement that district court judge notify defendant of right to counsel when arraigning defendant). The IDS Act did not alter these requirements. The IDS Office is considering adopting additional procedures to assist judicial officials in notifying individuals of their right to counsel, after considering the suggestions and advice of the bar, bench, and other interested persons.

Subsection (b): This subsection implements the requirements of revised G.S. 7A-453, which deals with the situation in which a person has been in custody for more than 48 hours and has no counsel. Revised G.S. 7A-453 is not materially different than the former version of that statute; it has always required that notice be given, either to the Public Defender or clerk, concerning in-custody defendants without counsel. The revised statute merely provides that in counties designated by the IDS Office, the custodian of the person must notify the IDS Office's designee. In counties not designated by the IDS office, the custodian must notify the clerk of superior court. Through the above rule, the IDS Office makes the Public Defender its designee in counties that have a public defender office. In counties that do not have a public defender office, the IDS Office makes no designation; therefore, the custodian should continue to notify the clerk of court.

If a person is in custody without counsel, the Public Defender should bring the person's situation to the attention of the court, which may appoint counsel in accordance with Rule 1.5, below. The Public Defender also may tentatively assign himself or herself to represent the person pursuant to G.S. 7A-452(a).

Likewise, the clerk of court should bring the person's situation to the attention of a judge as soon as feasible; pursuant to G.S. 7A-452(c) and Rule 1.5, below, the clerk also may appoint counsel. If the clerk does not appoint counsel for an in-custody defendant, it is particularly important for the clerk to alert a district court judge, especially in cases involving probation violations, orders for arrest for failing to appear, surrenders by sureties, and misdemeanors in those judicial districts that do not routinely hold first appearances. In those cases, a defendant's first-scheduled court date may be several days or even weeks after he or she is taken into custody. If counsel is not appointed until that first court date, the case will likely have to be continued to a later date, resulting in inefficient use of court time, longer pretrial custody for defendants, and greater demands on limited jail resources.

Rule 1.4. Indigency.

(a) *Standard.* An indigent person is a person who is financially unable to secure legal representation or provide other necessary expenses of representation at the time the expenses are required.

(b) *Procedure for Determining Indigency.*

(1) Before appointing counsel in cases in which indigency is a condition of appointment, the court shall require the defendant or respondent to complete and sign under oath an affidavit of indigency on a form approved by the IDS Director.

(2) The court shall make reasonable inquiry of the defendant or respondent under oath to determine the truth of the statements made in the affidavit of indigency.

(3) The affidavit of indigency shall be filed in the records of the case.

(4) Based on the affidavit of indigency, the affiant's statements to the court on this subject, and such other information as may be brought to the attention of the court during the proceedings, the court shall determine whether the defendant or respondent is indigent.

(5) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding.

(6) If at any stage in the action or proceeding a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he or she must inform counsel appointed to represent him or her of that fact, who must promptly inform the court. (Adopted July 1, 2001.)

Authority: G.S. 7A-450; 7A-452; 7A-498.3(b); 7A-498.5(c)(8)

Commentary:

Revised G.S. 7A-452 continues to require the court in most cases to determine whether a person is indigent for purposes of receiving counsel at state expense; however, under G.S. 7A-498.3(b) and 7A-489.5(c)(8), the determination is to be made in accordance with policies and procedures adopted by the IDS office.

Subsection (a): The IDS Act did not alter the basic statutory definition of indigency in G.S. 7A-450(a), which is set forth in this rule. The court should continue to follow that definition and the North carolina cases interpreting it. See, e.g., State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972) ("An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense.").

The North Carolina cases direct that various factors, such as the person's employment, income, and assets, be weighed in determining whether a person is indigent. The cases do not establish a precise measure of indigency, however. The specific dollar amounts discussed in older cases are not particularly useful guides in assessing a person's ability to hire a lawyer now. To assist judicial officials and others in determining indigency, the IDS Office is working on developing more detailed standards and expanding on the basic statutory definition of indigency.

Subsection (b): Subsections (1) through (4) substantially repeat the procedure for determining indigency in former Rule D.0402 of the State Bar Rules. The form affidavit of indigency referred to in subsection (1) is the same form that has been used by the AOC (AOC-CR-226). Subsections (5) and (6) substantially repeat the requirements in G.S. 7A-450(c) and (d). Courts should continue to follow any other statutory requirements to assure that counsel is provided as appropriate. For example, although a district court judge reviews indigency at the defendant's first appearance in a felony case, a superior court judge must re-examine the question if the defendant appears without counsel in superior court. See G.S. 15A-942 (requiring superior court to do so at arraignment).

Subsection (b) also recognizes that in some cases, indigency is not a condition of appointment of counsel, for example, in cases in which a juvenile is alleged to be delinquent. See G.S. 7B-2000.

Rule 1.5. Appointment Procedure.

(a) *Districts Without a Public Defender Office.*

(1) In judicial districts that do not have a public defender office, each judicial district bar or county bar association shall adopt a plan or plans for the appointment by the court of qualified members of the private bar to represent indigent persons in non-capital criminal cases at the trial level. The plan may also include procedures for the appointment of counsel by the court in non-criminal cases at the trial level. Any plan adopted by a judicial district bar or county bar association shall provide for appointment of counsel on a systematic and impartial basis. To the extent a judicial district bar or county bar association plan does not address non-criminal or other categories of cases, the court shall appoint counsel in those cases on a systematic and impartial basis. A plan may be applicable to the entire district, or, at the election of the judicial district bar or county bar association, separate plans may be adopted by the district bar for use in each separate county within the district.

(2) Except as otherwise provided by the IDS Office, the plan or plans for a district or county in effect on June 30, 2001, shall govern the method by which counsel are thereafter selected in that district or county for appointment in non-capital criminal and non-criminal cases at the trial level. A plan is considered to be "in effect" on June 30, 2001, if by that date it has been adopted by the judicial district bar or county bar association, approved by the North Carolina State Bar, and certified to the clerk of superior court of the county to which the plan is applicable by the Secretary of the North Carolina State Bar.

(3) Beginning July 1, 2001, any revisions in a district or county plan must be adopted by the judicial district bar or county association and approved by the IDS Commission, following which the IDS Director shall certify the revised plan or plans to the clerk of superior court to which the plan or plans are applicable.

(4) Any provisions in district or county plans concerning appointment of counsel in capital or appellate cases, as defined in Parts 2 and 3 of these rules, shall be of no effect as of July 1, 2001.

(5) Any provisions in district or county plans that are inconsistent with rules now or hereafter adopted by the IDS Office shall be of no effect as of July 1, 2001.

(b) *Districts with a Public Defender Office.*

(1) No later than November 1, 2001, in judicial districts with a public defender office, the Public Defender shall submit to the IDS Director a proposed plan for the appointment of counsel in all cases subject to this part. The proposed plan shall provide for the making of appointments under the oversight of and pursuant to procedures adopted by the Public Defender.

(2) In developing the proposed plan, the Public Defender shall consult with the IDS Director and with the judicial district bench and bar in which the public defender's office is located. The IDS Director shall thereafter submit the proposed plan to the IDS Commission, which may approve the plan as submitted, modify it, or reject it. The plan adopted by the IDS Commission shall become the plan for appointment of counsel in that judicial district.

(3) After the Commission has adopted the initial plan for a judicial district with a public defender office, the IDS Director may, after consulting with the Public Defender, modify the plan and the requirements and procedures for appointing counsel in that judicial district as necessary to effectuate the purposes of the IDS Act. If any modifications being considered by the IDS Director substantially change the plan, the IDS Director shall submit the proposed changes to the IDS Commission for approval.

(4) Until a Public Defender's plan is approved by the IDS Commission, the court shall continue to appoint counsel in accordance with current procedure.

(5) The Public Defender shall not be appointed to represent, and shall not assign counsel to represent, a juvenile alleged to be abused, neglected, or dependent. In cases in which the guardian ad litem program operated by the Administrative Office of the Courts is unable to represent the juvenile, the court shall continue to appoint counsel for juveniles pursuant to G.S. 7B-1202.

(c) *Districts with a Special Counsel Office.* In judicial districts with a special counsel program, the court shall continue to appoint special counsel, pursuant to G.S. 122C-270, to represent all indigent respondents at all hearings, rehearings, and supplement hearings held at the state facility and on appeal. For cases assigned to a special counsel office that the office is unable to handle, the special counsel office shall adopt a plan for assigning such cases to qualified members of the private bar. The special counsel office shall submit any plan for approval and certification by the IDS Director.

(d) *Appointments Pursuant to Plans.*

(1) Except as otherwise provided by the IDS Director, all appointments of counsel in cases subject to this part shall be made in conformity with the plans described in this rule, unless the judge in cases subject to subsection (a), above, or the authority authorized to make appointments in cases subject to subsections (b) and (c), above, deems it proper in the furtherance of justice to appoint as counsel for a person a lawyer who is not on the certified plan or list or who is not next in sequence on the list.

(2) No attorney shall be appointed as counsel for a person in a non-capital criminal or non-criminal case in a court of any district unless the attorney has consented to placement of his or her name on the list of attorneys subject to appointment or, if the attorney has not agreed to do so, has otherwise consented to be appointed. The attorney named in the appointment order shall not delegate to another attorney any material responsibilities to the client, including representation at critical stages of the case, unless the court finds in open court that the substitute attorney practices in the same law firm as the appointed attorney and is on the list of attorneys who are eligible for appointment to the particular case, that the client and the substitute attorney both consent to the delegation, and that the delegation is in the best interests of the client.

(3) No person for whom counsel is appointed shall be entitled to select or specify the attorney assigned to defend him or her.

(e) *Record Keeping.*

(1) In districts without a public defender office, the clerk of superior court of each county, under the direction of the Administrative Office of the Courts pursuant to G.S.7A-343(3) and (10), shall continue to file in his or her office, maintain, and keep current the plan for assignment of counsel in non-capital criminal and non-criminal cases, and a record of all counsel eligible for appointment under the plan, applicable to said county as certified by the Secretary of the North Carolina State Bar or IDS Director, as the case may be.

(2) No later than November 1, 2001, in districts with a public defender office, the Public Defender shall file in his or her office, maintain, and keep current the plan for assignment of counsel in non-capital criminal and non-criminal cases pursuant to subsection (b), above, and a record of all counsel eligible for appointment under the plan, applicable to said district as certified by the IDS Director.

(3) In districts with a special counsel program, the special counsel shall file in his or her office, maintain, and keep current the plan for assignment of counsel pursuant to subsection (c), above, and a record of all counsel eligible for appointment under the plan, applicable to said district as certified by the IDS Director.

(4) Orders for the appointment of counsel shall be entered by the court on a form approved by the IDS Director.

(f) *Authority to Implement Other Programs, Plans, and Contracts.* Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. Nothing in these rules shall preclude the IDS Commission from adopting and enforcing rules that supercede a judicial district bar plan. (Adopted July 1, 2001; Subsection (d) amended effective July 8, 2005; Subsection (a) amended effective February 10, 2006; Subsection (d) amended effective February 16, 2007.)

Authority: G.S. 7A-452(a); 7A-498.3(a), (c); 7A-498.5(c), (d), (e); 122C-270

Commentary:

G.S. 7A-498.3 and 7A-498.5 grant the IDS Office broad authority to adopt rules, procedures, and standards for the appointment of counsel. See also G.S. 7A-452(a) (counsel shall be appointed by the court in non-capital criminal cases in accordance with rules adopted by the IDS Office). Because of the sheer number of non-capital criminal and non-criminal cases handled by appointed counsel each year, the IDS office is not presently able to consider or adopt improvements in the method for appointing counsel in such cases across the state. Accordingly, this rule continues much of the current practice and procedure. The text of this rule is based in large part on former Rule D.0404 of the State Bar Rules.

Subsection (a): The IDS Commission recognizes the continuing importance of district and county bar plans to the operation of the system, and in most respects this rule keeps the current plans in effect until the IDS Commission and IDS Office consider and implement changes. If a district bar or county bar association wishes to make changes to a plan after July 1, 2001, the changes must be approved by the IDS Commission rather than the North Carolina State Bar, which reflects the changes in authority implemented by the IDS Act. Many district and county bar plans do not specifically address non-criminal cases. If a plan does not address such cases, the court should appoint counsel on a systematic and impartial basis.

Subsection (b): Currently, in some districts with a public defender office, the judge assigns most indigent cases to the Public Defender, who then assigns to private counsel those cases that the office is unable to handle (either because of workload or conflict-of-interest reasons). All public defender offices are currently drafting plans that will expand this procedure to all districts with such an office. However, because all public defender offices are not in a position to begin performing this duty as of July 1, 2001, subsection (1) leaves current practices undisturbed until the Public Defender in the district submits a plan, which the IDS Director approves and certifies. The rule requires all Public Defenders to ensure that such a plan has been submitted, approved, and certified no later than November 1, 2001. Any plan adopted pursuant to this provision should address, among other things, the procedure to be followed when the public defender office has a conflict of interest.

Subsection (c): This subsection establishes a procedure similar to subsection (b), requiring special counsel offices (in districts where located) to develop plans for assigning to private counsel cases that the office is unable to handle.

Subsection (d): As in the past, appointments should be made in accordance with the plans for each district. The subsection makes some changes, however. First, subsection (1) clarifies that in the interest of justice an attorney may be appointed who is not on the list regardless of whether the attorney regularly practices in the district. Second, subsection (2) prohibits appointment of an attorney unless the attorney consents to appointment, either by agreeing to be on the list or, if not on the list, by consenting to being appointed. Subsection (d)(2) was amended effective July 8, 2005 and again February 16, 2007 to clarify that an attorney appointed to a case may not delegate material responsibility for that case to another attorney who is not named in the appointment order. See *State v. Carter,* 66 N.C. App. 21, 23, 311 S.E.2d 5, 7 (1984); RPC 58 (1989). If an appointed attorney is unable to appear at a scheduled court appearance due to a conflict in another court, secured leave, illness, or a family emergency, subsection (d) does not prohibit the attorney from asking another lawyer to appear on his or her behalf and seek a continuance continuance or argue a bond reduction motion for an incarcerated client. Subsection (d) also does not prohibit an appointed attorney who is unavailable from sending another lawyer to interview an incarcerated client. In exceptional cases where the appointed attorney is unavailable, the court may allow the appointed attorney to delegate client responsibilities at critical stages of a case if the court makes the specified findings.

Subsection (e): The clerk of superior court continues to keep a record of current district bar plans and eligibility lists in districts without a public defender office. Public defender and special counsel offices will keep their plans on file in their offices. The court (judge or clerk) continues to make a record of appointments by entering the order of appointment on a revised version of the form that has been used by the AOC (AOC-CR-224).

Subsection (f): This subsection recognizes the authority of the IDS Office to modify appointment procedures and to adopt different methods for delivering services (such as contracting with attorneys rather than appointing them on a case-by-case basis). See G.S. 7A-498.3; G.S. 7A-498.5.

Rule 1.6. Waiver of Counsel.

(a) *Standard.* An indigent person who has been informed of his or her right to be represented by counsel at any in-court-proceeding may, in writing, waive the right to in-court representation by counsel. Any such waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court shall follow the requirements of G.S. 15A-1242 and shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter.

(b) *Standby Counsel in Criminal Cases.* In a criminal case, if the defendant has elected to proceed without the assistance of counsel, the trial judge in his or her discretion may determine that standby counsel should be appointed to assist the defendant when called upon, and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule on his or her own motion. (Adopted July 1, 2001.)

Authority: G.S. 7A-457; 15A-1243

Commentary:

Subsection (a): Revised G.S. 7A-457(a) provides that waivers of in-court representation shall be in accordance with rules adopted by the IDS Office. The above rule restates the requirements for a valid waiver in G.S. 7A-457(a) and is intended to continue current practice and procedure on taking waivers until the IDS Office develops any additional rules or procedures. Until the IDS Office develops any such additional rules or procedures, courts can continue to use the same waiver of counsel form that has been used by the AOC (AOC-CR-227). This rule does not affect the standard in G.S. 7A-457(c) with respect to waiver of counsel at out-of-court proceedings, such as during interrogation, which the IDS Act did not revise. This rule also does not deal with waiver of retained counsel by a non-indigent person. If a person has no counsel, the court should determine whether the person wishes to waive the right to both appointed and retained counsel. In criminal cases, if the person wishes to represent himself or herself, the court must conduct the inquiry required by G.S. 15A-1242 on self-representation.

The IDS Act also did not affect the statutes that recognize that in some circumstances a person may lack the capacity to waive counsel. For example, G.S. 122C-268(d) provides that in cases in which a person is alleged to be mentally ill and subject to in-patient commitment, counsel shall be appointed if the person is indigent or refuses to retain counsel although financially able to do so. See also G.S. 35A-1107 (appointment of guardian ad litem for person alleged to be incompetent); G.S. 108A-105(b) (appointment of guardian ad litem for disabled adult). Similar provisions apply to minors who have a right to counsel. See G.S. 7B-600 and -601 (juvenile abuse and neglect proceedings); G.S. 7B-1101 (termination of parental rights where parent is a minor); G.S. 7B-2000 (juvenile delinquency proceedings).

Subsection (b): G.S. 15A-1243 provides that, in cases in which a defendant has elected to represent himself or herself, appointment of standby counsel shall be in accordance with rules adopted by the IDS office. For non-capital criminal cases, the above rule restates the provisions on appointment of standby counsel in G.S. 15A-1243 and is intended to continue the current practice and procedure.

Rule 1.7. Withdrawal of Appointed Counsel.

(a) *Scope of Obligation.* Unless otherwise provided by law, counsel appointed in a case subject to this part is required to continue with the representation through judgment at the trial level, discussion with the client about his or her right to appeal, and entry of notice of appeal or expiration of the time for giving notice of appeal. Nothing in these rules shall be construed as permitting or requiring an attorney of record to deviate from applicable laws of this State, the Rules of Professional Conduct administered by the North Carolina State Bar, or other legal or ethical obligations of an attorney as an officer of the court.

(b) *Withdrawal.* At any time during or pending the trial or retrial of a case subject to this part, a judge of a court of competent jurisdiction may, upon application of the attorney appointed to the case and for good cause shown, permit the attorney to withdraw from the case. If the judge allows the attorney to withdraw, appointment of new counsel shall be in accordance with Rule 1.5 of these rules.

(c) *Contract Counsel.* Withdrawal from a case by an attorney performing work under contract with the IDS Office shall be in accordance with the terms of the contract. If the contract does not specify a method of withdrawal, an attorney may withdraw in accordance with subsections (a) and (b) of this rule. (Adopted July 1, 2001)

Authority: G.S. 7A-498.2(b); 7A-498.3(a), (c); 7A-498.5(c), (d); 15A-143; 15A-144

Commentary:

Subsection (a): G.S. 15A-143 states that an attorney making a general appearance in a criminal case is obligated to represent the defendant "until entry of final judgment." Subsection (a) is intended to emphasize the attorney's further responsibility to advise the client concerning appeal and to enter notice of appeal if requested. This rule applies that requirement to all cases subject to this part unless otherwise provided by law.

Subsection (b): — This subsection restates the provisions in former Rule D.0405 of the State Bar Rules on withdrawal from a case at the trial level. If a person other than appointed counsel (such as the client, prosecutor, or IDS Director) requests that a judge of a court of competent jurisdiction remove counsel for good cause, the judge shall follow established law. See, e.g., State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982); State v. Hutchins, 303 N.C.

321, 279 S.E.2d 788 (1981); see also State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Subsection (c): — This subsection is new. Although contracts entered into by the IDS Office may require that attorneys obtain a judge's approval to withdraw from a case, they potentially may provide for a different method of reassigning cases.

Rule 1.8. Contracts.

The IDS Office is authorized to enter into contracts for legal representation and related services in cases in which the IDS Office is responsible for the provision and oversight of legal representation of a person. Contracts may provide for, among other things, appointment of particular counsel to handle certain cases and compensation at a specified rate. Any contracts for legal representation or related services in cases under the oversight of the IDS Office must be approved by the IDS Director. (Adopted July 1, 2001)

Authority: G.S. 7A-498.2(b); 7A-498.3(a), (c), (d); 7A-498.5(c), (d), (f)

Commentary:

This rule reflects the authority granted the IDS Office to contract for services in cases in which the IDS Office is responsible for the provision of legal services, and to control the expenditure of funds for quality legal representation and related services in such cases.

Rule 1.9. Payment of Appointed Counsel.

(a) *Compensation at Trial.*

(1a) If an attorney seeks compensation for time spent waiting in court for multiple cases to be called or working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. For all cases finally disposed at the trial level on or after July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the trial judge within no more than one year after the date on which the case was finally disposed at the trial level. For all cases finally disposed at the trial level before July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the trial judge by January 1, 2006. In accordance with policies and procedures approved by the IDS Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline.

(1b) Upon completion of the representation of a person by appointed counsel in the trial court in a non-capital criminal or non-criminal case, the trial judge shall, upon application, enter an order fixing the fee to which the attorney is entitled. In doing so, the judge shall review the amount of time claimed by the attorney, and shall approve an appropriate amount of time based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the effort and responsibility involved.

(2) For all fee applications that are signed by a judge on or after February 1, 2008, once the judge approves an appropriate amount of time pursuant to subsection (1b), above, the hourly rate for attorney compensation in such cases in both district and superior court, for both in-court and out-of-court time, shall be $75 per hour. For cases in which an attorney claims and the court approves less than one hour of time, the fee shall be $75.

(3) Even if the trial, hearing, or other proceeding is never held, preparation therefore is nevertheless compensable and, in extraordinary cases pending in superior court, the presiding judge may allow a fee for services rendered and payment for expenses incurred pending final determination of the case. In such cases, the time approved and hourly rate paid shall be set pursuant to subsections (1b) and (2), above.

(4) Fees shall be fixed by the district court judge who hears the case for actions or proceedings finally determined in the district court, and by the superior court judge who hears the case for actions or proceedings originating in or heard on appeal in superior court.

(5) This section does not preclude districts from compensating attorneys in the above cases based on methods other than hours per case, such as per case fee schedules or per session rates, or based on an hourly rate that differs from that set forth in subsection (2), above, provided that the alternative compensation method or rate is approved by the IDS Director. Any district using or proposing an alternative compensation method shall notify the IDS Director, and the IDS Director may approve the method used or proposed provided it is consistent with the purposes of the IDS Act.

(b) *Orders for Payment.* Orders for the payment of compensation to appointed counsel for representation shall be entered by the judge on a form approved by the IDS Director. A copy of the order for the payment of fees shall be forwarded by the clerk of superior court to IDS Financial Services Division, Courier Box 56-10-50, Raleigh, N.C. If no courier is available, a copy of the order shall be mailed to P.O. Box 2448, Raleigh, N.C. 27602.

(c) *Fee Schedules.* The IDS Director may authorize or require the use of fee schedules for the compensation of attorneys and the payment for services related to legal representation in non-capital criminal and non-criminal cases.

(d) *Compensation of Contract Counsel.* Compensation of attorneys performing work under contract with the IDS Office shall be paid in accordance with the terms of the contract.

(e) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the court or the IDS Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds. (Adopted July 1, 2002; Subsections (a) and (b) amended May 6, 2005; Subsection (e) amended September 15, 2006; Subsections (a)(1a) and (b) amended August 13, 2007; Subsection (a) amended February 1, 2008.)

Authority: G.S. 7A-458; 7A-498.5(f)

Commentary:

This rule effectively continues the current practice on compensating appointed counsel in non-capital criminal and non-criminal cases. It incorporates substantial portions of former Rule D.0406 of the State Bar rules and of G.S. 7A-458 before it was revised by the IDS Act. Representation is complete within the meaning of this rule when counsel has fulfilled the obligations set forth in Rule 1.7(a), above. Courts using fee schedules in effect before the effective date of the IDS Act should notify the IDS Office of any such schedules. Because of the sheer number of non-capital criminal and non-criminal cases handled by appointed attorneys, the IDS Office is not presently in a position to assume responsibility for determining compensation throughout the state. However, the IDS Commission and IDS Office are developing plans for assuming that responsibility as soon as feasible.

Subsection (a): — Effective April 1, 2002, subsection (a) established a standard hourly rate of $65 in all non-capital and non-criminal cases at the trial level. The subsection was amended effective February 1, 2008 to increase that rate to $75 per hour for all fee applications signed by judges on or after February 1, 2008. The subsection was also amended effective May 6, 2005 to clarify that attorneys can not double-bill the state for time spent waiting in court or working on multiple cases simultaneously. For all cases finally disposed at the trial level on or after July 1, 2005, the subsection was amended to require attorneys to submit fee applications to the presiding judge within one year of the date of final disposition. Effective August 13, 2007, the subsection was amended to allow attorneys to apply for an advance extension or waiver of the deadline in accordance with policies and procedures approved by the IDS Commission. Attorney fee applications submitted more than one year after the date of final disposition without an approved extension or waiver will not be paid from state funds.

Subsection (b): In entering orders for payment, courts should continue to use a revised version of the fee application form that has been used by the AOC (AOC-CR-225). Effective May 6, 2005, the clerk is no longer required to certify every individual fee application. However, fee applications must be sent to IDS Financial Services in a secure packet directly from the clerk's office.

Subsection (e): Subsection (e) was amended effective September 15, 2006 to clarify that, to avoid any potential for overreaching or the appearance of impropriety, an appointed attorney cannot subsequently accept fees as retained counsel from the client or the client's family. If family or friends of an indigent client want to contribute to non-counsel services, such as expert or support services, nothing in this subsection precludes them from doing so. However, the appointed attorney must place any such funds in his or her trust account and provide an accounting to the contributing family member and the IDS Director. If, during the course of representation as appointed counsel, an attorney learns that a client who was previously determined to be indigent has become financially able to pay for the representation, G.S. 7A-450(d) directs the attorney to inform the court. *But cf.* RPC 52 (Jan. 13, 1989) (directing counsel to "call upon his client to reveal that circumstance to the tribunal" and, if the client refuses to permit disclosure, to move to withdraw). If the court finds that the client is no longer indigent, the appointed attorney may move to withdraw or continue the representation *pro bono*.

Rule 1.10. Supporting Services.

In non-capital criminal and non-criminal cases, the court may approve fees for the service of expert witnesses, investigators, and others providing services related to legal representation. (Adopted July 1, 2001.)

Authority: G.S. 7A-454; 7A-498.3(c); 7A-498.5(c)(6)

Commentary:

The above statutes, as revised, provide that appointment and compensation of experts, investigators, and others providing services related to legal representation shall be in accordance with IDS rules. For non-capital criminal and non-criminal cases, this rule is intended to restate in general terms the current statutory and case law on such services. For capital cases, see Part 2, Rules 2D.1 through 2D.5.

Rule 1.11. Recoupment of Fees.

(a) *Generally.* To the extent required by law, individuals who have been appointed counsel under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender office, the value of services rendered by counsel. The judge setting the fee to be paid or the value of services rendered shall determine the amount to be recouped if recoupment is required by law. The court shall ensure that the person potentially responsible for paying the fees is notified of the potential liability, and that the person has a reasonable opportunity to be heard on the issue.

(b) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law. (Adopted July 1, 2001.)

Authority: G.S. 7A-450.1 through -450.4; 7A-455; 7A-498.5(c)(8)

Commentary:

For the most part, this rule is intended to continue current practice in non-capital criminal and non-criminal cases with respect to recoupment of the cost of appointed counsel. In criminal cases, recoupment is governed by G.S. 7A-455. The IDS Act made only one change to that statute. It required that the value of services reflected in a judgment against a defendant be set in accordance with rules adopted by the IDS Office. Since Rules 1.9 and 1.10 continue to leave with the judge the responsibility of setting fees for counsel and supporting services, this rule continues to leave with the judge the responsibility of setting the amount of any judgment. The Public Defender remains obligated to inform the judge of the value of legal services rendered to the defendant. The form judgment is a revised version of the same fee application form that has been used by the AOC (AOC-CR-225).

In some non-criminal cases, recoupment of fees is also required, although the procedure for recoupment differs somewhat from the procedure in criminal cases. See G.S. 7A-450.1 through -450.4. The IDS Act did not alter those procedures.

This rule also provides that a person potentially liable for fees should be given reasonable notice and an opportunity to be heard. In most cases covered by this part, the person will be present at the time judgment is entered, and the court can give the person an opportunity to be heard on the amount proposed to be entered.

PART 2

RULES FOR PROVIDING LEGAL REPRESENTATION IN CAPITAL CASES

This second part addresses the procedure to be followed in capital cases. The rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001. Fee applications for capital representation filed on or after that date will be governed by these rules.

These rules are intended to set forth a comprehensive system for providing legal representation incases that potentially may be tried capitally or that have resulted in a sentence of death. Unlike the Rules for Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases, described in Part 1, this part departs significantly from previous practice and procedure. The approach taken below reflects the intent of the IDS Act, which places with the Office of Indigent Defense Services (IDS Office) the responsibility for appointing and compensating counsel in capital cases.

This part is divided into four subparts, corresponding to the major areas requiring attention in capital litigation:

- Appointment and Compensation of Trial Counsel
- Appointment and Compensation of Appellate Counsel
- Appointment and Compensation of Post-Conviction Counsel
- Appointment and Compensation of Experts and Others Providing Services Related to Legal representation

This part also includes an appendix containing standards that attorneys must meet to be considered for appointment as trial, appellate, or post-conviction counsel in capital cases.

The rules are authorized by Chapters 7A and 15A of the North Carolina General Statutes (G.S.), and by the IDS Act. The rules supercede the provisions on capital representation in Section D. of the Rules and Regulations of the North Carolina State Bar (State Bar Rules) and any provisions on capital representation in local bar plans issued pursuant to the State Bar Rules. As of July 1, 2001, those rules, which were authorized by former G.S. 7A-459, are no longer effective.

Whenever the term "IDS Director" is used in these rules and appendix, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules and appendix, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules and appendix, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001.)

Subpart 2A. Appointment and Compensation of Trial Counsel in Capital Cases.

Rule 2A.1. Coverage of this Subpart.

(a) *Applies to Capital Trials.* This subpart applies to all capital offenses and all non-capital criminal charges brought contemporaneously with or subsequently joined with a capital offense. A "capital offense" means any first-degree murder charge or charge of murder where the degree is undesignated, except cases in which the defendant was under 18 years of age at the time of the offense and not potentially punishable by death. The term "capital defendant" means a defendant charged with a capital offense.

(b) *Authority to Implement Other Programs, Plans, and Contracts.* Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants in capital trials pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. (Adopted July 1, 2001; Subsection (a) amended May 6, 2005.)

Authority: G.S. 7A-498.2(b); 7A-498.3(a); 7A-498.5(c)(7), (c)(8), (d)

Commentary:

Effective May 6, 2005, subsection (a) was amended to clarify that the term "capital case" refers only to cases in which the defendant is eligible to receive the death penalty, and does not refer to those cases in which life imprisonment without parole is the maximum possible punishment because the defendant was under the age of 18 at the time of the offense. See G.S. 14-17; Roper v. Simmons, 2005 U.S. LEXIS 2200, 125 S. Ct. 1183 (2005).

Rule 2A.2. Appointment of Trial Counsel.

(a) *Provisional Appointment of Local Counsel.* Upon learning that a defendant has been charged with a capital offense, the IDS Director may immediately appoint a lawyer on a provisional basis to conduct a preliminary investigation to determine whether the defendant is indigent and needs appointed counsel. Provisional counsel shall report the results of his or her investigation to the IDS Director. If the defendant has not had a first appearance in court, the IDS Director may authorize provisional counsel to attend the defendant's first appearance and advise the court whether the case is a capital case as defined by these rules and therefore subject to the appointment procedures in this subpart. Provisional counsel is authorized to take steps to protect the capital defendant's rights pending appointment of trial counsel by the IDS Director.

(b) *Assignment of IDS Office.* At the defendant's first appearance in district court, the court shall determine whether the defendant is indigent pursuant to paragraph 1.4 of the Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases, and charged with a capital offense as defined in paragraph 2A.1(a) above. If the court so finds, it shall notify the IDS Director of the need to appoint counsel for the capital defendant in accordance with these rules. If the defendant is charged with a capital offense in an indictment and his or her first appearance is in superior court, the court shall determine whether the defendant is indigent and is charged with a capital offense as defined in paragraph 2A.1(a) above. If the court so finds, the court shall ensure that the IDS Director is notified of the need to appoint counsel for the capital defendant, in accordance with these rules, by email, facsimile, or telephone.

(c) *Appointment of First Trial Counsel.* The IDS Director shall appoint at least one lawyer for a capital defendant as early in the process as possible. The IDS Director shall maintain a list of lawyers eligible for appointment as lead or associate counsel. The list shall consist of lawyers who are eligible to be lead or associate counsel pursuant to the procedures in Appendix 2A of these rules, and may include attorneys in private practice, public defenders and assistant public defenders, and attorneys with whom the IDS Office contracts or employs to provide representation in capital cases. If the first lawyer appointed will serve as lead trial counsel, the IDS Director shall appoint that lawyer from the list of lawyers eligible for appointment as lead counsel. If the first lawyer appointed will serve as associate trial counsel, the IDS Director shall appoint that lawyer from the list of lawyers eligible for appointment as lead or associate counsel. Appointment orders, signed by the IDS director, shall be distributed to the clerk of superior court, the district attorney, the appointed attorney, and the defendant.

(d) *Appointment of Second Trial Counsel.* Upon request by and consultation with the current appointed lawyer, the IDS Director may appoint a second lawyer for a capital defendant prior to a declaration at a hearing pursuant to Rule 24 of the General Rules of Practice that the case will be prosecuted capitally, if the IDS Director finds good cause justifying an earlier appointment. If a second lawyer has not been appointed prior to a hearing pursuant to Rule 24 of the General Rules of Practice at which a judge determines that the state may prosecute the case capitally, the current appointed lawyer shall immediately notify the IDS Director of the judicial determination and the IDS Director shall immediately appoint a second lawyer. The IDS Director shall maintain a list of lawyers eligible for appointment as lead or associate counsel. The list shall consist of lawyers eligible to be lead or associate counsel pursuant to the procedures in Appendix 2A of these rules, and may include attorneys in private practice, public defenders and assistant public defenders, and attorneys with whom the IDS Office contracts or employs to provide representation in capital cases. If the second lawyer appointed will serve as lead trial counsel, the IDS Director shall appoint that lawyer from the list of lawyers eligible for appointment as lead counsel. If the second lawyer appointed will serve as associate trial counsel, the IDS Director shall appoint that lawyer from the list of lawyers eligible for appointment as lead or associate counsel. The IDS Director shall consult with the first lawyer appointed about the appointment of the second lawyer. Appointment orders, signed by the IDS Director, shall be distributed to the clerk of superior court, the district attorney, the appointed attorney, and the defendant.

(e) *No Subsequent Appointment of Retained Counsel.* If a retained attorney becomes unable to continue representing a capital defendant because the defendant or any third party can not fulfill the terms of the financial agreement between the attorney and the defendant or any third party, the retained attorney may file with the court a motion to withdraw. If the court permits the retained attorney to withdraw, that attorney is not eligible to be appointed to represent the defendant. (Adopted July 1, 2001; Subsection (e) adopted effective May 6, 2005; Subsection (d) amended effective June 6, 2008.)

Authority: G.S. 7A-450(b), (b1); 7A-451(b); 7A-452(a); 7A-498.3(b), (c); 7A-498.5(d), (h)

Commentary:

Subsection (a): This provision, allowing for designation of provisional counsel, is in recognition of the importance of affording counsel to capital defendants as soon as possible. The IDS Office expects that it will receive daily information from the Administrative Office of the Court's Automated Criminal Information System (ACIS) about the murder warrants issued in each county. This information is entered into ACIS automatically and immediately in those counties in which the computerized Magistrate System is installed, and manually by clerks of court in the remaining counties. Once a day, the IDS Office will receive email generated by ACIS listing all murder warrants entered into the system in the previous twenty-four hours.

Subsection (b): When a district or superior court judge finds a capital defendant indigent, he or she will notify the IDS Director by the most convenient immediate means — either email, facsimile, or telephone — of the defendant's name, the docket numbers of each of the warrants or indictments for which the defendant needs appointed counsel (including contemporaneously charged non-capital offenses), and the offenses charged. The IDS Director will approve and make available a form (AOC-CR-427) on which the judge will record the means by which the IDS Director was notified. The judge will file the form with the clerk of superior court.

Subsections (c) and (d): In capital cases, G.S. 7A-452(a) provides that, where practicable, either lead or associate defense counsel shall be a member of the bar in that judicial division.

These subsections authorize the IDS Director to appoint lead or associate trial counsel, or both. Subsection (d) was amended effective June 6, 2008 to limit the circumstances in which the IDS Director may appoint a second attorney to represent a capital defendant prior to a declaration at a Rule 24 hearing that the case will be prosecuted capitally. If a case is declared non-capital after the IDS Director has appointed two counsel, the IDS Director will consult with appointed counsel and may remove one counsel.

Rule 2A.3. Waiver of Counsel.

(a) *Standard.* An indigent capital defendant who has been informed of his or her right to be represented by counsel at any in-court-proceeding may, in writing, waive the right to in-court representation by counsel. Any such waiver of counsel shall be effective only if the court finds of record that at the time of waiver the defendant acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court shall follow the requirements of G.S. 15A-1242 and shall consider, among other things, such matters as the defendant's age, education, familiarity with the English language, mental condition, and the complexity of the matter.

(b) *Standby counsel in capital cases.* If a capital defendant has elected to proceed without the assistance of counsel, the trial judge shall immediately notify the IDS Director, who may appoint, in his or her discretion, standby counsel to assist the defendant when called upon, and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule on his or her own motion. (Adopted July 1, 2001.)

Authority: G.S. 7A-457; 15A-1243

Commentary:

Subsection (a): Revised G.S. 7A-457(a) provides that waivers of in-court representation shall be in accordance with rules adopted by the IDS Office. The above rule restates the requirements for a valid waiver in G.S. 7A-457(a) and is intended to continue current practice and procedure on taking waivers until the IDS Office develops any additional rules or procedures. Until the IDS Office develops any such additional rules or procedures, courts can continue to use the same waiver of counsel form that has been used by the AOC (AOC-CR-227). This rule does not affect the standard in G.S. 7A-457(c) with respect to waiver of counsel at out-of-court proceedings, such as during interrogation, which the IDS Act did not revise. This rule also does not deal with waiver of retained counsel by a non-indigent capital defendant. If a capital defendant has no counsel, the court should determine whether the defendant wishes to waive the right to both appointed and retained counsel. If a capital defendant wishes to represent himself or herself, the court must conduct the inquiry required by G.S. 15A-1242 on self-representation.

Subsection (b): G.S. 15A-1243 provides that, in cases in which a defendant has elected to represent himself or herself, appointment of standby counsel shall be in accordance with rules adopted by the IDS Office. For capital cases, the above rule directs the trial judge to immediately notify the IDS Director, who may appoint standby trial counsel.

Rule 2A.4. Compensation and Recoupment.

(a) *Compensation.* Appointed counsel who represented an indigent capital defendant at trial shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in trial representation of the defendant. If an attorney seeks compensation for time spent working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. Following review of the fee application, the IDS Director shall determine the amount of compensation and forward the award to IDS Financial Services for payment. If counsel is required pursuant to paragraph 2A.5(a)(iv) below to meet with the IDS Director to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent an indigent capital defendant may apply for and receive interim payments in the discretion of the IDS Director. For all cases finally disposed at the trial level on or after July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the IDS Director within no more than one year after the date on which the case was finally disposed at the trial level. For all cases finally disposed at the trial level before July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the IDS Director by January 1, 2006. In accordance with policies and procedures approved by the IDS Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline. Counsel may make a written request for a review of the amount of compensation approved by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. A retained attorney is not eligible to receive state funds to supplement the amount of compensation he or she has received from a capital defendant or any third party.

(b) *Recoupment of Fees Generally.* To the extent required by law, capital defendants for whom counsel has been appointed under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the defendant of the potential liability, and afford the defendant a reasonable opportunity to be heard on the issue. The trial judge or other appropriate judicial official shall then determine the amount to be recouped if recoupment is required by law.

(c) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(d) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the IDS Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds. (Adopted July 1, 2001; Subsection (d) adopted effective November 12, 2004; Subsection (a) amended May 6, 2005; Subsection (d) amended effective September 15, 2006; Subsection (a) amended August 13, 2007; Subsection (b) amended effective March 7, 2008.)

Authority: G.S. 7A-450.1 through -450.4; G.S. 7A-452(b); 7A-455; 7A-458; 7A-498.1(4), (5); 7A-498.3(c),(d); 7A-498.5(c)(8), (f)

Commentary:

Subsection (a): Counsel should continue to use a revised version of the capital case fee application that has been used by the AOC (AOC-CR-425) to document fee and expense applications. Subsection (a) was amended May 6, 2005 to clarify that attorneys can not double-bill the state for time spent working on multiple cases simultaneously. For all cases finally disposed at the trial level on or after July 1, 2005, the subsection was also amended to require attorneys to submit fee applications to the IDS Director within one year of the date of final disposition. Effective August 13, 2007, the subsection was amended to allow attorneys to apply for an advance extension or waiver of the deadline in accordance with policies and procedures approved by the IDS Commission. Attorney fee applications submitted more than one year after the date of final disposition without an approved extension or waiver will not be paid from state funds. Finally, the subsection was amended to provide that an attorney who was retained to represent a capital defendant can not seek additional compensation from the state.

Subsection (b): In capital cases, recoupment of the cost of court-appointed counsel is governed by G.S. 7A-455. The IDS Act made only one change to that statute. It required that the value of services reflected in a judgment against a defendant be set in accordance with rules adopted by the IDS Office. Since Rule 2A.4(a) authorizes the IDS Director to set fees for counsel and supporting services, this rule requires the IDS Director to notify the defendant of the potential liability and afford the defendant a reasonable opportunity to be heard on the issue, before the trial judge can set the amount of any judgment. The subsection was amended effective March 7, 2008 to clarify that judgments for attorney fees can be ordered by the trial judge or another appropriate judicial official. The Public Defender is obligated to inform the IDS Director of the value of legal services rendered to the defendant. The form judgment is a revised version of the form that has been used by the AOC (AOC-CR-425).

Subsection (d): Subsection (d) was amended effective September 15, 2006 to clarify that, to avoid any potential for overreaching or the appearance of impropriety, an appointed attorney cannot subsequently accept fees as retained counsel from the client or the client's family. If family or friends of an indigent client want to contribute to non-counsel services, such as expert or support services, nothing in this subsection precludes them from doing so. However, the appointed attorney must place any such funds in his or her trust account and provide an accounting to the contributing family member and the IDS Director. This commentary was amended effective September 19, 2008 to clarify that, if family or friends of an indigent client hire an attorney to represent the client, the appointed attorney shall file a motion to withdraw from the representation. If, during the course of representation as appointed counsel, an attorney learns that a client who was previously determined to be indigent has become financially able to pay for the representation, G.S. 7A-450(d) directs the attorney to inform the court. *But cf.* RPC 52 (Jan. 13, 1989) (directing counsel to "call upon his client to reveal that circumstance to the tribunal" and, if the client refuses to permit disclosure, to move to withdraw). If the court finds that the client is no longer indigent, the appointed attorney may move to withdraw or continue the representation *pro bono*.

Rule 2A.5. Conditions of Appointment.

(a) *Requirements.* The IDS Director may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

(i) consult with the IDS Director or his or her designee at regular intervals during the pendency of the representation, as required by the IDS Director;

(ii) attend training and/or continuing legal education in the area of capital trial representation as directed by the IDS Director;

(iii) follow the procedures required in Part 2D of these rules concerning appointment and compensation of experts, and other expenses of representation; and

(iv) meet with the IDS Director following a verdict in the case and prior to final payment of counsel fees to review the course of the representation.

(b) *Substitution of Counsel.* For good cause, the IDS Director may request *ex parte* that a judge of a court of competent jurisdiction replace lead or associate counsel previously appointed with new counsel selected by the IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.1(1), (2); 7A-498.5(a), (c)(4), (c)(7), (h); 7A-498.6(b)(8)

Commentary:

Paragraph 2A.5(b) permits the IDS Director to request *ex parte* that a judge remove an attorney previously appointed. It would be impossible to note all the circumstances that reasonably might cause the IDS Director to make such a request. Such circumstances might not in themselves constitute ineffective assistance of counsel. *See State v. Sweezy,* 291 N.C. 366, 371-72, 230 S.E.2d 524 (1976); see also *State v. Kuplin,* 316 N.C. 387, 396, 343 S.E.2d 793 (1986) ("Each case must be examined on an individual basis. In the absence of a constitutional violation, the decision about whether appointed counsel shall be replaced is a matter solely for the discretion of the trial court."). Reasonable tactical disagreements between the IDS Director and appointed counsel will not constitute grounds for the IDS Director to request substitution of counsel. If the judge determines that the attorney is rendering ineffective assistance of counsel or that the attorney has an impermissible conflict of interest, substitution is required as a matter of law. *See State v. Moorman,* 320 N.C. 387, 358 S.E.2d 502 (1987); *State v. James,* 111 N.C. App. 785, 433 S.E.2d 755 (1993).

Subpart 2B. Appointment and Compensation of Appellate Counsel in Capital Cases.

Rule 2B.1. Coverage of this Subpart.

(a) *Applies to Capital Appeals.* This subpart applies to capital appeals and all appeals from offenses joined with a capital appeal. The term "capital appeal" includes only appeals taken from a sentence of death.

(b) *Authority to Implement Other Programs, Plans, and Contracts.* Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants in capital appeals pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.2(b); 7A-498.3(a); 7A-498.5(c)(7), (c)(8), (d)

Rule 2B.2. Appointment of Appellate Counsel.

(a) *Provisional Appointment of the Office of the Appellate Defender.* In extraordinary circumstances and in the absence of a court appointment pursuant to paragraph 2B.2(b) below, the Appellate Defender may appoint the Office of the Appellate Defender on a provisional basis to make a preliminary determination of the defendant's entitlement to appointed counsel in the Appellate Division, and to file a petition for an appropriate extraordinary writ in the Appellate Division.

(b) *Appointment of the Office of Appellate Defender by the Court.* Following entry of a judgment imposing a death sentence, the IDS Director shall appoint the Office of Appellate Defender as appellate counsel in the capital case, and in any joined non-capital case upon which the court enters judgment, if the court determines that the capital defendant is indigent. It shall not be necessary for the IDS Director to file an order appointing the Office of Appellate Defender. The appellate entries made by the court following entry of a death judgment against an indigent defendant shall reflect that appeal is taken by operation of law pursuant to G.S. 15A-2000(d)(1), and that the IDS Director has appointed the Office of Appellate Defender. The appellate entries shall be mailed or transmitted by facsimile to the Office of Appellate Defender as soon as practicable following entry of judgment.

(c) *Representation by Appellate Defender; Assignment of Other Appellate Counsel.* The Appellate Defender shall represent on appeal as many of the defendants with capital appeals as possible to maximize the effectiveness of the Office of Appellate Defender, consistent with the other goals and responsibilities of that office. For the defendants that the Office of Appellate Defender does not represent on appeal, the Appellate Defender shall appoint one or two lawyers to represent the defendant on appeal. The Appellate Defender shall maintain a list of lawyers eligible to represent capital defendants on appeal pursuant to the procedures in Appendix 2B to these rules. The Appellate Defender shall appoint from that list pursuant to rules approved by the IDS Director. Appointment orders, signed by the Appellate Defender, shall be distributed to the appellant, trial judge, prosecuting attorney, defense attorneys at trial, clerk of superior court for the county where the trial took place, and court reporter(s).

(d) *Conflicts.* If the Office of Appellate Defender is appointed to represent a capital defendant whose case would create a conflict of interest with a current or previous client of the office of Appellate Defender, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in the new case pursuant to the rules under which the Appellate Defender would appoint counsel. If the Office of Appellate Defender is appointed to represent two or more clients between whom there is a conflict of interest, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in all cases in which a conflict exists.

(e) *Evidentiary Hearings on Remand from the Appellate Courts Pending Direct Appeal and Assignment of Counsel by the Appellate Defender.* After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one or two additional lawyers to represent the appellant at an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending. If additional counsel is appointed for that purpose, that counsel must be on the roster of attorneys who are approved to represent indigent capital defendants in the Trial Division pursuant to Rule 2A.2(d)(App.). Compensation of counsel appointed under this subsection shall be governed by Rule 2B.3. Appointment and compensation of experts and payment of other expenses related to litigation at the evidentiary hearing as authorized under this subsection shall be governed by Part 2D of these rules. (Adopted July 1, 2001; amended July 9, 2004; Subsection (c) amended effective November 4, 2005; New subsection (e) adopted November 4, 2005.)

Authority: G.S. 7A-450(b); 7A-452(a); 7A-498.3(b), (c); 7A-498.5(d), (h); 7A-498.8(b)(1), (b)(6)

Commentary:

The superior court shall continue to use a revised version of the appellate entries form that has been used by the AOC (AOC-CR-350) to appoint the Office of Appellate Defender to represent the defendant in a capital appeal. The form will memorialize the automatic appeal of the conviction and sentence pursuant to G.S. 15A-2000(d)(1), the defendant's indigency status, the appointment of the Office of Appellate Defender by operation of these rules, and other relevant information common to all appeals of right from criminal convictions in superior court.

Subsection (a): This provision was added in July 2004 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender in certain circumstances. The need for this authority has typically arisen in three types of cases: 1) cases in which the Appellate Defender believes that a trial court has erroneously denied indigency status after a person who the court previously determined was indigent entered notice of appeal, and that a petition for an extraordinary writ should be filed on the person's behalf; 2) cases in which a trial court has determined that a person is indigent but denied appointed appellate counsel, and the Appellate Defender believes that the person has a right to appointed appellate counsel and that a petition for an extraordinary writ should be filed on the person's behalf; and 3) cases in which the Appellate Defender is contacted by appointed trial counsel concerning the need for immediate review of a pre-trial ruling, and the Appellate Defender agrees that the ruling should be challenged in the appellate courts by means of a petition for an extraordinary writ.

Subsection (e): This provision was added in November 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending.

Rule 2B.3. Compensation and Recoupment.

(a) *Compensation.* Appointed counsel who represented an indigent capital defendant on appeal shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in appellate representation of the defendant. If an attorney seeks compensation for time spent working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. Following review of the fee application, the IDS Director shall determine the amount of compensation and forward the award to IDS Financial Services for payment. If counsel is required pursuant to paragraph 2B.4(b)(iii) below to meet with the Appellate Defender or others to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent an indigent capital defendant may apply for and receive interim payments in the discretion of the IDS Director. For all cases finally disposed at the appellate level on or after July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the Appellate Defender or IDS Director within no more than one year after the date on which the appeal was finally disposed. For all cases finally disposed at the appellate level before July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the Appellate Defender or IDS Director by January 1, 2006. In accordance with policies and procedures approved by the IDS Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline. Counsel may make a written request for a review of the amount of compensation determined by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

(b) *Recoupment of Fees Generally.* To the extent required by law, capital defendants for whom counsel has been appointed under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender or appellate defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the defendant of the potential liability, and afford the defendant a reasonable opportunity to be heard on the issue. The trial judge or other appropriate judicial official shall then determine the amount to be recouped if recoupment is required by law.

(c) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(d) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the IDS Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds. (Adopted July 1, 2001; Subsection (d) adopted effective November 12, 2004; Subsection (a) amended May 6, 2005; Subsection (d) amended effective September 15, 2006; Subsection (a) amended August 13, 2007; Subsection (b) amended effective March 7, 2008.)

Authority: G.S. 7A-450.1 through -450.4; 7A-452(b); 7A-455; 7A-458; 7A-498.1(4), (5); 7A-498.3(c), (d); 7A-498.5(c)(8), (f)

Commentary:
See the commentary to Rule 2A.4, above.

Rule 2B.4. Conditions of Appointment.

(a) *Petitions for Certiorari, Oppositions to Petitions for Certiorari, and Representation in the Supreme Court of the United States.* If the defendant does not receive sentencing relief in the Supreme Court of North Carolina, the appointed appellate lawyer shall prepare and file in the Supreme Court of the United States a timely petition for writ of certiorari to the Supreme Court of North Carolina, unless relieved of this responsibility by the IDS Director or Appellate Defender. If the defendant receives sentencing relief in the Supreme Court of North Carolina, but the Supreme Court of the United States arguably has certiorari jurisdiction on an issue that could result in guilt-phase relief, the appointed appellate lawyer will be compensated for preparing and filing in the Supreme Court of the United States a timely petition for writ of certiorari to the Supreme Court of North Carolina only if the lawyer obtains prior written authorization from the IDS Director or Appellate Defender. If the defendant receives relief in the Supreme Court of North Carolina and the state files a petition for writ of certiorari, the appointed appellate lawyer shall prepare and file a timely response in opposition to the petition, unless relieved of this responsibility by the IDS Director or Appellate Defender. If the Supreme Court of the United States grants certiorari, the appointed appellate lawyer shall represent the defendant in proceedings before the Supreme Court, unless relieved of this responsibility by the IDS Director or Appellate Defender.

If the IDS Director or Appellate Defender relieves the appointed appellate lawyer of any of these responsibilities or declines to authorize appointed appellate counsel to file a writ of certiorari on an issue that could result in guilt-phase relief, the Appellate Defender may undertake the representation directly or appoint one or two other qualified appellate attorneys from the list of lawyers eligible to represent capital defendants on appeal. The Appellate Defender also may appoint the Office of Appellate Defender or another qualified appellate attorney from the list of lawyers eligible to represent capital defendants on appeal as co-counsel with appointed appellate counsel. Compensation of counsel for work performed pursuant to this subsection shall be governed by Rule 2B.3.

(b) *Other Requirements.* The IDS Director or Appellate Defender may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

(i) consult with the Appellate Defender or his or her designee during the pendency of the representation in the Appellate Division or in the Supreme Court of the United States as provided by paragraph 2B.4(a), above, participate in practice oral arguments, and submit briefs for pre-filing review, as required by the Appellate Defender;

(ii) attend training and/or continuing legal education in the area of capital appellate representation as approved by the IDS Director; and

(iii) meet with the Appellate Defender and any others designated by the IDS Director following an appellate decision and prior to final payment of counsel fees to review the course of the representation.

(c) *Substitution of Counsel.* For good cause, the IDS Director may request *ex parte* that a court of competent jurisdiction replace an appellate attorney previously appointed with new counsel selected by the IDS Director. (Adopted July 1, 2001; Subsection (a), (b) amended September 14, 2007.)

Authority: G.S. 7A-451(b)(7), 7A-498.1(1), (2); 7A-498.5(a), (c)(4), (c)(7), (h); 7A-498.6(b)(8); 7A-498.8(b)(3), (b)(4), (b)(6a)

Commentary:

Subsection (a): Subsection (a) was amended effective September 14, 2007 to address defense petitions for certiorari in the Supreme Court of the United States on issues that could lead to guilt-phase relief, oppositions to state petitions for certiorari, and the responsibility for representation in the Supreme Court of the United States if that Court grants certiorari review. The amendments reflect statutory revisions that were enacted during the 2007 legislative session, which extended the entitlement to counsel to ”review of any judgment or decree rendered on direct appeal by the Supreme Court of North Carolina pursuant to the certiorari jurisdiction of the United States Supreme Court.” S.L. 2007-323, § 14.19(a).

Subsection (b): Based on the same statutory revisions described in the commentary to subsection 2B.4(a), above, this subsection was amended effective September 14, 2007 to clarify that the Appellate Defender may set additional conditions of appointment for representation in the Supreme Court of the United States, including requiring consultations, reviews of draft petitions and briefs, and practice oral arguments.

Subsection (c): See the commentary to Rule 2A.5(b), above.

Subpart 2C. Appointment of Post-Conviction Counsel in Capital Cases.

Rule 2C.1. Coverage of this Part.

(a) *Applies to Capital Post-Conviction.* This subpart applies to capital defendants whose death sentences are on direct appeal to the Supreme Court of North Carolina or have been affirmed on direct appeal by the Supreme Court of North Carolina.

(b) *Authority to Implement Other Programs, Plans, and Contracts.* Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants in capital post-conviction proceedings pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-451(c), (d); 7A-498.2(b); 7A-498.3(a); 7A-498.5(c)(7), (c)(8), (d)

Rule 2C.2. Appointment of Post-Conviction Counsel.

The IDS Director shall appoint two lawyers as post-conviction counsel in each indigent capital post-conviction case following the appointment of the IDS Office by the court pursuant to G.S. 7A-451(c). In view of the time limits imposed by G.S. 15A-1415 for the filing of post-conviction motions in a capital case, the court shall immediately notify the IDS Director of the appointment of the IDS Office. The IDS Director shall maintain a list of lawyers eligible to represent capital defendants in post-conviction proceedings pursuant to the procedures in Appendix 2C of these rules. Appointment orders, signed by the IDS Director, shall be distributed to the defendant, clerk of superior court for the county where the trial took place, district attorney, attorney general, and lawyers appointed as post-conviction counsel. (Adopted July 1, 2001.)

Authority: G.S. 7A-450(b); 7A-451(c), (d); 7A-498.3(b), (c); 7A-498.5(d), (h)

Commentary:
Pursuant to G.S. 7A-451(c), an indigent capital defendant may apply to the superior court of the district in which the defendant was indicted for appointment of post-conviction counsel. If the court finds that the defendant is indigent and desires counsel, it shall appoint the IDS Office, which shall in turn appoint two counsel to represent the defendant in post-conviction proceedings. The IDS Director will approve and make available a form to facilitate the court's appointment of the IDS Office (AOC-CR-427).The court can notify the IDS Director that it has appointed the IDS Director by mail, facsimile, or email.

Rule 2C.3. Compensation and Recoupment.

(a) *Compensation.* Appointed counsel who represented an indigent capital defendant in post-conviction proceedings shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in post-conviction representation of the defendant. If an attorney seeks compensation for time spent working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. Following review of the fee application, the IDS Director shall determine the amount of compensation and forward the award to IDS Financial Services for payment. If counsel is required pursuant to paragraph 2C.4(a)(iv) below to meet with the IDS Director to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent a capital defendant on post-conviction may apply for and receive interim payments in the discretion of the IDS Director. For all cases finally disposed at the post-conviction level on or after July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the IDS Director within no more than one year after the date on which the post-conviction proceedings were finally disposed. For all cases finally disposed at the post-conviction level before July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the IDS Director by January 1, 2006. In accordance with policies and procedures approved by the IDS Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline. Counsel may make a written request for a review of the amount of compensation determined by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

(b) *Recoupment of Fees Generally.* To the extent required by law, capital defendants for whom counsel has been appointed under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender or appellate defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the defendant of the potential liability, and afford the defendant a reasonable opportunity to be heard on the issue. The trial judge or other appropriate judicial official shall then determine the amount to be recouped if recoupment is required by law.

(c) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(d) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the IDS Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds. (Adopted July 1, 2001; Subsection (d) adopted effective November 12, 2004; Subsection (a) amended May 6, 2005; Subsection (d) amended effective September 15, 2006; Subsection (a) amended August 13, 2007; Subsection (b) amended effective March 7, 2008.)

Authority: G.S. 7A-450.1 through -450.4; 7A-452(b); 7A-455; 7A-458; 7A-498.1(4), (5); 7A-498.3(c), (d); 7A-498.5(c)(8), (f)

Commentary:
See the commentary to Rule 2A.4, above.

Rule 2C.4. Conditions of Appointment.

(a) *Requirements.* The IDS Director may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

(i) consult with the IDS Director during the pendency of the representation and submit the Motion for Appropriate Relief or other filings for pre-filing review, as required by the IDS Director;

(ii) attend training and/or continuing legal education in the area of capital post-conviction representation as approved by the IDS Director;

(iii) follow the procedures required in Part 2D of these rules concerning appointment and compensation of experts, and other expenses of representation; and

(iv) meet with the IDS Director following the end of the representation and prior to final payment of counsel fees to review the course of the representation.

(b) *Substitution of Counsel.* For good cause, the IDS Director may request *ex parte* that a judge of a court of competent jurisdiction replace post-conviction counsel previously appointed with new counsel selected by the IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.1(1), (2); 7A-498.5(a), (c)(4), (c)(7), (h); 7A-498.6(b)(8)

Commentary:
See the commentary to Rule 2A.5(b), above.

Subpart 2D. Appointment and Compensation of Experts and Payment of Other Expenses Related to Legal Representation in Capital Cases.

Rule 2D.1. Initial Application.

Defense counsel shall make application to the IDS Director for authorization to retain experts or for other substantial expenses necessary to the defense of the capital defendant before applying to a court for such authorization, and before incurring a financial obligation for which defense counsel will apply to the IDS Director for payment by the IDS Office. The application shall be in writing, unless exceptional or extraordinary circumstances necessitate an oral motion. Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny. The IDS Director may require counsel to make a more particularized application before approving or disapproving the application. (Adopted July 1, 2002.)

Authority: G.S. 7A-450(b); 7A-454; 7A-498.1(1); 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Commentary:
Routine expenses, such as typical long-distance telephone calls, are not substantial expenses within the meaning of this rule. Counsel can resolve any question about whether an expense requires prior approval of the IDS Director by communication with the IDS Director by telephone or email.

Ordinarily, counsel should submit to the IDS Director a written application for expert funding. However, in exceptional or extraordinary circumstances, counsel may apply for expert funding by telephone or email.

Rule 2D.2. Confidentiality of Application.

The IDS Director will maintain the application in a confidential file open only to the IDS Office and the defense team. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.3(a), (c); 7A-498.5(c)(6), (f)

Rule 2D.3. Disapproval of Application.

If the IDS Director disapproves the application, timely written notice of disapproval of the application will be delivered to counsel. The IDS Director will maintain the notice of disapproval in a confidential file open only to the IDS Office and the defense team. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Rule 2D.4. Application to Court.

Defense counsel may apply to a court for appointment of experts or for other expenses following disapproval by the IDS Director, but counsel may not submit an application to a court that includes information not contained in the application made to the IDS Director unless exceptional or extraordinary circumstances necessitate submitting such new or additional information directly to a court. If counsel makes application to a court following the IDS Director's disapproval, counsel shall submit with its application to the court a complete copy of the IDS Director's written notice of disapproval and a complete copy of the written application made to the IDS Director. Counsel must immediately forward to the IDS Director a complete copy of any court order approving funds previously disapproved by the IDS Director and a complete copy of the application made to the court. Such court order and application will be maintained in a confidential file open only to the IDS Office and the defense team. (Adopted July 1, 2001.)

Authority: G.S. 7A-454; 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Commentary:
If, after denial of an initial application to the IDS Director for appointment or compensation of experts or other supporting services, defense counsel discovers new or additional information that is relevant to such application, counsel ordinarily should submit a new application to the IDS Director before submitting an application to a court. Counsel may submit to a court an application that contains new or additional information only in exceptional or extraordinary circumstances.

Rule 2D.5. Authority to Implement other Programs, Plans, and Contracts.

Nothing in these rules shall prohibit appointment or compensation of otherwise qualified experts pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-454; 7A-498.1(1), (3); 7A-498.3(a), (c); 7A-498.5(c)(6), (d), (f)

Appendix to Part 2.

The following three appendices set eligibility standards for trial, appellate, and post-conviction counsel in capital cases.

Appendix 2A. Standards for Lead and Associate Trial Counsel in Capital Cases.

Rule 2A.1. (App.) Trial Qualifications and Experience.

(a) *Lead Counsel.* To be eligible to be appointed as lead counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as lead counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2A.1(c) (App.) below.

A candidate for appointment must demonstrate that he or she:

(i) has at least six years of criminal or civil litigation experience; or has at least four years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization;

(ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;

(iii) has participated as trial counsel in at least ten jury trials to verdict or to hung jury;

(iv) has tried a capital case to verdict or to hung jury as lead defense counsel; or has tried two capital cases to verdict or to hung jury as associate defense counsel; or has represented to disposition at the trial level defendants in four homicides cases; and

(v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

(b) *Associate Counsel.* To be eligible to be appointed as associate counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as associate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2A.1(c) (App.) below.

A candidate for appointment must demonstrate that he or she:

(i) has at least three years of criminal or civil litigation experience;

(ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;

(iii) has participated as trial counsel in at least four jury trials to verdict or to hung jury; or has spent two years in practice in a capital defense organization; and

(iv) has substantial familiarity with scientific and medical evidence, including mental health, social history, and pathology evidence.

(c) *Waiver.* If an attorney cannot meet one or more of the requirements set forth above, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as lead or associate counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation, may either waive such requirement(s) or defer any requirement(s) for a reasonable time and in the interim place the attorney on the roster of qualified lead or associate counsel.

Rule 2A.2. (App.) Applications.

(a) *Application.* An attorney who seeks to be appointed as lead or associate counsel in a capital case shall submit to the IDS Director an application on a form prescribed by the IDS Director. The application shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall specify for which Judicial Division roster(s) of qualified lead counsel and associate counsel he or she seeks to be considered. The attorney shall also identify any requirement(s) that he or she requests be waived, and shall set forth in detail his or her trial experience or other exceptional qualifications that justify waiver.

(b) *Required Submissions.* In support of an application, an attorney shall submit to the IDS Director:

(i) a list of all first-degree murder cases in which the attorney has appeared within the past five years, including the name of the case, the county, the trial judge, the prosecuting attorney, any co-counsel, the result or verdict, and any reported appellate decision in the case;

(ii) at least two examples of substantial written legal work product prepared by the attorney at the trial or appellate level in connection with separate felony cases;

(iii) a description of specialized criminal defense training programs attended within the past five years, such as those sponsored by the North Carolina Academy of Trial lawyers, the North Carolina Bar Association, or the Center for Death Penalty Litigation;

(iv) the names, addresses, and phone numbers of two superior court judges, two prosecutors, and two defense attorneys familiar with the attorney's work as an advocate; and

(v) any additional material that may assist the IDS Director in evaluating the applicant's trial qualifications and experience.

(c) *Waiver or Deferral of Required Submissions.* If an attorney has not provided each of the above items, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as lead or associate counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation as either lead or associate counsel, may either waive such submission(s) or defer submission of any item(s) for a reasonable time and in the interim place the attorney on the roster of qualified lead or associate counsel.

(d) *Creation of Capital Trial Roster.* Following review of each application to determine that it is complete, the IDS Director will investigate the contents of the submission, contact references, and determine whether the attorney is qualified for appointment as lead or associate counsel in a capital case. The IDS Director shall thereafter create and maintain a roster of attorneys qualified for and willing to accept appointments as lead and associate counsel in each Judicial Division.

(e) *Appeal to the IDS Commission.* If the IDS Director determines that an attorney is not qualified for appointment as lead or associate counsel in a capital case or otherwise declines to place the attorney's name on the capital trial roster, the attorney may make a written request for a review of the IDS Director's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 2A.3. (App.) Retention and Eligibility.

(a) *On-Going Training.* To remain eligible for appointment as lead or associate counsel in a capital case, an attorney must attend capital training sessions as prescribed by the IDS Director, and consult regularly and frequently with the IDS Director with respect to each capital case to which the attorney is appointed.

(b) *Removal from Roster.* The IDS Director may remove from the roster of attorneys qualified for appointment as lead or associate counsel in a capital case any attorney who has ignored requirements for appointment as lead or associate counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as lead or associate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as lead or associate counsel. The IDS Director may also remove an attorney from a roster if, as part of a periodic review of the roster, the IDS Director determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner. If the IDS Director removes an attorney from the capital trial roster, the attorney may make a written request for a review of the IDS Director's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (b) amended effective February 10, 2006.)

Appendix 2B. Standards for Appellate Counsel in Capi tal Cases.

Rule 2B.1. (App.) Appellate Qualifications and Experience.

(a) *Appellate Counsel.* To be eligible to be appointed as appellate counsel on direct appeal in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as appellate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2B.1(b) (App.) below.

A candidate for appointment must demonstrate that he or she:

(i) has at least five years of criminal, appellate, or post-conviction experience; or has at least three years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization; or is currently serving as the Appellate Defender or an Assistant Appellate Defender;

(ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina;

(iii) is familiar with practice and procedure in the trial and appellate courts of North Carolina; and

(iv) has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney.

(b) *Waiver.* If an attorney cannot meet one or more of the requirements set forth above, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as appellate counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation, may either waive such requirement(s) or defer any requirement(s) for a reasonable time and in the interim place the attorney on the roster of qualified appellate counsel. (Adopted July 1, 2001.)

Rule 2B.2. (App.) Applications.

(a) *Application.* An attorney who seeks to be appointed as appellate counsel in a capital case shall submit to the Appellate Defender an application on a form prescribed by the IDS Director. The application shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement(s) that he or she requests be waived, and shall set forth in detail his or her appellate experience or other exceptional qualifications that justify waiver.

(b) *Required Submissions.* In support of an application, an attorney shall submit to the Appellate Defender:

(i) at least two appellate briefs, written exclusively or primarily by the applicant, the opposing briefs, and the appellate court's decision;

(ii) a description of specialized capital or other criminal appellate advocacy, or other criminal practice program, attended in the past five years;

(iii) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one appellate adversary, who are familiar with the applicant's work as an advocate; and

(iv) any additional material that may assist the IDS Director in evaluating the applicant's appellate qualifications and experience.

The applicant may submit the name, address, and phone number of one appellate judge, if the judge is familiar with the applicant's work as an advocate.

(c) *Waiver or Deferral of Required Submissions.* If an attorney has not provided each of the above items, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as appellate counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel, may either waive such submission(s) or defer submission of any item(s) for a reasonable time and in the interim place the attorney on the roster of qualified appellate counsel.

(d) *Creation of Capital Appeals Roster.* Following review of each application to determine that it is complete, the Appellate Defender will investigate the contents of the submission, contact references, and make any further investigation deemed necessary. The Appellate Defender shall then make a recommendation to the IDS Director as to whether the attorney is qualified for appointment as appellate counsel in a capital case. The IDS Director shall make the final determination as to whether an attorney should be included on the capital appeals roster. The Appellate Defender shall thereafter create and maintain a roster of attorneys qualified for and willing to accept appointments as appellate counsel.

(e) *Appeal to the IDS Commission.* If the IDS Director determines that an attorney is not qualified for appointment as appellate counsel in a capital case or otherwise declines to place the attorney's name on the capital appeals roster, the attorney may make a written request for a review of the IDS Director's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 2B.3. (App.) Retention and Eligibility.

(a) *On-Going Training.* To remain eligible for appointment as counsel on a capital appeal, an attorney must attend and successfully complete training sessions as prescribed by the Appellate Defender, and consult regularly and frequently with the Appellate Defender with respect to each capital case to which the attorney is appointed.

(b) *Removal from Roster.* The IDS Director may remove from the roster of attorneys qualified for appointment as appellate counsel in a capital case any attorney who has ignored requirements for appointment as appellate counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as appellate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel. The IDS Director may also remove an attorney from the roster if, as part of a periodic review of the roster, the IDS Director determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner. If the IDS director removes an attorney from the capital appeals roster, the attorney may make a written request for a review of the IDS Director's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (July 1, 2001; Subsection (b) amended effective February 10, 2006.)

Appendix 2C. Standards for State Post-Conviction Cou nsel in Capital Cases.

Rule 2C.1. (App.) State Post-Conviction Qualifications and Experience.

(a) *State Post-Conviction Counsel.* To be eligible to be appointed as counsel on a Motion for Appropriate Relief and any appeal therefrom in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2C.1(b) (App.) below.

A candidate for appointment must demonstrate that he or she:

(i) has at least five years criminal or civil trial experience; or has at least five years criminal or civil appellate experience; or has at least five years state or federal post-conviction experience; or has at least three years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a public or private capital defense organization; or is currently in practice in a capital defense organization;

(ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina;

(iii) is familiar with the practice and procedure of the trial and appellate courts of North Carolina, including the practice and procedure for filing a Motion for Appropriate Relief, and with the practice and procedure of the federal courts with regard to federal habeas corpus petitions;

(iv) has had primary responsibility for representing a party in at least three criminal or civil appeals, or criminal post-conviction proceedings; and

(v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

(b) *Waiver.* If an attorney cannot meet one or more of the requirements set forth above, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation, may either waive such requirement(s) or defer any requirement(s) for a reasonable time and in the interim place the attorney on the roster of qualified post-conviction counsel. (Adopted July 1, 2001.)

Rule 2C.2. (App.) Applications.

(a) *Application.* An attorney who seeks to be appointed as post-conviction counsel in a capital case shall submit to the IDS Director an application on a form prescribed by the IDS Director. The application shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement(s) that he or she requests be waived, and shall set forth in detail his or her criminal or civil litigation, appellate and/or post-conviction experience, or other exceptional qualifications that justify waiver.

(b) *Required Submissions.* In support of an application, an attorney shall submit to the IDS Director:

(i) at least two examples of substantial written legal work product prepared by the attorney in connection with separate cases, or at least two appellate briefs, written exclusively or primarily by the applicant, the opposing briefs, and the appellate court's decision in the case;

(ii) a description of specialized trial, appellate, or post-conviction capital defense training programs attended in the past five years;

(iii) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one adversary, who are familiar with the applicant's work as an advocate; and

(iv) any additional material that may assist the IDS Director in evaluating the applicant's post-conviction qualifications and experience.

The applicant may submit the name, address, and phone number of one judge, if the judge is familiar with the applicant's work as an advocate.

(c) *Waiver or Deferral of Required Submissions.* If an attorney has not provided each of the above items, the IDS Director, upon determination that the attorney has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case, and will apply that knowledge and skill with appropriate thoroughness and preparation as post-conviction counsel, may either waive such submission(s) or defer submission of any item(s) for a reasonable time and in the interim place the attorney on the roster of qualified post-conviction counsel.

(d) *Creation of Post-Conviction Roster.* Following review of each application to determine that it is complete, the IDS Director will investigate the contents of the submission, contact references, and determine whether the attorney is qualified for appointment as post-conviction counsel in a capital case. The IDS Director shall thereafter create and maintain a roster of attorneys qualified for and willing to accept appointments as post-conviction counsel.

(e) *Appeal to the IDS Commission.* If the IDS Director determines that an attorney is not qualified for appointment as post-conviction counsel in a capital case or otherwise declines to place the attorney's name on the capital post-conviction roster, the attorney may make a written request for a review of the IDS Director's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006.)

Rule 2C.3. (App.) Retention and Eligibility.

(a) *On-Going Training.* To remain eligible for appointment as counsel on an initial Motion for Appropriate relief and any appeal therefrom, an attorney must attend and successfully complete capital training sessions as prescribed by the IDS Director, and consult regularly and frequently with the IDS Director with respect to each capital case to which the attorney is appointed.

(b) *Removal from Post-Conviction Roster.* The IDS Director may remove from the roster of attorneys qualified for appointment as post-conviction counsel in a capital case any attorney who has ignored requirements for appointment as post-conviction counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as post-conviction counsel. The IDS Director may also remove an attorney from the roster if, as part of a periodic review of the roster, the IDS Director determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner. If the IDS Director removes an attorney from the capital post-conviction roster, the attorney may make a written request for a review of the IDS director's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Subsection (b) amended effective February 10, 2006.)

PART 3

RULES FOR PROVIDING LEGAL REPRESENTATION IN NON-CAPITAL CRIMINAL APPEALS AND NON-CRIMINAL APPEALS

This third part addresses the procedure to be followed when a person is entitled to appointed counsel on appeal to the Appellate Division from adverse decisions in the Trial Division in both non-capital criminal proceedings and non-criminal proceedings. The rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001. Fee applications for appellate representation filed on or after that date will be governed by these rules.

The rules supercede the provisions on appellate representation in Section D. of the Rules and Regulations of the North Carolina State Bar (State Bar Rules) and any provisions on appellate representation in local bar plans issued pursuant to the State Bar Rules. As of July 1, 2001, those rules, which were authorized by former G.S. 7A-459, are no longer effective.

Whenever the term "IDS Director" is used in these rules, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001; amended November 15, 2002.)

Rule 3.1. Coverage of this Part.

This part applies to cases in which an indigent person is entitled to appointed appellate counsel pursuant to G.S. 7A-498.3 on appeal of right or other review to the Appellate Division from an adverse ruling in the Trial Division, other than a judgment imposing a sentence of death or a non-capital judgment joined with a judgment imposing a sentence of death. (Adopted July 1, 2001; amended effective November 15, 2002.)

Authority: G.S. 7A-451(b); 7A-452; 7A-498.3(a)

Commentary:

The bulk of the cases governed by this subsection will be indigent non-capital criminal appeals. However, G.S. 7A-451(a) identifies sixteen types of "actions and proceedings" in which persons are entitled to appointed counsel.

Where a right to appellate review of an adverse ruling is authorized by statute in any of these sixteen actions and proceedings, a person is entitled to appointed appellate counsel. Subsection (b) of G.S. 7A-451 reads in relevant part as follows:

> (b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable: . . . (6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

Three of the four statutory references in subsection (6) are specific. G.S. 7A-30(1) and -30(2) extend a person's right to counsel to appeals of right from decisions of the North Carolina Court of Appeals to the Supreme Court of North Carolina based either on a substantial constitutional question or on a dissent in the Court of Appeals. Subchapter XIV of Chapter 15A governs motions for appropriate relief and appeals of right from criminal convictions returned in the Trial Division, including appeals from superior court to the Appellate Division.

G.S. 7A-27, the fourth statutory reference in G.S. 7A-451(b), broadly concerns "appeals of right" from the Trial Division, and contains five subsections. Subsection (a) mandates that appeals in death cases go directly to the Supreme Court of North Carolina. Subsection (b) directs that appeals from "any final judgment of a superior court" other than those in death cases or those based on a guilty or no contest plea, go directly to the Court of Appeals. Subsection (c) directs that civil district court appeals go directly to the Court of Appeals. Subsection (d) concerns appeals from certain interlocutory orders in civil cases. Subsection (e) states that "[f]rom any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals."

Rule 3.2. Appointment of Appellate Counsel.

(a1) *Provisional Appointment of the Office of the Appellate Defender to File a Petition for an Extraordinary Writ.* In extraordinary circumstances and in the absence of a court appointment pursuant to paragraph 3.2(b) below, the Appellate Defender may appoint the Office of the Appellate Defender, or an attorney on the roster of counsel who are qualified and willing to accept appointment to represent persons in the Appellate Division, on a provisional basis to make a preliminary determination of the person's entitlement to appointed counsel in the Appellate Division, and to file a petition for an appropriate extraordinary writ in the Appellate Division.

(a2) *Provisional Appointment of the Office of the Appellate Defender in Proceedings Under Subchapter I of Chapter 7B of the General Statutes.* In the absence of a court appointment pursuant to paragraph 3.2(b) below, when the Appellate Defender is notified by trial counsel of an appealable ruling adverse to the respondent in an action brought under Subchapter I of Chapter 7B of the General Statutes, the Appellate Defender may appoint the Office of the Appellate Defender, or an attorney on the roster of counsel who are qualified and willing to accept appointment to represent persons in the Appellate Division, on a provisional basis to make a preliminary determination of the respondent's entitlement to appointed counsel in the Appellate Division, and to represent the respondent in contemplation of an appeal, or to consult with trial counsel and the respondent on the decision of whether to enter notice of appeal.

(b) *Appointment of the Office of Appellate Defender by the Court.* When a person enters notice of appeal in a case subject to this part and requests appointment of appellate counsel, the trial court shall make a determination of the person's indigency in accordance with Part 1, paragraph 1.4(b) of these rules. In its discretion, the court may rely on a previous determination of indigency. If the court determines that the person is indigent, the court shall appoint the Office of Appellate Defender to represent the person in the Appellate Division, except that, in cases subject to G.S. 122C-270(e) and 122C-289 where the appeal was filed before October 1, 2006, the district court shall appoint as appellate counsel of record the attorney who represented the person in district court. These rules, including provisions relating to standards and compensation, govern all other aspects of appointment of counsel appointed under the foregoing exception.

(c) *Transmittal of Judgment and Forms.* Following the appointment of the Office of Appellate Defender to represent a person in a case subject to this part, the clerk of superior court shall immediately send to the Office of Appellate Defender, by United States mail or by facsimile, a copy of the judgment or decree from which the appeal was taken, as well as any written appellate entries or rulings the court makes with respect to the appeal.

(d) *Assignment of Counsel by the Appellate Defender.* If the Appellate Defender determines that, to insure quality appellate representation, a person's appeal should not be assigned to the Office of Appellate Defender, the Appellate Defender shall assign the person's case to private counsel or a public defender or assistant public defender listed on the roster of qualified appellate counsel maintained by the Appellate Defender pursuant to paragraph 3.4 below and rules approved by the IDS Director. Such counsel is thereafter appellate counsel of record, subject to the limitations and conditions of appointment in paragraph 3.2(i), below.

(e) *Conflicts.* If the Office of Appellate Defender is appointed to represent a person whose case would create a conflict of interest with a current or previous client of the Office of Appellate Defender, the Appellate Defender shall immediately notify the IDS Director, and the IDS Director shall appoint counsel in the new case pursuant to the rules under which the Appellate Defender would appoint counsel. If the Appellate Defender is appointed to represent co-appellants, the Appellate Defender may appoint the Office of the Appellate Defender to represent a co-appellant and may appoint counsel for the remaining co-appellants so long as the Appellate Defender previously has not undertaken representation of a co-appellant.

(f) *Notice of Assignment and Request for Record.* Following the Appellate Defender's decision to assign an appeal to other counsel, or following the IDS Director's assignment of counsel in case of a conflict, the assigning authority shall immediately notify assigned counsel of the appointment, and shall also notify the clerk of superior court, the court reporter(s) or other custodian(s) of the recorded proceedings, and the adverse parties of the name, address, and telephone number of assigned counsel. The Office of Appellate Defender shall transmit to assigned appellate counsel a copy of the documents forwarded to the Office of Appellate Defender by the clerk of superior court pursuant to paragraph 3.2(b) above, and shall request that the clerk transmit to assigned counsel the complete file maintained by the clerk in the case.

(g1) *Litigation of Non-Capital Motions for Appropriate Relief Pending Direct Appeal and Assignment of Counsel by the Appellate Defender.* Appellate counsel appointed pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a non-capital Motion for Appropriate Relief ("MAR") pending direct appeal pursuant to G.S. 15A-1418 must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize MAR litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating an MAR. If additional counsel is appointed to prepare, file, or litigate the MAR, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent defendants at trial charged with the highest offense the appellant has appealed, or a higher offense. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to MAR litigation authorized under this subsection shall be governed by Part 2D of these rules.

(g2) *Evidentiary Hearings on Remand from the Appellate Courts Pending Direct Appeal and Assignment of Counsel by the Appellate Defender.* After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional lawyer to represent the appellant at an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending. If additional counsel is appointed for that purpose in a criminal case, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent indigent defendants in the Trial Division charged with the highest offense that is being remanded, or a higher offense. If additional counsel is appointed for that purpose in a case brought under Chapter 7B of the General Statutes, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent indigent persons in the Trial Division in the applicable type of case. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to litigation at the evidentiary hearing as authorized under this subsection shall be governed by Part 2D of these rules.

(h) *Litigation of Motions to Modify Dispositional Orders Pending Direct Appeal in Juvenile Delinquency Cases and Assignment of Counsel by the Appellate Defender.* Appellate counsel appointed to a juvenile delinquency case pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a motion to modify a dispositional order pending direct appeal pursuant to G.S. 7B-2600 must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize the litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel and the Juvenile Defender, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating a motion to modify a dispositional order. If additional counsel is appointed to prepare, file, or litigate the motion, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent juveniles in district court delinquency proceedings charged with the highest offense the appellant has appealed, or a higher offense. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to the motion to modify the dispositional order authorized under this subsection shall be governed by Part 2D of these rules.

(i) *Petitions for Certiorari, Oppositions to Petitions for Certiorari, and Representation in the Supreme Court of the United States.* If appellate counsel appointed pursuant to Part 3 of these rules seeks to be compensated for any of the following, counsel must obtain prior written authorization from the Appellate Defender:

(i) preparing and filing a petition for certiorari seeking review of federal constitutional issues in the Supreme Court of the United States following an unfavorable final ruling in the North Carolina Appellate Division;

(ii) preparing and filing an opposition in response to a petition for certiorari review filed by the state in the Supreme Court of the United States following a favorable final ruling in the North Carolina Appellate Division; and

(iii) representation in the Supreme Court of the United States if certiorari is granted.After consulting with appointed appellate counsel, as an alternative to authorizing appointed appellate counsel to undertake any of the above representation, the Appellate Defender may relieve appointed appellate counsel of this responsibility and undertake the representation directly or appoint another qualified appellate attorney from the list of lawyers eligible to represent non-capital defendants or respondents on appeal. The Appellate Defender also may appoint the Office of Appellate Defender or another qualified appellate attorney from the list of lawyers eligible to represent non-capital defendants or respondents on appeal as co-counsel with appointed appellate counsel. The appointed appellate counsel may seek review of the Appellate Defender's decision from the IDS Director. Compensation of counsel for work performed pursuant to this subsection shall be governed by Rule 3.3.

(j) *Litigation of Motions Challenging Adjudicatory, Dispositional, or Other Final Orders Pending Direct Appeal in Abuse, Neglect, Dependency, or Termination of Parental Rights Cases and Assignment of Counsel by the Appellate Defender.* Appellate counsel appointed to represent a respondent in an abuse, neglect, dependency, or termination of parental rights case pursuant to Part 3 of these rules who seeks to be compensated for preparing, filing, or litigating a motion in district court challenging an adjudicatory, dispositional, or other final order pending direct appeal must obtain prior authorization from the Appellate Defender. If the Appellate Defender declines to authorize the litigation, appointed appellate counsel may seek authorization from the IDS Director. After consulting with appointed appellate counsel, the Appellate Defender or IDS Director may appoint one additional counsel to represent the appellant for purposes of preparing, filing, or litigating such a motion. If additional counsel is appointed to prepare, file, or litigate the motion, that counsel must be on a roster of counsel in some North Carolina jurisdiction who are qualified to represent respondents in district court abuse, neglect, dependency, or termination of parental rights proceedings. Compensation of counsel appointed under this subsection shall be governed by Rule 3.3. Appointment and compensation of experts and payment of other expenses related to the motion authorized under this subsection shall be governed by Part 2D of these rules. (Adopted July 1, 2001; Subsection (d) amended effective January 18, 2002; Subsection (f) adopted effective November 15, 2002; New subsection (a1) adopted effective July 9, 2004; New Subsection (g1) adopted effective November 15, 2002; New subsection (g2) adopted effective November 4, 2005; New subsection (h) adopted effective July 8, 2005; New subsection (a2) adopted effective February 10, 2006; Subsection (b) amended effective September 15, 2006 and effective December 8, 2006; Subsection (d) amended effective September 14, 2007; New subsection (i) adopted effective September 14, 2007; New subsection (j) adopted effective September 19, 2008.)

Authority: G.S. 7A-450(b); 7A-451(b)(6), (b)(8); 7A-452(a); 7A-498.3; 7A-498.5(d), (h); 7A-498.8(b)(1), (b)(6), (b)(6a)

Commentary:

In all actions and proceedings in which courts previously appointed appellate counsel, the court shall appoint the Office of Appellate Defender.

Subsection (a1): This provision was added in July 2004 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender or a private appellate attorney in certain circumstances. The need for this authority has typically arisen in three types of cases: 1) cases in which the Appellate Defender believes that a trial court has erroneously denied indigency status after a person who the court previously determined was indigent entered notice of appeal, and that a petition for an extraordinary writ should be filed on the person's behalf; 2) cases in which a trial court has determined that a person is indigent but denied appointed appellate counsel, and the Appellate Defender believes that the person has a right to appointed appellate counsel and that a petition for an extraordinary writ should be filed on the person's behalf; and 3) cases in which the Appellate Defender is contacted by appointed trial counsel concerning the need for immediate review of a pre-trial ruling, and the Appellate Defender agrees that the ruling should be challenged in the appellate courts by means of a petition for an extraordinary writ.

Subsection (a2): This provision was added in February 2006 to authorize the Appellate Defender to provisionally appoint the Office of the Appellate Defender or a private appellate attorney on a provisional basis in proceedings brought under Subchapter I of Chapter 7B of the General Statutes.

The need for this authority arose when the Supreme Court of North Carolina adopted Rule 3A of the North Carolina Rules of Appellate Procedure, which is designed to expedite appeals in abuse, neglect, or dependency and termination of parental rights cases.

Subsection (b): This subsection was revised in September 2006 to conform with amendments to G.S. 122C-270 and 122C-289 in the 2005 Technical Corrections Act. See S.L. 2006-264. Previously, G.S. 122C-270 and 122C-289 provided that the attorney appointed to represent the respondent in district court was also responsible for perfecting and concluding any appeal. For all civil commitment appeals filed on or after October 1, 2006, S.L. 2006-264 directs that appellate counsel for the indigent respondent shall be appointed in accordance with rules adopted by the IDS Office. As with all other indigent appeals, this subsection was subsequently revised to provide that, for civil commitment appeals filed on or after October 1, 2006, the court shall appoint the Office of the Appellate Defender to represent the respondent. Civil commitment appeals filed before October 1, 2006 continue to be the responsibility of the attorney assigned at the initial district court hearing. This subsection was further revised in December 2006 to clarify that the trial court is the proper body to determine an appellant's indigency and appoint the Office of the Appellate Defender.

Subsection (g1): This provision was added in November 2002 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a non-capital motion for appropriate relief pending direct appeal.

Subsection (g2): This provision was added in November 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate an evidentiary hearing in the Trial Division on remand from the Appellate Division when the direct appeal is still pending.

Subsection (h): This provision was added in July 2005 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a motion to modify a juvenile dispositional order in district court pending appeal. G.S. 7B-2600(b) gives the district court authority to reduce the nature or duration of an illegally imposed disposition order in a juvenile delinquency case.

Subsection (i): This new subsection was adopted effective September 14, 2007 to address petitions for certiorari and oppositions in response to petitions for certiorari in the Supreme Court of the United States in cases involving important issues of federal law, as well as the responsibility for representation in the Supreme Court of the United States if that Court grants certiorari review. The amendments reflect statutory revisions that were enacted during the 2007 legislative session, which, subject to the IDS Rules, extended the entitlement to counsel to review of certain judgments or decrees rendered on direct appeal by a court of the North Carolina Appellate Division. S.L. 2007-323, § 14.19(a). Before requesting authorization to seek certiorari review by the Supreme Court of the United States from a ruling of the North Carolina Court of Appeals, appointed appellate counsel must seek review of the federal constitutional issues in question by the Supreme Court of North Carolina in a petition for discretionary review or an appeal based on a dissent in the North Carolina Court of Appeals. The decision to authorize compensation will be in the Appellate Defender's discretion, subject to review by the IDS Director, based on the criteria set forth in G.S. 7A-451(b)(8).

Subsection (j): This provision was added in September 2008 to authorize the Appellate Defender or IDS Director to appoint counsel to litigate a motion in district court challenging an adjudicatory, dispositional, or other final order in an abuse, neglect, dependency, or termination of parental rights case pending appeal.

Rule 3.3. Compensation of Appellate Counsel.

(a) *Setting of Fee.* Assigned private appellate counsel of record shall be compensated in an amount determined by the IDS Director following consultation with the Appellate Defender, except that the IDS Director shall not consult with the Appellate Defender concerning the fee to be paid to counsel assigned pursuant to paragraph 3.2(d) above. If counsel is required pursuant to paragraph 3.4(f)(iii) below to meet with the Appellate Defender to review the representation, the fee shall include compensation for time spent in that review.

(b) *Fee Application.* After a person's appeal becomes final, assigned private counsel shall submit to the Appellate Defender, or to the IDS Director in a conflict case, an itemized fee application on a form prescribed by the Appellate Defender, showing the time counsel spent in appellate representation of the person. If an attorney seeks compensation for time spent working on multiple cases simultaneously, the attorney's time shall be prorated among each of the cases involved. Following review of the fee application, the Appellate Defender shall forward the application to the IDS Director with a recommendation concerning the amount to be paid. The IDS Director shall fix the fee to be paid and forward the award to IDS Financial Services for payment. For all cases finally disposed at the appellate level on or after July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the Appellate Defender or IDS Director within no more than one year after the date on which the appeal was finally disposed. For all cases finally disposed at the appellate level before July 1, 2005, final attorney fee applications must be signed by the appointed attorney and submitted to the Appellate Defender or IDS Director by January 1, 2006. In accordance with policies and procedures approved by the IDS

Commission, an attorney may apply to the IDS Director for one advance extension of the applicable deadline or for a waiver of the applicable deadline. Assigned private appellate counsel may apply for interim payments.

(c) *Recoupment of Fees Generally.* To the extent required by law, persons who have been appointed counsel under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender or appellate defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the person potentially responsible for paying the fees of the potential liability, and afford the person a reasonable opportunity to be heard on the issue. The trial judge or other appropriate judicial official shall then determine the amount to be recouped if recoupment is required by law.

(d) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(e) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any fees for the representation other than that awarded by the IDS Director. If a third party contributes funds to non-counsel services, counsel shall place the funds in trust and account to the third party and the IDS Director about the use of the funds. (Adopted July 1, 2001; Subsection (e) adopted effective November 12, 2004; Subsection (a) amended May 6, 2005; Subsection (e) amended effective September 15, 2006; Subsection (a) amended August 13, 2007; Subsection (c) amended effective March 7, 2008.)

Authority: G.S. 7A-450.1 through -450.4;7A-452(b); 7A-455; 7A-458; 7A-498.1(4), (5); 7A-498.3(c), (d); 7A-498.5(c)(8), (f); 7A-498.8(b)

Commentary:

Subsection (b): The Appellate Defender will make available to counsel a form approved by the Appellate Defender (AOC-CR-426) to document fee and expense applications. Subsection (b) was amended effective May 6, 2005 to clarify that attorneys can not double-bill the state for time spent working on multiple cases simultaneously. For all cases finally disposed at the appellate level on or after July 1, 2005, the subsection was also amended to require attorneys to submit fee applications to the Appellate Defender or IDS Director within one year of the date of final disposition. Effective August 13, 2007, the subsection was amended to allow attorneys to apply for an advance extension or waiver of the deadline in accordance with policies and procedures approved by the IDS Commission. Attorney fee applications submitted more than one year after the date of final disposition without an approved extension or waiver will not be paid from state funds.

Subsection (c): In appellate cases, recoupment of the cost of court-appointed counsel is governed by G.S. 7A-455. The IDS Act made only one change to that statute. It required that the value of services reflected in a judgment against a defendant be set in accordance with rules adopted by the IDS Office. Since Rules 3.3(a) and (b) authorize the IDS Director to set fees for appellate counsel, this rule requires the IDS Director to notify the person potentially responsible for paying the fees of the potential liability and afford the person a reasonable opportunity to be heard on the issue, before the trial judge sets the amount of any judgment. The subsection was amended effective March 7, 2008 to clarify that judgments for attorney fees can be ordered by the trial judge or another appropriate judicial official. The Public Defender and Appellate Defender are obligated to inform the IDS Director of the value of legal services rendered to a defendant. The form judgment is a new form (AOC-CR-426) that is similar to the form previously used by the AOC.

Subsection (e): Subsection (e) was amended effective September 15, 2006 to clarify that, to avoid any potential for overreaching or the appearance of impropriety, an appointed attorney cannot subsequently accept fees as retained counsel from the client or the client's family. If family or friends of an indigent client want to contribute to non-counsel services, such as expert or support services, nothing in this subsection precludes them from doing so. However, the appointed attorney must place any such funds in his or her trust account and provide an accounting to the contributing family member and the IDS Director. If, during the course of representation as appointed counsel, an attorney learns that a client who was previously determined to be indigent has become financially able to pay for the representation, G.S. 7A-450(d) directs the attorney to inform the court. *But cf.* RPC 52 (Jan. 13, 1989) (directing counsel to "call upon his client to reveal that circumstance to the tribunal" and, if the client refuses to permit disclosure, to move to withdraw). If the court finds that the client is no longer indigent, the appointed attorney may move to withdraw or continue the representation *pro bono.*

Rule 3.4. Standards for Appellate Counsel.

(a) *Maintenance of Roster.* The Appellate Defender shall maintain a roster of attorneys who are qualified and willing to accept appointment by the Appellate

Defender or IDS Director to represent persons in the Appellate Division pursuant to these rules.

(b) *Qualifications.* To be eligible for appointment to represent persons in the Appellate Division, an attorney must demonstrate that he or she is proficient in legal writing and oral advocacy, has the required legal knowledge and skill necessary for appellate representation, and will apply that knowledge and skill with appropriate thoroughness and preparation.

(c) *Submission of Application.* An attorney who desires to be on the roster of qualified appellate counsel shall submit to the Appellate Defender an application on a form prescribed by the Appellate Defender, accompanied by the following materials:

(i) a complete resume of the applicant's educational and legal experience;

(ii) four samples of the applicant's legal writing, which may include pleadings, memoranda of law, or appellate briefs;

(iii) three letters of recommendation from attorneys licensed in North Carolina for five or more years, or from professors of law familiar with the applicant's legal writing and oral advocacy skills;

(iv) unless the applicant is currently serving as the Appellate Defender or an Assistant Appellate Defender, a listing of three cases in which the applicant represented an appellant to judgment in the Appellate Division; and

(v) any additional materials that may assist the Appellate Defender in evaluating the applicant's appellate qualifications and experience.

(d) *Waiver.* If an attorney cannot supply one or more of the submissions set forth in paragraph (c), the Appellate Defender, upon demonstration that the attorney has the required legal knowledge and skill necessary for representation as appellate counsel, and will apply that knowledge and skill with appropriate thoroughness and preparation, may either waive such submission(s) or defer such submission(s) for a reasonable time and in the interim place the attorney on the roster of qualified appellate counsel.

(e) *Review of Application and Creation of Appellate Roster.* Following receipt of the application to be on the roster of qualified appellate counsel, the Appellate Defender shall consider the submitted materials, conduct such investigation as is appropriate, and determine whether the attorney is qualified for appointment as appellate counsel in a non-capital criminal or non-criminal case. The Appellate Defender shall notify the applicant in writing whether he or she will be placed on the roster of qualified appellate counsel. If the Appellate Defender determines that an attorney is not qualified for appointment as appellate counsel in a non-capital criminal or non-criminal case or otherwise declines to place the attorney's name on the appellate roster, the attorney may make a written request for a review of the Appellate Defender's decision from a committee of the IDS Commission designated by the IDS Commission to conduct such review.

(f) *Conditions of Appointment.* The Appellate Defender or IDS Director may set additional conditions of appointment, including requiring attorneys appointed under this subpart to:

(i) consult with the Appellate Defender or his or her designee during the pendency of the representation in the Appellate Division or in the Supreme Court of the United States as provided by paragraph 3.2(i), above, participate in practice oral arguments, and submit briefs for pre-filing review, as required by the Appellate Defender;

(ii) promptly notify the Appellate Defender by mail, facsimile, or email upon the filing of each brief or substantive motion or memorandum in the case, include in the notification a copy of the Questions Presented in each brief, and upon request by the appellate Defender, transmit to the Appellate Defender a copy of the entire brief, motion, or memorandum, or portions thereof; and

(iii) meet with the Appellate Defender or his or her designee following an appellate decision and prior to final payment of counsel fees to review the course of the representation.

(g) *Retention of Eligibility.* To remain eligible for appointment as counsel in a non-capital criminal or non-criminal appeal, an attorney must attend and successfully complete any training sessions prescribed by the Appellate Defender. (Adopted July 1, 2001; Subsection (e) amended effective February 10, 2006; Subsection (f) amended effective September 14, 2007.)

Authority: G.S. 7A-450(b); 7A-451(b)(8); 7A-498.1(1), (2); 7A-498.5(c)(2), (c)(4), (h); 7A-498.6(b)(8); 7A-498.8(b)(3),(b)(4), (b)(6a).

Commentary:

Subsection (f): Based on statutory revisions that were enacted during the 2007 legislative session, which extended the entitlement to counsel to review of certain judgments or decrees rendered on direct appeal by a court of the North Carolina Appellate Division, see S.L. 2007-323, § 14.19(a), this subsection was amended effective September 14, 2007 to clarify that the Appellate Defender may set additional conditions of appointment for representation in the Supreme Court of the United States, including requiring consultations, reviews of draft petitions and briefs, and practice oral arguments.

Rule 3.5. Substitution of Counsel.

For good cause, the Appellate Defender or IDS Director may request *ex parte* that a judge of a court of competent jurisdiction replace appellate counsel previously appointed with new counsel selected by the Appellate Defender or IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.1(1), (2); 7A-498.5(c)(4), (h); 7A-498.6(b)(8); 7A-498.8(b)

Commentary:

This rule permits the Appellate Defender or IDS Director to request *ex parte* that a judge remove an attorney previously appointed. It would be impossible to note all the circumstances that reasonably might cause the Appellate Defender or IDS Director to make such a request. Such circumstances might not in themselves constitute ineffective assistance of counsel. *See State v. Sweezy,* 291 N.C. 366, 371-72, 230 S.E.2d 524 (1976); *see also State v. Kuplin,* 316 N.C. 387, 396, 343 S.E.2d 793 (1986) ("Each case must be examined on an individual basis. In the absence of a constitutional violation, the decision about whether appointed counsel shall be replaced is a matter solely for the discretion of the trial court."). Reasonable tactical disagreements between the Appellate Defender and appointed counsel, or between the IDS Director and appointed counsel, will not constitute grounds for the Appellate Defender or IDS Director to request substitution of counsel. If the judge determines that the attorney is rendering ineffective assistance of counsel or that the attorney has an impermissible conflict of interest, substitution is required as a matter of law. *See State v. Moorman,* 320 N.C. 387, 358 S.E.2d 502 (1987); *State v. James,* 111 N.C. App. 785, 433 S.E.2d 755 (1993).

Rule 3.6. Removal from Roster.

Following consultation with the IDS Director, the Appellate Defender may remove from the roster of attorneys qualified for appointment as appellate counsel any attorney who has ignored requirements for appointment as appellate counsel; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for representation as appellate counsel; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation as appellate counsel. Following consultation with the IDS Director, the Appellate Defender may also remove an attorney from the roster if, as part of a periodic review of the roster, the Appellate Defender determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible appellate representation of indigent persons and of delivering quality services in the most efficient and cost-effective manner. If the Appellate Defender removes an attorney from the appellate roster, the attorney may make a written request for a review of the Appellate Defender's decision from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review. (Adopted July 1, 2001; Amended effective February 10, 2006.)

Authority: G.S. 7A-498.1(1), (2); 7A-498.5(c)(4), (h); 7A-498.8(b)

Rule 3.7. Authority to Implement other Programs, Plans, and Contracts.

Nothing in these rules shall prohibit assignment of otherwise qualified counsel to represent indigent defendants on appeal pursuant to programs, plans, or contracts that may be implemented from time to time to improve quality, efficiency, and economy where such programs, plans, or contracts are approved by the IDS Director. (Adopted July 1, 2001.)

Authority: G.S. 7A-498.1; 7A-498.3(a), (c); 7A-498.5(c), (d), (f)

Appendix Indigent Defense Performance Guidelines.

Commission on Indigent Defense Services
Adopted November 12, 2004

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

PREFACE

SECTION 1:

Guideline 1.1 Function of Performance Guidelines

Guideline 1.2 Role of Defense Counsel

Guideline 1.3 Education, Training and Experience of Defense Counsel

Guideline 1.4 General Duties of Defense Counsel

SECTION 2:

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

Guideline 2.2 Initial Interview

Guideline 2.3 Pretrial Release Proceedings in Misdemeanor and Felony Cases

Guideline 2.4 Probable Cause Hearing in Felony Cases

Guideline 2.5 Charging Language in Criminal Pleadings

Guideline 2.6 Indictments and Bills of Information in Felony Cases

Guideline 2.7 Arraignment in Felony Cases

SECTION 3:

Guideline 3.1 Search Warrants and Prosecution Requests for Non-Testimonial Evidence

Guideline 3.2 Client's Competence and Capacity to Proceed

SECTION 4:

Guideline 4.1 Case Review, Investigation, and Preparation

Guideline 4.2 Discovery in Cases Within the Original Jurisdiction of the Superior Court

Guideline 4.3 Theory of the Case

SECTION 5:

Guideline 5.1 The Decision to File Pretrial Motions

Guideline 5.2 Filing and Arguing Pretrial Motions

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

Guideline 6.2 The Contents of the Negotiations

Guideline 6.3 The Decision to Enter a Plea of Guilty

Guideline 6.4 Entry of the Plea before the Court

SECTION 7:

Guideline 7.1 General Trial Preparation

Guideline 7.2 Preserving the Record on Appeal

Guideline 7.3 *Voir Dire* and Jury Selection

Guideline 7.4 Opening Statement

Guideline 7.5 Confronting the Prosecution's Case

Guideline 7.6 Presenting the Defense Case

Guideline 7.7 Closing Argument

Guideline 7.8 Jury Instructions

SECTION 8:

Guideline 8.1 Obligations of Counsel in Sentencing

Guideline 8.2 Sentencing Options, Consequences, and Procedures

Guideline 8.3 Preparation for Sentencing

Guideline 8.4 The Sentencing Services Plan or Presentence Report

Guideline 8.5 The Prosecution's Sentencing Position

Guideline 8.6 The Defense Sentencing Theory

Guideline 8.7 The Sentencing Process

SECTION 9:

Guideline 9.1 Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court

Guideline 9.2 Motion for Appropriate Relief in the Trial Division

Guideline 9.3 Right to Appeal to the Appellate Division

Guideline 9.4 Bail Pending Appeal

Guideline 9.5 Post-Disposition Obligations

Commission on Indigent Defense Services
Adopted November 12, 2004

Preface

The primary goal of the Commission on Indigent Defense Services ("IDS Commission") is to ensure that indigent defendants in North Carolina are afforded high quality legal representation. *See* G.S. 7A-498.1(2). To further that goal, the Indigent Defense Services Act of 2000 directs the Commission to establish "[s]tandards for the performance of public defenders and appointed counsel." G.S. 7A-498.5(c)(4).

These performance guidelines are based largely on the "Performance Guidelines for Criminal Defense Representation" that have been promulgated by the National Legal Aid and Defender Association, as well as a review of standards and guidelines in several other jurisdictions, including Connecticut, Kansas, Massachusetts, New Mexico, New York City, Oregon, and Washington. Over a period of several months, a Committee of the IDS Commission reviewed a draft of these guidelines and revised them to fit the nuances of North Carolina law and practice. Initial proposed guidelines were then sent to 70 public and private defense attorneys around the state, with a request that they provide feedback. Based on the comments that were received, the Committee made a number of changes to that earlier draft. In August 2004, the revised guidelines were mailed to all public defenders and assistant public defenders, more than 2,000 private defense attorneys, all active district and superior court judges, and all elected district attorneys for comments. Again, based on the comments that were received, the Committee made a number of improvements to the guidelines. The full IDS Commission then adopted the attached performance guidelines on November 12, 2004.

These performance guidelines cover all indigent adult non-capital criminal cases in district and superior court. The guidelines are intended to identify issues that may arise at each stage of a criminal proceeding, and to recommend effective approaches to resolving those issues. Because all provisions will not be applicable in all cases, the guidelines direct counsel to use his or her best professional judgment in determining what steps to undertake in specific cases. The Commission hopes these guidelines will be useful as a training tool and resource for new and experienced defense attorneys, as well as a tool for potential systemic reform in some areas. The guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims or attorney disciplinary proceedings.

The IDS Commission believes that providing high quality criminal defense representation is a difficult and challenging endeavor, which requires great skill and dedication. That skill and dedication is demonstrated by defense counsel across North Carolina on a daily basis, and the Commission commends those counsel. The Commission recognizes that the goals embodied in these guidelines will not be attainable without sufficient funding and resources, and hopes the North Carolina General Assembly will continue its support of quality indigent defense services.

The IDS Commission thanks all of the defense attorneys who zealously represent indigent defendants across the state. In addition, the Commission thanks everyone who worked on the drafting of these performance guidelines and who offered comments. The Commission plans to review and revise the guidelines on a regular basis to ensure that they continue to comply with North Carolina law and reflect quality performance, and invites ongoing feedback from the defense bar and criminal justice community.

Commission on Indigent Defense Services
Adopted November 12, 2004

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

SECTION 1:

Guideline 1.1 Function of Performance Guidelines

(a) The Commission on Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of the Indigent Defense Services Act of 2000—improving the quality of indigent defense representation in North Carolina—and pursuant to G.S. 7A-498.5(c)(4).

(b) These guidelines are intended to serve as a guide for attorney performance in non-capital criminal cases at the trial level, and contain a set of considerations and recommendations to assist counsel in providing quality representation for indigent criminal defendants. The guidelines also may be used as a training tool.

(c) These are performance guidelines, not standards. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. In deciding what steps are appropriate, counsel should use his or her best professional judgment.

Guideline 1.2 Role of Defense Counsel

(a) The paramount obligations of criminal defense counsel are to provide zealous and quality representation to their clients at all stages of the criminal process, and to preserve, protect, and promote their clients' rights and interests throughout the criminal proceedings. Attorneys also have an obligation to conduct themselves professionally, abide by the Revised Rules of Professional Conduct of the North Carolina State Bar and other ethical norms, and act in accordance with all rules of court.

(b) Defense counsel are the professional representatives of their clients. Counsel should candidly advise clients regarding the probable success and consequences of adopting any posture in the proceedings, and provide clients with all information necessary to make informed decisions. Counsel does not have an obligation to execute any directive of a client that does not comport with law or standards of ethics or professional conduct.

Guideline 1.3 Education, Training and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in North Carolina. Counsel should also be informed of any applicable local rules, including those set forth in the district's case docketing plan, as well as the practices of the specific judge before whom a case is pending.

(b) Counsel has an ongoing obligation to stay abreast of changes and developments in criminal law and procedure, and to continue his or her legal education, skills training, and professional development.

(c) Prior to accepting appointment to an indigent criminal matter, counsel should have sufficient experience, skills, training, and supervision to provide quality representation. Where appropriate to provide competent representation, counsel should consult with more experienced attorneys to acquire necessary knowledge and information, including information about the practices of judges, prosecutors, and other court personnel.

Guideline 1.4 General Duties of Defense Counsel

(a) Before accepting appointment to an indigent criminal case, an attorney has an obligation to ensure that he or she has available sufficient time, resources, knowledge, and experience to afford quality representation to a defendant in a particular matter. If it later appears that counsel is unable to afford quality representation in the case, counsel should move to withdraw. If counsel is allowed to withdraw, he or she should cooperate with new counsel to the extent that such cooperation is in the best interests of the client and in accord with the Revised Rules of Professional Conduct.

(b) Counsel must be alert to all actual and potential conflicts of interest that would impair their ability to represent a client. If counsel identifies an actual conflict of interest, counsel should immediately move to withdraw. If counsel identifies a potential conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients. Where appropriate, counsel may seek an advisory opinion on any potential conflicts from the North Carolina State Bar. Mere tactical disagreements between counsel and a client ordinarily do not justify withdrawal from a case. If it is necessary for counsel to withdraw, counsel should do so in a way that protects the client's rights and interests, and does not violate counsel's ethical duties to the client.

(c) Counsel has an obligation to maintain regular contact with the client and keep the client informed of the progress of the case. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.

(d) Counsel should appear on time for all scheduled court hearings in a client's case. If scheduling conflicts arise, counsel should resolve them in accordance with Rule 3.1 of the General Rules of Practice.

(e) Counsel should never give preference to retained clients over appointed clients, or suggest that retained clients should or would receive preference.

SECTION 2:

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

Where appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

Guideline 2.2 Initial Interview

(a) Counsel shall arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client's case. If necessary, counsel may arrange for a designee to conduct the initial interview.

(b) *Preparation:*

Prior to conducting the initial interview, the attorney should, where possible:

(1) be familiar with the charges against the client, as well as the elements and potential punishment of each charged offense;

(2) obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by pretrial service or detention agencies concerning pretrial release, and law enforcement reports;

(3) be familiar with the legal criteria for determining pretrial release conditions and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set, as well as any written policies of the judicial district, and whether any pretrial service or other agencies are available to act as a custodian for the client's release; and

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(c) *The Interview:*

(1) The purpose of the initial interview is to acquire information from the client concerning pretrial release and, where appropriate, the facts of the case, and to provide the client with information concerning the case. Counsel should try to ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.

(2) Information that should be acquired during the initial interview includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, employment record and history, and immigration status (if applicable);

(B) the client's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and educational and armed services history;

(C) the client's immediate medical and/or mental health needs;

(D) the client's past criminal history, if any, including arrests and convictions for adult and juvenile offenses and prior history of court appearances or failure to appear in court;

(E) the existence of any other pending charges against the client and the identity of any other appointed or retained counsel;

(F) whether the client is on probation or parole, and the client's past or present performance under supervision;

(G) the ability of the client to meet any financial conditions of release; and

(H) the names of individuals or other sources that counsel can contact to verify the information provided by the client, and the permission of the client to contact those individuals.

(3) Information to be provided to the client during the initial interview includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency, and an explanation that the client is not required to and should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting the attorney;

(D) the nature of the charges and potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(F) how counsel can be reached and when counsel plans to have contact with the client next;

(G) realistic answers, where possible, to the client's most urgent questions; and

(H) what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, such as medical or mental health attention, and contact with family members.

(4) Where appropriate, counsel should be prepared at the initial interview to ask the client to sign a release authorizing counsel to access confidential information.

(d) *Additional Information*

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(1) the facts surrounding the charges against the client and the client's view of any potential defenses;

(2) any evidence of improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved; and

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Guideline 2.3 Pretrial Release Proceedings in Misdemeanor and Felony Cases

(a) As soon as possible after appointment, where the client has not been able to obtain pretrial release, counsel should consider filing a motion to reduce bond or otherwise modify any pretrial release conditions that were set by the magistrate or other judicial official at the client's initial appearance.

(b) Counsel should be prepared to present to the appropriate judicial official a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release. Counsel should consider the potential consequences of allowing the client to make statements at any bond reduction hearing.

(c) In counties with a pretrial service program, counsel should consider utilizing the services of that program where it would be likely to benefit the client.

(d) Counsel should fully inform the client of his or her conditions of release after such conditions have been set by the court.

(e) If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should be familiar with and explain to the client the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how properly to post such assets.

(f) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the jail, and if appropriate the court, to any special medical or psychiatric and security needs of the client that are known to counsel.

Commission on Indigent Defense Services
Adopted November 12, 2004

Guideline 2.4 Probable Cause Hearing in Felony Cases

(a) Counsel should discuss with the client the meaning of probable cause and the procedural aspects surrounding a probable cause determination, and should consider the tactical advantages and disadvantages of having a probable cause hearing. Counsel should consider any concessions the prosecution might make if the defendant waives, or does not oppose a continuance of, a probable cause hearing. Before waiving a probable cause hearing, counsel should consider the possible benefits of a hearing, including the potential for discovery and the development of impeachment evidence. Counsel also should be aware of all consequences if the client waives a probable cause hearing, including the effect of waiver on the statutory deadline for requesting voluntary discovery under G.S. 15A-902(d).

(b) In preparing for a probable cause hearing, counsel should consider:

(1) the elements of each of the offenses alleged;

(2) the law for establishing probable cause;

(3) factual information that is available concerning the existence or lack of probable cause;

(4) the tactics of full or partial cross-examination;

(5) additional factual information and impeachment evidence that could be discovered by counsel during the hearing; and

(6) any continuing need to pursue modification of the conditions of release if the client is in custody.

Counsel ordinarily should not call the client or defense witnesses to testify at the probable cause hearing unless there are sound tactical reasons for doing so.

Guideline 2.5 Charging Language in Criminal Pleadings

(a) Counsel should review the criminal pleadings in all cases and, unless there are sound tactical reasons for not doing so, move to dismiss the pleading if there are defects in the charging language, including but not limited to:

(1) the pleading does not list all of the essential elements of the charged offense; and

(2) the pleading contains more than one charge in a single count.

(b) Even if the pleading adequately charges a crime, counsel should be sufficiently familiar with the language of the pleading to recognize a fatal variance at trial and move to dismiss the charge if the evidence is insufficient to support the charge as pled.

(c) Counsel should be aware of all time limits applicable to challenges to defects in the charging language of a criminal pleading. Counsel also should be aware of the potential consequences of alerting the prosecution to defects in the charging language.

Guideline 2.6 Indictments and Bills of Information in Felony Cases

(a) Upon return of a bill of indictment, unless there are sound tactical reasons for not doing so, counsel should consider any potential grounds for quashing the indictment or challenges to the grand jury proceedings, including, but not limited to:

(1) improper composition of the grand jury as a whole, including any systematic exclusion of qualified persons either in the drawing of the list of potential grand jurors or the selecting of grand jurors from the list;

(2) the inclusion of a grand juror who does not meet the requirements of G.S. 9-3;

(3) the bill of indictment lacks the signatures and markings required by G.S. 15A-644;

(4) the bill of indictment was not found to be true by at least twelve grand jurors and/or was not returned in open court; and

(5) the bill of indictment was based entirely on the testimony of witnesses who were disqualified or evidence that is incompetent.

(b) Counsel should be aware of all time limits applicable to motions to quash the indictment or challenges to the grand jury proceedings.

(c) Where applicable, counsel should consider, and inform the client of, the advantages and disadvantages of waiving a bill of indictment and consenting to a bill of information pursuant to G.S. 15A-642 and G.S. 15A-923.

Guideline 2.7 Arraignment in Felony Cases

Counsel should consider whether to request arraignment under G.S. 15A-941(d). Counsel should be aware that some pretrial motions may be waived if they are not filed at or before arraignment (or within the time limit prescribed by G.S. 15A-952 if arraignment is waived), including a motion to continue, motion challenging venue or for change of venue, motion to join or sever offenses, motion challenging grand jury composition, motion for a bill of particulars, and motion challenging non-jurisdictional pleading defects. Counsel should also consult local calendaring rules to determine whether they establish different deadlines for pretrial motions.

SECTION 3:

Guideline 3.1 Search Warrants and Prosecution Requests for Non-Testimonial Evidence

(a) Counsel should be familiar with the law governing search warrants under G.S. 15A-241 *et seq.* and applicable case law, including, but not limited to, the requirements for a search warrant application, the basis for issuing a search warrant, the required form and content of a search warrant, the execution and service of a search warrant, and the permissible scope of the search.

(b) Counsel should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as participation in an in-person lineup, handwriting exemplars, and physical specimens), the potential consequences if a defendant refuses to comply with a non-testimonial identification order issued pursuant to G.S. 15A-271 *et seq.*, and the extent to which counsel may participate in or observe the proceedings.

Guideline 3.2 Client's Competence and Capacity to Proceed

(a) When defense counsel has a good faith doubt as to the client's capacity to proceed in a criminal case, counsel may:

(1) file an *ex parte* motion to obtain the services of a mental health expert and thereby determine whether to raise the client's competency before the court; or

(2) file a motion questioning the client's competence to stand trial or enter a plea under G.S. 15A-1001(a) and applicable case law, in which case the court may order a mental health examination at a state mental health facility or by the appropriate local forensic examiner.

(b) While the client's wishes ordinarily control, counsel may question competency without the client's assent or over the client's objection if necessary.

(c) After counsel receives and reviews the report from any court-ordered competency examination, counsel should consider whether to file a motion requesting a formal hearing on the client's capacity to proceed.

(d) Whenever competency is at issue, counsel still has a continuing duty to prepare the case for all anticipated court proceedings.

(e) If the court enters an order finding the client incompetent and orders involuntary commitment proceedings to be initiated, defense counsel ordinarily will not represent the client at those proceedings, but should cooperate with the commitment attorney upon request.

SECTION 4:

Guideline 4.1 Case Review, Investigation, and Preparation

(a) Counsel has a duty to conduct an independent case review and investigation. The client's admissions or statements to counsel of facts constituting guilt do not necessarily obviate the need for such independent review and investigation. The review and investigation should be conducted as promptly as possible.

(b) Sources of review and investigative information may include the following:

(1) *Charging Documents, Statutes, and Case Law*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the client is charged;

(B) the defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses; and

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, double jeopardy, or irregularities in the grand jury proceedings.

(2) *The Client*

An in-depth interview or interviews of the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s);

(B) elicit information concerning possible improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(C) explore the existence of other potential sources of information relating to the offense or client, including school, work, jail, probation, and prison records;

(D) collect information relevant to sentencing; and

(E) continue to assess the client's medical and/or mental health needs.

(3) *Potential Witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the client. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *The Police and Prosecution*

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so (*e.g.*, defense obligations under G.S. 15A-905).

(5) *The Courts*

If possible, counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel should also review the client's prior court file(s) where appropriate.

(6) *Information in the Possession of Third Parties*

Where appropriate, counsel should seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

(7) *Physical Evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should view the physical evidence consistent with case needs.

(8) *The Scene*

Where appropriate, counsel or an investigator should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the alleged offense.

(9) *Assistance from Experts, Investigators, and Interpreters*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate to:

(A) prepare a defense;

(B) adequately understand the prosecution's case;

(C) rebut the prosecution's case; and/or

(D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

If counsel determines that expert or investigative assistance is necessary and appropriate, counsel should file an *ex parte* motion setting forth the particularized showing of necessity required by *Ake v. Oklahoma*, *State v. Ballard*, and their progeny. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court. Counsel should take all necessary steps to preserve for appeal any denial of expert, investigative, or interpreter funding.

(c) During case preparation and throughout trial, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel should also consider how best to respond to objections that could be raised by the prosecution.

Guideline 4.2 Discovery in Cases Within the Original Jurisdiction of the Superior Court

(a) Counsel has a duty to pursue discovery procedures provided by the applicable rules of criminal procedure within the time periods prescribed by G.S. 15A-902, and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

(b) Prior to filing a formal motion with the court, counsel must first serve the prosecutor with a written request for voluntary discovery unless counsel and the prosecutor agree in writing to comply voluntarily with G.S. 15A-901 *et seq.* Counsel must file a motion to compel discovery if the prosecution's response is unsatisfactory or delayed. Regardless of the prosecution's response, counsel should file a motion to compel discovery if the case is proceeding to trial.

(c) In exceptional cases, counsel should consider not making a discovery request or signing a written agreement under G.S. 15A-902(a), on the ground that it will trigger a defense obligation to disclose evidence under G.S. 15A-905.

(d) Unless there is a sound tactical reason for not requesting discovery or signing a written agreement under G.S. 15A-902(a) (*e.g.*, defense obligations under G.S. 15A-905), counsel should seek discovery to the broadest extent permitted under federal and state law, including but not limited to, the following items:

(1) all information to which the defendant is entitled under G.S. 15A-903;

(2) all potential exculpatory information and evidence to which the defense is entitled under *Brady v. Maryland* and its progeny, including but not limited to:

(A) impeachment evidence, such as a witness' prior convictions or other misconduct; bias of a witness; a witness' capacity to observe, perceive, or recollect; and psychiatric evaluations of a witness;

(B) evidence discrediting police investigation and credibility;

(C) evidence undermining the identification of the client;

(D) evidence tending to show the guilt of another;

(E) the identity of favorable witnesses; and

(F) exculpatory physical evidence; and

(3) to the extent not provided under statutory discovery, any other information necessary to the defense of the case, including but not limited to:

(A) the names, addresses, and availability of state witnesses;

(B) the details of the circumstances under which any oral or written statements by the accused or a co-defendant were made;

(C) any evidence of prior bad acts that the prosecution may intend to use against the client;

(D) the data underlying any expert reports; and

(E) any evidence necessary to enable counsel to determine whether to file a motion to suppress evidence under G.S. 15A-971 *et seq.*

(e) Counsel should seek the timely production and preservation of discoverable evidence. If the prosecution fails to disclose or belatedly discloses discoverable evidence, counsel should consider requesting one or more of the sanctions provided by G.S. 15A-910.

(f) If counsel believes the state may destroy or consume in testing evidence that is significant to the case (*e.g.*, rough notes of law enforcement interviews, 911 tapes, drugs, or blood samples), counsel should also file a motion to preserve the evidence in the event that it is discoverable.

(g) Counsel should timely comply with all of the requirements in G.S. 15A-905 governing disclosure of evidence by the defendant and notice of defenses and expert witnesses. Counsel also should be aware of the possible sanctions for failure to comply with those requirements under G.S. 15A-910.

Guideline 4.3 Theory of the Case

During case review, investigation, and trial preparation, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for the client's acquittal or conviction of a lesser offense, while also telling the defense story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which counsel determines all actions in a case.

SECTION 5:

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing appropriate pretrial motions whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief which the court has authority to grant.

(b) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Among the issues that counsel should consider addressing in pretrial motions are:

(1) the pretrial custody of the client and a motion to review conditions of release;

(2) the constitutionality of the implicated statute or statutes;

(3) any potential defects in the grand jury composition or charging process;

(4) the sufficiency of the charging document under all applicable statutory and constitutional provisions;

(5) the dismissal of a charge on double jeopardy grounds;

(6) the need for a bill of particulars;

(7) the propriety and prejudice of any joinder or severance of charges or defendants;

(8) the statutory and constitutional discovery obligations of the prosecution;

(9) the suppression of evidence gathered as the result of violations of the North Carolina Constitution and the United States Constitution, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the client's right to counsel, or privilege against self-incrimination; and

(D) unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification;

(10) the suppression of evidence gathered in violation of any right, duty, or privilege arising out of North Carolina law;

(11) access to necessary support or investigative resources or experts;

(12) the need for a change of venue;

(13) the defendant's speedy trial rights and/or calendaring rights under G.S. 7A-49.4;

(14) the defendant's right to a continuance in order adequately to prepare his or her case;

(15) matters of trial evidence that may be appropriately litigated by means of a pretrial motion in *limine*;

(16) the suppression of a prior conviction obtained in violation of the defendant's right to counsel;

(17) the recusal of the trial judge;

(18) the full recordation of all proceedings pursuant to G.S. 15A-1241;

(19) matters of trial or courtroom procedure; and

(20) notice of affirmative defenses if required by G.S. 15A-905(c) and G.S. 15A-959.

(c) Counsel should be aware of all time limits on the filing of pretrial motions, and should know whether a motion must or may be accompanied by a factual affidavit.

(d) Unless there are sound tactical reasons for not doing so, counsel should request that the court rule on all previously filed defense motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner, should comport with the formal requirements of statute and court rules, and should succinctly inform the court of the authority relied upon.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery, and research relevant to the claim(s) advanced;

(2) the subpoenaing of all helpful evidence, and the subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and procedures applying to the hearing, including the benefits and costs of having the client and other defense witnesses testify;

(4) obtaining the assistance of an expert witness where appropriate and necessary; and

(5) preparation and submission of a memorandum of law where appropriate.

(c) If a hearing on a pretrial motion is held in advance of trial, counsel should attempt to obtain the transcript of the hearing for use at trial where appropriate.

Commission on Indigent Defense Services
Adopted November 12, 2004

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel should fully explain to the client the rights that would be waived by a decision to enter a plea and not proceed to trial.

(b) Counsel should keep the client fully informed of any plea discussions and negotiations, and convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

(c) Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should also explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if counsel believes the client's decisions are not in his or her best interest, counsel should attempt to persuade the client to change his or her position.

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of a plea, counsel should:

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

SECTION 7:

Guideline 7.1 General Trial Preparation

(a) Throughout preparation and trial, counsel should consider the theory of the defense and ensure that counsel's decisions and actions are consistent with that theory.

(b) The decision to proceed to trial rests solely with the client. Counsel should discuss with the client the relevant strategic considerations of this decision. When appropriate, counsel should also explain to the client that decisions concerning trial strategy are ordinarily to be made by counsel, after consultation with the client and investigation of the applicable facts and law. However, counsel should be aware that, under North Carolina law, if counsel and a fully informed competent client reach an absolute impasse as to tactical decisions, the client's wishes may control.

(c) In advance of trial, counsel should take all steps necessary to complete thorough investigation, discovery, and research. Among the steps counsel should consider in preparation are:

(1) interviewing and subpoenaing all potentially helpful witnesses;

(2) examining and subpoenaing all potentially helpful physical or documentary evidence;

(3) obtaining funds for defense investigators and experts, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(4) obtaining and reading transcripts of any prior proceedings in the case or related proceedings; and

(5) obtaining photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may aid the fact finder in understanding the defense case.

(d) Where appropriate, counsel should have the following information and materials available at the time of trial:

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) reports, test results, and other materials disclosed by the prosecution pursuant to G.S. 15A-901 *et seq.*;

(4) *voir dire* topics, plans, or questions;

(5) a plan, outline, or draft of opening statement;

(6) cross-examination plans for all possible prosecution witnesses;

(7) direct-examination plans for all prospective defense witnesses;

(8) copies of defense subpoenas;

(9) prior statements of all prosecution witnesses (*e.g.*, transcripts, police reports);

(10) prior statements of all defense witnesses;

(11) reports from defense experts;

(12) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(13) originals and copies of all documentary exhibits;

(14) proposed jury instructions with supporting case citations;

(15) copies of critical statutes and cases; and

(16) a plan, outline, or draft of closing argument.

(e) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that reasonably can be anticipated to arise in the trial.

(f) Counsel should be familiar with case law concerning making admissions of guilt to the jury without the client's consent.

(g) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (*e.g.*, use of prior convictions to impeach the defendant) and, where appropriate, should prepare motions and memoranda for such advance rulings.

(h) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should try to ensure that the client does not appear before the jury in jail or other inappropriate clothing, or in shackles or handcuffs. If an incarcerated client is brought before the jury in jail clothing, shackles, or handcuffs, counsel should object and seek appropriate relief from the court.

(i) Counsel should plan with the client, court personnel, and/or sheriff's office for the most convenient system for conferring throughout the trial.

(j) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Guideline 7.2 Preserving the Record on Appeal

Counsel should establish a proper record for appellate review throughout the trial process, including requesting recordation of all significant portions of the trial under G.S. 15A-1241(b). If something non-verbal transpires during trial that is relevant and important, counsel should ask to have the record reflect what happened.

Guideline 7.3 *Voir Dire* and Jury Selection

(a) *Preparation*

(1) Counsel should be familiar with the procedures by which a jury panel is selected, and should be alert to any potential legal challenges to the composition or selection of the panel.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from the panel, and should be alert to any potential legal challenges to those procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list where feasible, and should develop a method for tracking juror selection and seating.

(4) Counsel should be familiar with any juror questionnaire that may be used by the court or prosecution and, where appropriate, should develop a defense questionnaire and file a pretrial motion to authorize its use.

(5) In advance of trial, counsel should develop *voir dire* topics, plans, or questions that are tailored to the specific case. Among the purposes *voir dire* questions should be designed to serve are:

(A) to elicit information about the attitudes of individual jurors, which will inform the use of peremptory strikes and challenges for cause;

(B) to determine the jurors' attitudes toward legal principles that are critical to the defense case, including, where appropriate, the client's decision not to testify; and

(C) to present the client, preview the defense case, and assess the impact of damaging information on the jurors' ability to fairly consider the case.

In conducting *voir dire*, counsel should be aware that jurors may develop impressions of counsel and the defendant, and should recognize the importance of establishing a relationship of credibility.

(6) Counsel should be familiar with the law concerning mandatory and discretionary *voir dire* inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

(7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel also should be aware of the statutory and case law directing that peremptory challenges need to be exhausted in order to preserve for appeal the denial of any challenges for cause.

(b) *Examining the Prospective Jurors*

(1) Counsel should personally conduct the *voir dire* examination of the panel.

(2) If the court denies counsel's request to ask questions during *voir dire* that are significant or necessary to the defense of the case, counsel should take all steps necessary to protect the *voir dire* record for appeal, including filing a written motion listing the proposed *voir dire* questions or otherwise making proposed questions part of the record.

(3) If the *voir dire* questions may elicit sensitive answers or where otherwise appropriate, counsel should request individual *voir dire.*

(c) *Challenges and Objections*

(1) Counsel should consider challenging for cause all persons who are subject to challenge under G.S. 15A-1212, including all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case, when it is likely to benefit the client.

(2) When a challenge for cause is denied, counsel should consider exercising a peremptory challenge to remove the juror. Counsel should be aware of the requirements in G.S. 15A-1214(h) for preserving the denial of a challenge for cause for appellate review.

(3) In exercising challenges for cause and peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

(4) Counsel should object to and preserve for appellate review all issues relating to the unconstitutional exclusion of jurors by the prosecution or court.

Guideline 7.4 Opening Statement

(a) Prior to delivering an opening statement, counsel should consider whether to ask for sequestration of witnesses.

(b) Counsel should be familiar with North Carolina law and the individual trial judge's practices regarding the permissible content of an opening statement. Counsel should consider the need to, and if appropriate, ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement.

(d) Counsel's objectives in making an opening statement may include the following:

(1) to introduce the theory of the defense case;

(2) to provide an overview of the defense case;

(3) to identify the weaknesses of the prosecution's case;

(4) to emphasize the prosecution's burden of proof;

(5) to summarize the anticipated testimony of witnesses, and the role of each in relationship to the entire case;

(6) to describe the exhibits that will be introduced and the role of each in relationship to the entire case;

(7) to clarify the jurors' responsibilities;

(8) to state the ultimate inferences counsel wants the jury to draw;

(9) to personalize the client and counsel for the jury; and

(10) to prepare the jury for the client's testimony or decision not to testify.

(e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement into the defense opening statement and summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless sound tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error; and

(2) the possibility that an objection might enhance the significance of the information in the jurors' minds, or otherwise negatively affect the jury.

Guideline 7.5 Confronting the Prosecution's Case

(a) Counsel should anticipate weaknesses in the prosecution's proof, and research and prepare to argue corresponding motions for judgment of dismissal or nonsuit.

(b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

(c) Unless sound tactical reasons exist for not doing so, counsel should make timely objections and motions to strike improper state evidence, and assert all possible statutory and constitutional grounds for exclusion of the evidence. If evidence is admissible only for a limited purpose, counsel should consider requesting an appropriate limiting instruction.

(d) In preparing for cross-examination, counsel should be familiar with North Carolina law and procedures concerning cross-examination and impeachment of witnesses. Counsel should be prepared to question witnesses as to the existence and content of prior statements.

(e) In preparing for cross-examination, counsel should:

(1) consider the need to integrate cross-examination, the theory of the defense, and closing argument;

(2) consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the defense case;

(3) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal, and consider a cross-examination plan for each of the anticipated witnesses;

(4) be alert to inconsistencies, variations, and contradictions within each witness' testimony;

(5) be alert to inconsistencies, variations, and contradictions between different witnesses' testimony;

(6) if applicable, review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

(7) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

(8) be alert to issues relating to witness credibility, including bias and motive for testifying; and

(9) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(f) Counsel should consider conducting a *voir dire* examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the law concerning competency of witnesses in general, and admission of expert testimony in particular, to be able to raise appropriate objections.

(g) Before beginning cross-examination, counsel should ascertain whether the prosecutor provided copies of all prior statements of prosecution witnesses as required by G.S. 15A-903(a). If disclosure was not properly made, counsel should request relief as appropriate under G.S. 15A-910, including:

(1) a cautionary instruction;

(2) adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;

(3) exclusion of the witness' testimony and all evidence affected by that testimony;

(4) a mistrial;

(5) dismissal of the case; and/or

(6) any other sanctions counsel believes would remedy the violation.

(h) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of dismissal or nonsuit on each count charged. Where appropriate, counsel should be prepared with supporting case law.

Guideline 7.6 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not presenting defense evidence, and instead relying on the evidence and inferences, or lack thereof, from the prosecution's case.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, including but not limited to, the likelihood of cross-examination and impeachment concerning prior convictions and prior bad acts that affect credibility.

(c) Counsel should be aware of the elements of any affirmative defense(s) and know whether the defense bears a burden of persuasion or production. Counsel should be familiar with the notice requirements for affirmative defenses and introduction of expert testimony that are imposed by G.S. 15A-905(c), G.S. 15A-959, and North Carolina case law.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the implications that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses and any negative consequences that may flow from such testimony;

(4) consider the need for expert witnesses;

(5) consider the use of demonstrative evidence and the order of exhibits; and

(6) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecution.

(f) Counsel should prepare all defense witnesses for direct examination and possible cross-examination. Where appropriate, counsel should also advise witnesses and the defendant of suitable courtroom dress and demeanor.

(g) If a prosecution objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.

(h) Counsel should conduct redirect examination as appropriate.

(i) At the close of all of the evidence, counsel should renew the motion for judgment of dismissal or nonsuit on each charged count.

Guideline 7.7 Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation, including the law governing closing arguments under G.S. 7A-97 and G.S. 15A-1230, Rule 10 of the General Rules of Practice for the Superior and District Courts, and North Carolina case law.

(b) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

(1) highlighting weaknesses in the prosecution's case;

(2) describing favorable inferences to be drawn from the evidence;

(3) incorporating into the argument:

(A) the theory of the defense case;

(B) helpful testimony from direct and cross-examinations;

(C) verbatim instructions drawn from the expected jury charge;

(D) responses to anticipated prosecution arguments; and

(E) visual aids and exhibits; and

(4) the effects of the defense argument on the prosecution's rebuttal argument.

(c) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, seeking cautionary instructions, or requesting a mistrial unless sound tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) the possibility that an objection or cautionary instruction might enhance the significance of the information in the jurors' minds;

(2) whether, with respect to a motion for mistrial, counsel believes that the case will result in a favorable verdict for the client; and

(3) the need to preserve the objection for appellate review.

Guideline 7.8 Jury Instructions

(a) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of pattern charges, and preserving objections to the instructions.

(b) Pursuant to G.S. 15A-1231, counsel should submit in writing proposed special instructions or modifications of the pattern jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions. Counsel should try to ensure that all jury instruction discussions are on the record..

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court does not adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record for appeal, including filing a copy of proposed instructions pursuant to G.S. 15A-1231.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If there are grounds for objecting to any jury instructions, counsel should object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should ask the judge to state the proposed charge to counsel before it is delivered to the jury. Counsel should also try to ensure that any supplemental instructions are given to the entire jury in open court pursuant to G.S. 15A-1234(d).

SECTION 8:

Guideline 8.1 Obligations of Counsel in Sentencing

Counsel's obligations in the sentencing process include:

(a) where a defendant chooses not to proceed to trial, to attempt to negotiate a plea agreement with consideration of the sentencing, correctional, and financial implications;

(b) to try to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

(c) to ensure that all reasonably available mitigating and favorable evidence, which is likely to benefit the client, is presented to the court;

(d) to develop a plan that seeks to achieve the sentencing alternative most favorable to the client, and that reasonably can be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

(e) to try to ensure that all information presented to the court which may harm the client, if inaccurate, untruthful, or otherwise improper, is stricken from the text of any sentencing services plan or presentence report;

(f) to consider the need for and availability of sentencing specialists, or mental health or mental retardation professionals; and

(g) to identify and preserve potential issues for appeal.

Guideline 8.2 Sentencing Options, Consequences, and Procedures

(a) Counsel should be familiar with and advise the client of the sentencing provisions and options applicable to the case, including:

(1) the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, mandatory consecutive sentence requirements, and constitutional limits on sentences;

(2) deferred prosecution, prayer for judgment continued, probation without a conviction, and diversionary programs;

(3) probation or suspension of sentence, and mandatory and permissible conditions of probation;

(4) confinement in a mental institution;

(5) forfeiture of assets seized in connection with the case;

(6) any mandatory registration requirements, including sex offender registration, or mandatory DNA testing; and

(7) the possibility of expungement and sealing of records.

(b) Counsel should be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including:

(1) credit for pretrial detention;

(2) the likelihood that the conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(3) the possibility of earned-time credits;

(4) the availability of correctional programs and work release;

(5) the availability of drug rehabilitation programs, psychiatric treatment, and health care; and

(6) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution.

Counsel should also discuss with the client that there may be other potential collateral consequences of the judgment and sentence, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) Counsel should be familiar with the sentencing procedures, including:

(1) the effect that plea negotiations may have upon the sentencing discretion of the court;

(2) the procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;

(3) the practices of those who prepare the sentencing services plan or presentence report, and the defendant's rights in that process;

(4) access to the sentencing services plan or presentence report by counsel and the defendant;

(5) the defense sentencing presentation and/or sentencing memorandum;

(6) the opportunity to challenge information presented to the court for sentencing purposes;

(7) the availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burdens of proof at such a hearing; and

(8) the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing

In preparing for sentencing, counsel should consider the need to:

(a) inform the client of the applicable sentencing requirements, options, and alternatives, and the sentencing judge's practices and procedures if known;

(b) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(c) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical and mental health history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

(d) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, after considering the possible consequences that any admission of guilt may have on an appeal, subsequent retrial, or trial on other offenses;

(e) inform the client of the effects that admissions and other statements may have on an appeal, retrial, or other judicial proceedings, such as collateral or restitution proceedings;

(f) inform the client if counsel will ask the court to consider a particular sentence or range of sentences; and

(g) collect and present documents and affidavits to support the defense position and, where relevant, prepare and present witnesses to testify at the sentencing hearing.

Guideline 8.4 The Sentencing Services Plan or Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation and submission of a sentencing services plan or presentence report, and should consider the tactical implications of requesting that a plan be prepared.

(b) If a plan is prepared, counsel should:

(1) provide to the official preparing the plan relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(2) prepare the client to be interviewed by the person preparing the plan;

(3) review the completed plan and discuss it with the client;

(4) try to ensure the client has adequate time to examine the completed plan; and

(5) take appropriate steps to ensure that erroneous or misleading information that may harm the client is challenged or deleted from the plan.

Guideline 8.5 The Prosecution's Sentencing Position

Unless there is a sound tactical reason for not doing so, counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, including the factual basis for any sentence in the aggravated range.

Guideline 8.6 The Defense Sentencing Theory

Counsel should prepare a defense sentencing presentation and, where appropriate, a defense sentencing memorandum. Among the topics counsel may wish to include in the sentencing presentation or memorandum are:

(a) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(b) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

(c) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(d) challenges to incorrect or incomplete information, and inappropriate inferences and characterizations that are before the court; and

(e) a defense sentencing proposal.

Guideline 8.7 The Sentencing Process

(a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's legal rights and interests.

(b) Where appropriate, counsel should be prepared to present supporting evidence, including testimony of witnesses, affidavits, letters, and public records, to establish the facts favorable to the defendant.

(c) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement and psychiatric treatment or drug rehabilitation, and against deportation or exclusion of the defendant.

(d) Where appropriate, counsel should prepare the client to personally address the court. In addition, counsel should prepare any expert and other witnesses to address the court.

(e) After the sentencing hearing is complete, counsel should fully explain to the client the terms of the sentence, including any conditions of probation.

SECTION 9:

Guideline 9.1 Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court

(a) When a defendant has been convicted of a misdemeanor in district court, except where the defendant explicitly waives his or her right to appeal as part of a plea agreement, counsel should advise the client of the right to appeal for trial *de novo* with a jury in superior court. Counsel should also advise the client of the potential advantages and disadvantages of exercising that right.

(b) Counsel should be aware of, and advise the client of, the time limit for *de novo* appeal set forth in G.S. 15A-1431(c).

Guideline 9.2 Motion for Appropriate Relief in the Trial Division

(a) Counsel should be familiar with the procedures available under G.S. 15A-1411 *et seq.* to seek a new trial, dismissal of charges, or other relief. Counsel should be aware of the grounds for relief that must be asserted within 10 days after entry of judgment, and the grounds that may be asserted more than 10 days after entry of judgment.

(b) When a judgment has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for appropriate relief with the trial court pursuant to G.S. 15A-1414. In deciding whether to file such a motion, the factors counsel should consider include:

(1) the likelihood of success of the motion, given the nature of the error or errors that can be raised; and

(2) the effect that such a motion might have on the client's appellate rights, including whether the filing of such a motion will assist in preserving the defendant's right to raise on appeal the issues that might be raised in the motion for appropriate relief.

Guideline 9.3 Right to Appeal to the Appellate Division

(a) Counsel should inform the defendant of his or her right to appeal the judgment of the court to the appellate division and the action that must be taken to perfect an appeal.

(b) If the defendant has a right to appeal and wants to file an appeal, the attorney shall preserve the defendant's right to do so by entering notice of appeal in accordance with the procedures and timelines set forth in G.S. 15A-1448 and the Rules of Appellate Procedure. Pursuant to Rule 33(a) of the North Carolina Rules of Appellate Procedure and Rules 1.7(a) and 3.2(a) of the Rules of the Commission on Indigent Defense Services, the entry of notice of appeal does not constitute a general appearance as counsel of record in the appellate division.

(c) If the defendant does not have a right to appeal and counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of *certiorari*, counsel should inform the defendant of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure.

(d) If counsel believes the defendant has a right to appeal and continues to be indigent, but the trial court denies appointed appellate counsel or denies indigency status for purposes of appeal, trial counsel should consult with the Office of the Appellate Defender about the defendant's options and inform the defendant of those options.

(e) Where the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court, and should timely respond to reasonable requests from appellate counsel for additional information about the case.

Guideline 9.4 Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist under G.S. 15A-536 to be released on bail pending the disposition of the appeal and, prior to the appointment of appellate counsel, make such a motion where appropriate.

(b) Where an appeal is taken and after appellate counsel is appointed, trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for bail.

Guideline 9.5 Post-Disposition Obligations

Even after counsel's representation in a case is complete, counsel should comply with a client's reasonable requests for information and materials that are part of counsel's file. Counsel should also take reasonable steps to correct clerical or other errors in court documents, including jail credit calculations.

Index to Rules for Indigent Defense Services

A

APPELLATE COUNSEL.

Appointment, compensation eligibility.
- Capital cases, IDS Rules 2B.1 to 2B.4.
  - Standards for, IDS Appxs 2B.1 to 2B.3.
- Non-capital criminal and non-criminal cases, IDS Rules 3.1 to 3.7.

C

CAPITAL CASES.

Appellate counsel.
- Additional conditions of appointment, setting, IDS Rule 2B.4.
- Appeal to IDS commission.
  - Determination that lawyer not qualified, IDS Appx 2B.2.
- Appellate defender.
  - Appointment and representation, IDS Rule 2B.2.
  - Conflict of interest, IDS Rule 2B.2.
- Application for appointment, IDS Appx 2B.2.
- Appointment of appellate counsel, IDS Rule 2B.2.
- Capital appeals roster.
  - Creation, IDS Appx 2B.2.
  - Removal from, IDS Appx 2B.3.
- Certiorari.
  - When appointed counsel required to file writ, IDS Rule 2B.4.
- Compensation, IDS Rule 2B.3.
- Conditions of appointment, IDS Rule 2B.4.
- Conflict of interest in appellate defender, IDS Rule 2B.2.
- Contract services.
  - Recoupment of services, IDS Rule 2B.3.
- Coverage of part, IDS Rule 2B.1.
- Knowledge and experience.
  - Standards and qualifications, IDS Appx 2B.1.
- On-going training.
  - Required to retain eligibility for appointment, IDS Appx 2B.3.
- Other appellate counsel.
  - Assignment to defendant, IDS Rule 2B.2.
- Other programs, plans and contracts.
  - Authority to implement, IDS Rule 2B.1.
- Outside compensation prohibited, IDS Rule 2B.3.
- Provisional appointment of office of appellate defender, IDS Rule 2B.2.
- Recoupment of fees, IDS Rule 2B.3.
- Replacement of counsel, substitute appointed, IDS Rule 2B.4.
- Standards and qualifications, IDS Appx 2B.
- Submissions with application for appointment, IDS Appx 2B.2.
- Substitution of counsel.
  - Replacement of counsel, IDS Rule 2B.4.
- Third party contributing non-counsel funds.
  - Funds placed in trust, accounting required, IDS Rule 2B.3.

CAPITAL CASES —Cont'd

Appellate counsel —Cont'd
- Training session.
  - Required to retain eligibility for appointment, IDS Appx 2B.3.
- Waiver of knowledge and experience requirements.
  - Standards and qualifications, IDS Appx 2B.1.

Evidentiary hearing at trial level on remand.
- Appointment of counsel, IDS Rule 2B.2.

Experts, appointment and compensation, other expenses.
- Appointment of experts.
  - Application to court, IDS Rule 2D.4.
- Confidentiality of applications, IDS Rule 2D.2.
  - Notice of disapproval of application, IDS Rule 2D.3.
- Disapproval of application, IDS Rule 2D.3.
- Notice of disapproval, IDS Rule 2D.3.
- Other programs, plans or contracts.
  - Authority to implement, IDS Rule 2D.5.
- Payment.
  - Application to IDS, IDS Rule 2D.1.
- Retention of expert.
  - Application to IDS, IDS Rule 2D.1.

Post conviction counsel.
- Application for appointment, IDS Appx 2C.2.
- Appointment of counsel, IDS Rule 2C.2.
- Compensation, IDS Rule 2C.3.
- Conditions of appointment, requirements, IDS Rule 2C.4.
- Contract services.
  - Recoupment, IDS Rule 2C.3.
- Coverage of part, IDS Rule 2C.1.
- Experience and knowledge.
  - Standards for, IDS Appx 2C.1.
- List of eligible lawyers, IDS Rule 2C.2.
- On-going training.
  - Required to remain eligible, IDS Appx 2C.3.
- Other programs, plans and contracts.
  - Authority to implement, IDS Rule 2C.1.
- Outside compensation prohibited, IDS Rule 2C.3.
- Post-conviction roster.
  - Creation, IDS Appx 2C.2.
  - Removal from, IDS Appx 2C.3.
- Recoupment of fees, IDS Rule 2C.3.
- Replacement of counsel.
  - Appointment of substitute, IDS Rule 2C.5.
- Standards for, IDS Appx 2C.
- Submissions with application for appointment, IDS Appx 2C.2.
- Substitution of counsel.
  - Replacement of counsel, IDS Rule 2C.5.
- Third party contributing non-counsel services funds.
  - Funds placed in trust, accounting required, IDS Rule 2C.3.
- Training session.
  - Required to remain eligible, IDS Appx 2C.3.
- Two lawyers appointed, IDS Rule 2C.2.
- Waiver of experience and knowledge standards, IDS Appx 2C.1.

CAPITAL CASES —Cont'd
Trial counsel.
  Appeal to IDS commission.
    Review of determination that attorney not qualified, IDS Appx 2A.2.
  Appointment of trial counsel, IDS Rule 2A.2.
    Application for appointment as lead or associate counsel, IDS Appx 2A.2.
  Assignment of IDS office, IDS Rule 2A.2.
  Capital defendant defined, IDS Rule 2A.1.
  Capital offense defined, IDS Rule 2A.1.
  Capital trial roster.
    Creation, IDS Appx 2A.2.
    Removal for, IDS Appx 2A.3.
  Compensation, IDS Rule 2A.4.
  Conditions of appointment, requirements, IDS Rule 2A.5.
  Contract services.
    Recoupment, IDS Rule 2A.4.
  Coverage of subpart, IDS Rule 2A.1.
  First lawyer appointed, IDS Rule 2A.2.
  Lead and associate counsel, appointment, IDS Rule 2A.2.
    Standards for, IDS Appx 2A.
  List of lawyers eligible for appointment, IDS Rule 2A.2.
  Local counsel, provisional appointment, IDS Rule 2A.2.
  Non-capital charges joined with capital charges, applicability to, IDS Rule 2A.1.
  Notification by court of need to appoint counsel, IDS Rule 2A.2.
  On-going training to remain eligible for appointment, IDS Appx 2A.3.
  Other programs, plans and contracts.
    Implementation authorized, IDS Rule 2A.1.
  Outside compensation prohibited, IDS Rule 2A.4.
  Provisional appointment, local counsel, IDS Rule 2A.2.
  Qualifications and experience.
    Standards for lead and associate counsel, IDS Appx 2A.1.
  Recoupment of compensation, IDS Rule 2A.4.
  Replacement of counsel with new counsel, IDS Rule 2A.5.
  Second trial counsel appointed, IDS Rule 2A.2.
  Standby counsel.
    Waiver of counsel by defendant, IDS Rule 2A.3.
  Submissions with application for appointment, IDS Appx 2A.2.
  Substitution of counsel.
    Replacement of counsel with new counsel, IDS Rule 2A.5.
  Third party contributing funds to non-counsel services.
    Funds placed in trust, accounting required, IDS Rule 2A.4.
  Training session.
    Required to remain eligible for appointment, IDS Appx 2A.3.
  Waiver of counsel, IDS Rule 2A.3.
  Waiver of qualifications and experience standards.
    Standards for lead and associate counsel, IDS Appx 2A.1.
  Withdrawal of retained counsel.
    Ineligibility to be appointed to represent defendant, IDS Rule 2A.2.

E

EXPERTS.
Capital cases.
  Appointment and compensation, other expenses, IDS Rules 2D.1 to 2D.5.

N

NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES.
Appellate counsel.
  Abuse, neglect, dependency or termination of parental rights cases.
    Litigation of motions challenging final orders pending direct appeal.
      Authorization, IDS Rule 3.2.
  Appellate roster.
    Creation, IDS Rule 3.4.
    Removal from, IDS Rule 3.6.
  Appointment of appellate defender, IDS Rule 3.2.
  Assignment to private counsel or public defender, IDS Rule 3.2.
  Certiorari review in Supreme Court of United States.
    Petition for or in opposition, filing, compensation, representation, IDS Rule 3.2.
  Compensation, IDS Rule 3.3.
  Conditions of appointment, requirements, IDS Rule 3.4.
  Conflicts of interest.
    Appellate defender, IDS Rule 3.2.
  Contract services.
    Recoupment, IDS Rule 3.3.
  Coverage of part, IDS Rule 3.1.
  Experience and knowledge requirement, IDS Rule 3.4.
  Fee application.
    Private assigned counsel, IDS Rule 3.3.
  Indigency determination prior to appointment.
    In trial court, IDS Rule 3.2.
  Judgment or decree and appellate entries and rulings.
    Forwarding to appointed counsel, IDS Rule 3.2.
  Juvenile matters.
    Motion to modify dispositional orders, prior authorization required, IDS Rule 3.2.
    Provisional appointment, IDS Rule 3.2.
  Motion for appropriate relief.
    Prior authorization from appellate defender, IDS Rule 3.2.
  Notice of assignment, IDS Rule 3.2.
  Other programs, plans and contracts.
    Authority to implement, IDS Rule 3.7.
  Outside compensation prohibited, IDS Rule 3.3.
  Petition for extraordinary writ.
    Provisional appointment to file, IDS Rule 3.2.
  Provisional appointment of office of appellate defender, IDS Rule 3.2.
  Recoupment of fees, IDS Rule 3.3.
  Replacement of counsel.
    Substitute, IDS Rule 3.5.
  Review of appellate defender decision.
    Attorney not eligible for appointment, IDS Rule 3.4.

NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES —Cont'd
Appellate counsel —Cont'd
  Roster of attorneys, IDS Rule 3.4.
  Setting fee.
    Private assigned counsel, IDS Rule 3.3.
  Standards, IDS Rule 3.4.
  Submissions with application for appointment, IDS Rule 3.4.
  Substitution of counsel, IDS Rule 3.5.
  Third party contributing non-counsel services funds.
    Funds placed in trust, accounting required, IDS Rule 3.3.
  Training session to remain eligible, IDS Rule 3.4.
Evidentiary hearing in trial court on remand.
  Appointment of counsel, IDS Rule 3.2.
Trial level.
  Affidavit of Indigency.
    Required, IDS Rule 1.4.
  Appellate case, defined, inapplicability of part, IDS Rule 1.1.
  Appointment procedure, IDS Rule 1.5.
  Capital case, defined, inapplicability of part, IDS Rule 1.1.
  Clerk of superior court.
    Responsibilities as to in-custody defendants, IDS Rule 1.3.
  Compensation of appointed counsel, IDS Rule 1.9.
  Continued representation, obligation of appointed counsel, IDS Rule 1.7.
  Contract with IDS, IDS Rule 1.8.
    Compensation of contract counsel, IDS Rule 1.9.
    Recoupment for services of contract counsel, IDS Rule 1.11.
    Withdrawal of contract counsel, IDS Rule 1.7.
  Coverage of rule, IDS Rule 1.1.
  Delegation to another attorney material responsibilities, IDS Rule 1.5.
  Determining indigency.
    Procedure, IDS Rule 1.4.
  District bar.
    Plan for appointment, district without public defender, IDS Rule 1.5.
  Experts, fees for, IDS Rule 1.10.
  Fee schedules, IDS Rule 1.9.
  Fees for support services, IDS Rule 1.10.
  In-custody defendants.
    Responsibilities of public defenders and clerks, IDS Rule 1.3.
  Indigency defined, IDS Rule 1.4.

NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES —Cont'd
Trial level —Cont'd
  Indigency, determining, IDS Rule 1.4.
  Investigators, fees for, IDS Rule 1.10.
  Non-criminal cases defined, IDS Rule 1.1.
  Obligation of appointed counsel, IDS Rule 1.7.
  Outside compensation prohibited, IDS Rule 1.9.
  Payment of appointed counsel, IDS Rule 1.9.
  Plan for appointment, IDS Rule 1.5.
  Procedure for determining indigency, IDS Rule 1.4.
  Public defenders.
    Appointment procedure in districts with, IDS Rule 1.5.
    Responsibilities as to in-custody defendants, IDS Rule 1.3.
  Recordkeeping.
    Plans for assignment of counsel, IDS Rule 1.5.
  Recoupment of fees, IDS Rule 1.11.
  Special counsel office.
    Procedure for appointment, districts with, IDS Rule 1.5.
  Standard of indigency, IDS Rule 1.4.
  Standby counsel in criminal case.
    Waiver of counsel by defendant, IDS Rule 1.6.
  Substitute attorney.
    Delegation of material responsibilities to, IDS Rule 1.5.
  Support services, fees for, IDS Rule 1.10.
  Third party contributing non-counsel services funds.
    Funds place in trust, accounting required, IDS Rule 1.9.
  Trail level defined, IDS Rule 1.1.
  Waiver of counsel, IDS Rule 1.6.
  Withdrawal of appointed counsel, IDS Rule 1.7.

P

POST-CONVICTION COUNSEL.
Appointment, compensation, eligibility.
  Capital cases, IDS Rules 2C.1 to 2C.4.
    Standards for, IDS Appxs 2C.1 to 2C.3.

T

TRIAL COUNSEL.
Appointment, eligibility, compensation.
  Capital cases, IDS Rules 2A.1 to 2A.5.
    Standards for, IDS Appxs 2A.1 to 2A.3.
  Non-capital criminal and non-criminal cases, IDS Rules 1.1 to 11.

RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

Adopted September 16, 1969,
with amendments received through September 10, 1997.

Rules and Regulations

Article I. Authority
Article II. Determination of Indigency
Article III. Waiver of Counsel
Article IV. Appointment of Counsel
Article V. Withdrawal by Counsel
Article VI. Procedure for Payment of Compensation

Model Plan

Article I. Purpose
Article II. Applicability
Article III. Lists of Attorneys
Article IV. Committee on Indigent Appointments
Article V. Placement of Attorneys on List
Article VI. Appointment Procedure (Non-Capital Cases)
Article VII. Appointments in Capital Cases
Article VIII. Appellate Appointments
Article IX. Administration
Article X. Miscellaneous

Index follows Rules.

RULES AND REGULATIONS

ARTICLE I. AUTHORITY

Section 1.1.

These Rules and Regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

ARTICLE II. DETERMINATION OF INDIGENCY

Section 2.1.

Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

Section 2.2.

Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3.

The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4.

Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

ARTICLE III. WAIVER OF COUNSEL

Section 3.1.

Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the Court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

Section 3.2.

Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3.

The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

ARTICLE IV. APPOINTMENT OF COUNSEL

Section 4.1.

The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and/or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the Model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district. (Amended November 19, 1984; amended March 4, 1992.)

Section 4.2.

Such plan or plans as adopted by the judicial district bar shall be certified to the Council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the Clerk of Superior Court of each county to which each plan is applicable by the Secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district. (Amended November 19, 1984; amended March 4, 1992.)

Section 4.3.

No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4.

No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5.

The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the Secretary of the North Carolina State Bar. (Amended November 19, 1984.)

Section 4.6.

The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the Secretary of the North Carolina State Bar. (Amended November 19, 1984; amended March 4, 1992.)

Section 4.7.

Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

Section 4.8.

Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the State is seeking the death penalty. (Added May 26, 1978; amended March 4, 1992.)

Section 4.9.

Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office. (Added May 26, 1978; amended March 4, 1992.)

Section 4.10.

Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section. (Added May 26, 1978; amended March 4, 1992.)

Section 4.11.

In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein. (Added March 4, 1992.)

Section 4.12.

It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel. (Added March 4, 1992.)

Section 4.13.

Nothing in these regulations or in the Model Plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the N.C. State Bar. (Added March 4, 1992.)

ARTICLE V. WITHDRAWAL BY COUNSEL

Section 5.1.

At any time during or pending the trial or re-trial of a case, the trial Judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2.

At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3.

Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

CASE NOTES

Withdrawal Where Counsel Finds Appeal Wholly Frivolous or Lacking in Merit. — In appeals wholly frivolous or simply lacking in merit, counsel should avoid the dilemma of deciding between his professional and personal integrity as an attorney and the right of the defendant to the assistance of counsel. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds an appeal to be wholly frivolous and desires to be released of further responsibility, he should apply to the Supreme Court of North Carolina for permission to withdraw as appellate counsel. If this statutory procedure is followed, the Court could determine by the application of State and federal requirements whether the appeal is wholly frivolous, and whether to grant counsel's request to withdraw and dismiss the appeal, or proceed to a decision on the merits. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

There is a distinction between cases that are wholly frivolous in which counsel may be permitted to withdraw, and those apparently lacking in merit, but presenting arguable questions. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

ARTICLE VI. PROCEDURE FOR PAYMENT OF COMPENSATION

Section 6.1.

Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in G.S. 7A-458.

Section 6.2.

Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3.

Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

Section 6.4.

Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

Section 6.5.

Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

Section 6.6.

Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court. (Added August 31, 1973.)

MODEL PLAN

REGULATIONS FOR APPOINTMENT OF COUNSEL IN INDIGENT CASES IN THE __________ JUDICIAL DISTRICT

ARTICLE I. PURPOSE

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

ARTICLE II. APPLICABILITY

These regulations apply to any criminal case arising in the __________ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the masculine gender shall be construed to include both male and female persons. Reference to the singular shall, as appropriate, be construed to include the plural.

ARTICLE III. LISTS OF ATTORNEYS

Section 3.1.

Any attorney engaged in the private practice of law primarily in the __________ Judicial District who

(a) Maintains an office in the __________ Judicial District, and

(b) Practices criminal law in the courts of the __________ Judicial District to an appreciable extent, or intends or desires to do so,

may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

Section 3.2.

Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

Section 3.3.

Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.4.

Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.5.

The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the ____________ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived. (Amended March 4, 1992.)

Section 3.6.

Subject to the exception contained in Section 3.5, requirements for inclusion on the three lists are as follows:

(a) An attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that:

(1) He is competent to represent criminal defendants charged with misdemeanors and felonies, and

(2) Two attorneys who have engaged in the practice of law in the ____________ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(b) An attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the ____________ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He is competent to represent criminal defendants charged with felonies.

(c) An attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the ________ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent defendants charged with capital crimes and that they recommend that he be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office, and

(4) He is competent to represent criminal defendants charged with capital crimes.

Section 3.7.

The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein. (Amended March 4, 1992.)

ARTICLE IV. COMMITTEE ON INDIGENT APPOINTMENTS

Section 4.1.

A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

Section 4.2.

All members of the committee shall be attorneys who

(a) Are included on one of the appointment lists, and

(b) Have practiced criminal law in the ________ Judicial District, whether as a prosecutor or defense counsel, for not less than five years, and

(c) Are knowledgeable about practicing attorneys in the ________ Judicial District.

Section 4.3.

The committee shall consist of ______ members appointed by the President of the ________ Judicial District Bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

Section 4.4.

The President of the ________ Judicial District Bar shall appoint one of the members as Chairman of the Committee, who shall serve at the pleasure of the president as shall all other members of the committee.

Section 4.5.

The committee shall meet at the call of the Chairman upon reasonable notice. The first meeting shall be on ______________. Thereafter, the committee shall meet as often as is necessary to dispatch its business.

Section 4.6.

The committee shall have complete authority to accomplish the following:

(a) Supervise the administration of these regulations;
(b) Review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;
(c) Approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;
(d) Establish procedures with which to carry out its business;
(e) Interview attorneys seeking placement on any list and witnesses for or against such placement.

Section 4.7.

A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

Section 4.8.

The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

ARTICLE V. PLACEMENT OF ATTORNEYS ON LIST

Section 5.1.

Any attorney who wishes to have his name added to or deleted from any list, or to have his name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Article III for placement on a certain list. The written statements of competency required by Article III must be attached to the request.

Section 5.2.

The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request. (Amended March 4, 1992.)

Section 5.3.

The administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the ____________ Judicial District, and the District Attorney for the ____________ Judicial District, and the District's Public Defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee. (Amended October 21, 1994.)

Section 5.4.

When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

Section 5.5.

The committee shall determine whether an attorney requesting to be added to a list when he is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Article III. The request shall be granted or the addition or transfer allowed if the committee finds that he does meet all the standards. Conversely, the request shall be denied if the committee does not find that he meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his request and is advised of the basis for denial if the request is not granted.

Section 5.6.

If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Article III for the list on which he is placed, or that he can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his name from the list he is on, or transferring him from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken. (Amended March 4, 1992.)

Section 5.7.

An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident superior court judge of the ____________ judicial district. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney. (Amended March 4, 1992.)

Section 5.8.

Whenever an attorney who provides information to the committee, collectively or through any member, requests that his name not be used or that his information be treated confidentially, his request shall be granted unless doing so results in manifest unfairness.

ARTICLE VI. APPOINTMENT PROCEDURE (NON-CAPITAL CASES)

Section 6.1.

The administrator shall provide the clerk in each courtroom in the district and Superior Criminal Courts of the ____________ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear, and only in cases to be tried in counties in which they maintain offices, unless they agree in advance to accept cases from other counties.

Section 6.2.

Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he is on. The court shall proceed in sequence in appointing attorneys. If an attorney's name is passed over because he is not on a list relating to a particular charge, the court shall return to his name for the next appointment consistent with his lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness or other reasons. (Amended March 4, 1992.)

Section 6.3.

In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried. (Amended March 4, 1992.)

Section 6.4.

The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his attorney.

Section 6.5.

The court may appoint an attorney to represent more than one defendant in a single case.

Section 6.6.

In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Article III herein, and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys, but may pass over the name of any attorney known to be unavailable because of vacation, illness or other reasons, or, in his or her discretion, where justice so requires. (Added March 4, 1992.)

Section 6.7.

If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge. (Added March 4, 1992.)

ARTICLE VII. APPOINTMENTS IN CAPITAL CASES

Section 7.1.

In addition to the provisions of Article VI, the provisions of this Article shall apply to the appointment of counsel in capital cases.

Section 7.2.

A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the State is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys. (Amended March 4, 1992.)

Section 7.3.

No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE VIII. APPELLATE APPOINTMENTS

Section 8.1.

If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he does not meet all the requirements of Article III or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level. (Amended March 4, 1992.)

Section 8.2.

No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who has less than five years experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may, in its or his discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office. (Amended March 4, 1992.)

ARTICLE IX. ADMINISTRATION

Section 9.1.

The Senior Resident Superior Court Judge for the ______ Judicial District shall designate a person to serve as administrator of these regulations.

Section 9.2.

The administrator will perform the duties described previously and particularly shall:

(a) Maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(b) Keep current the three lists of attorneys;

(c) Assist the courtroom clerks and the Clerk of Superior Court in carrying out these regulations;

(d) Attend meetings of the committee as appropriate;

(e) Inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(f) Perform other administrative tasks necessary to the implementation of these regulations.

Section 9.3.

The administrator shall have such office, supplies, and equipment as can be provided by the Senior Resident Superior Court Judge or the committee.

Section 9.4.

The Clerk of Superior Court of each county in the ____________ Judicial District shall file and keep current these regulations for the assignment of counsel as certified to him by the Secretary of the North Carolina State Bar.

Section 9.5.

The Clerk of Superior Court of each county in the ____________ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his county.

ARTICLE X. MISCELLANEOUS

Section 10.1.

These regulations are issued pursuant to Article IV of the rules and regulations promulgated in accordance with North Carolina General Statute 7A-459 by the North Carolina State Bar Council, entitled Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set out in the Rules Volume of The General Statutes of North Carolina (published by The Michie Company). Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

Section 10.2.

It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he is not next in sequence or does not maintain an office in the county where the case is to be tried. (Amended March 4, 1992.)

Section 10.3.

These regulations shall be construed liberally in order to carry out the purpose stated in Article I.

Section 10.4.

These regulations shall become effective on ______________, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS ______ DAY OF __________, ________.

Index to Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

A

- APPOINTMENT OF COUNSEL.
- **Capital offenses.**
  - Appellate level, IndigCounsel §4.10.
  - Number, IndigCounsel §4.8.
  - Qualifications of counsel, IndigCounsel §4.9.
- **Eligible counsels.**
  - Maintenance of records, IndigCounsel §4.6.
- **Generally,** IndigCounsel §4.1.
- **Model plan.**
  - Adoption, IndigCounsel §4.1.
  - Certification, IndigCounsel §4.2.
  - Compliance with, IndigCounsel §4.2.
  - Filing, IndigCounsel §4.5.
  - Regulations for appointment of counsel. See MODEL PLAN.
- **Orders.**
  - Entry, IndigCounsel §4.7.
  - Public defender.
    - Authority, IndigCounsel §4.11.
    - Conflicts of interest, IndigCounsel §4.12.
- **Residency requirement,** IndigCounsel §4.3.
- **Selection by defendant.**
  - Prohibited, IndigCounsel §4.4.
  - Specialized programs and plans, IndigCounsel §4.13.
- **AUTHORITY TO ISSUE RULES AND REGULATIONS,** IndigCounsel §1.1.

C

- COMPENSATION OF COUNSEL.
- **Appellate level,** IndigCounsel §6.2.
- **Judgment against defendant,** IndigCounsel §6.5.
- **Orders,** IndigCounsel §6.1.
  - Copies, IndigCounsel §6.4.
  - Entry, IndigCounsel §6.3.
- **Outside compensation,** IndigCounsel §6.6.

D

- DETERMINATION OF INDIGENCY.
- **Affidavit.**
  - Execution, IndigCounsel §2.1.
  - Filing, IndigCounsel §2.3.
- **Examination of defendant,** IndigCounsel §2.2.
- **Generally,** IndigCounsel §2.4.

M

- MODEL PLAN.
- **Regulations for appointment of counsel.**
  - Administration.
    - Designation of administrator, IndigCounsel Model Plan Art IX §9.1.

- MODEL PLAN —Cont'd
- **Regulations for appointment of counsel —Cont'd**
  - Administration —Cont'd
    - Duties of administrator, IndigCounsel Model Plan Art IX §9.2.
    - Duties of clerks of superior courts, IndigCounsel Model Plan Art IX §9.4.
    - Office, supplies and equipment of administrator, IndigCounsel Model Plan Art IX §9.3.
    - Record of counsel eligible for appointment, IndigCounsel Model Plan Art IX §9.5.
  - Adoption of model plan, IndigCounsel §4.1.
  - Appellate appointments.
    - Qualifications of attorney, IndigCounsel Model Plan Art VIII §8.2.
    - Retention of attorney representing defendant at trial level, IndigCounsel Model Plan Art VIII §8.1.
  - Applicability of regulations, IndigCounsel Model Plan Art II, IndigCounsel Model Plan Art X §10.1.
  - Capital cases.
    - Additional counsel, IndigCounsel Model Plan Art VII §7.2.
    - Applicability of provisions, IndigCounsel Model Plan Art VII §7.1.
    - Qualifications of attorney, IndigCounsel Model Plan Art VII §7.3.
  - Certification of model plan, IndigCounsel §4.2.
  - Committee on indigent appointments.
    - Appointments, IndigCounsel Model Plan Art IV §4.3.
    - Authority, IndigCounsel Model Plan Art IV §4.1.
    - Chairman, IndigCounsel Model Plan Art IV §4.4.
    - Composition, IndigCounsel Model Plan Art IV §4.3.
    - Confidentiality of records, etc., IndigCounsel Model Plan Art IV §4.8.
    - Duties, IndigCounsel Model Plan Art IV §4.6.
    - Established, IndigCounsel Model Plan Art IV §4.1.
    - Lists of attorneys, IndigCounsel Model Plan Art III §3.5.
    - Meetings, IndigCounsel Model Plan Art IV §§4.5, 4.8.
    - Qualifications of members, IndigCounsel Model Plan Art IV §4.2.
    - Quorum, IndigCounsel Model Plan Art IV §4.7.
  - Construction of regulations, IndigCounsel Model Plan Art X §10.1.
    - Liberal construction, IndigCounsel Model Plan Art X §10.3.
  - Discretionary power of court, IndigCounsel Model Plan Art X §10.2.
  - Duties of clerk of superior court, IndigCounsel §4.5.

MODEL PLAN —Cont'd
Regulations for appointment of counsel —Cont'd
- Effective date, IndigCounsel Model Plan Art X §10.4.
- Filing, IndigCounsel §4.5.
- Liberal construction of regulations, IndigCounsel Model Plan Art X §10.3.
- List of attorneys.
  - Committee on indigent appointments, IndigCounsel Model Plan Art III §3.5.
  - First list, IndigCounsel Model Plan Art III §3.2.
  - Generally, IndigCounsel Model Plan Art III §3.1.
  - Placement of attorneys on list. See within this subheading, "Placement of attorneys on list."
  - Removal from list, IndigCounsel Model Plan Art V §5.6.
    - Appeals, IndigCounsel Model Plan Art V §5.7.
  - Requirements for inclusion on lists, IndigCounsel Model Plan Art III §3.6.
  - Review, IndigCounsel Model Plan Art III §3.7.
  - Second list, IndigCounsel Model Plan Art III §3.3.
  - Third list, IndigCounsel Model Plan Art III §3.4.
- Non-capital cases.
  - Appointment by clerk of court, IndigCounsel Model Plan Art VI §6.7.
  - Appointment by public defender, IndigCounsel Model Plan Art VI §6.6.
  - Clerk to be provided with current lists, IndigCounsel Model Plan Art VI §6.1.
  - Disregarding sequence, IndigCounsel Model Plan Art VI §6.3.
  - Notice of appointment, IndigCounsel Model Plan Art VI §6.4.

MODEL PLAN —Cont'd
Regulations for appointment of counsel —Cont'd
- Non-capital cases —Cont'd
  - Records, IndigCounsel Model Plan Art VI §6.2.
  - Representing more than one defendant in single case, IndigCounsel Model Plan Art VI §6.5.
- Placement of attorneys on list.
  - Appearance by requesting attorney, IndigCounsel Model Plan Art V §5.4.
  - Applicable standards, IndigCounsel Model Plan Art V §5.5.
  - Confidentiality of certain information, IndigCounsel Model Plan Art V §5.8.
  - Failure to meet standards or responsibilities, IndigCounsel Model Plan Art V §5.6.
  - Opportunity to comment on request, IndigCounsel Model Plan Art V §5.3.
  - Review of request, IndigCounsel Model Plan Art V §5.2.
  - Written request, IndigCounsel Model Plan Art V §5.1.
- Purpose of regulations, IndigCounsel Model Plan Art I.
- Record of counsel eligible for appointment, IndigCounsel §4.6.

W

WAIVER OF COUNSEL.
Acceptance, IndigCounsel §3.3.
Form, IndigCounsel §3.1.
Personal inquiry by judge, IndigCounsel §3.2.
Refusal to execute, IndigCounsel §3.1.

WITHDRAWAL BY COUNSEL.
Appellate level, IndigCounsel §5.2.
Generally, IndigCounsel §5.1.
Good cause, IndigCounsel §5.3.

NORTH CAROLINA SUPREME COURT LIBRARY RULES

Adopted December 20, 1967,
with amendments received effective March 1, 2005.

General Provisions

Rule
1. Short title.
2. Definitions.

Hours and Use of Library

3. Hours.
4. Use during regular hours.
5. Use after hours.
6. Entrance and exits.
7. Conduct.

Use of Material

8. Clearing of tables.
9. Abuse of material.
10. Replacement of lost materials.

Services

11. Copy service.
12. Research service.

Borrowing and Removing Material

Rule
13. Who may borrow material.
14. Return of borrowed material.
15. Receipts for borrowed material.
16. Borrowing proscriptions and limitations.
17. Removal from the justice building.
18. Transportation of material.

Internal Rules

19. Policies and procedures.

Penalty

20. Contempt of court.

Records and Annual Report

21. Records and annual report.

Appendix I

Official Register, State of North Carolina.

Index follows Rules.

GENERAL PROVISIONS

Rule 1. Short title.

The following rules and regulations shall be known and may be cited as North Carolina Supreme Court Library Rules.

Rule 2. Definitions.

Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(a) "Assistant Librarian" means the Assistant Librarian of the Supreme Court Library.

(a1) "User" means:

i. justice, judge, employee, or volunteer of the Appellate Division of the General Court of Justice;

ii. employee of the State of North Carolina in the discharge of official duties; and

iii. practicing attorney licensed in the State of North Carolina.

(a2) "Authorized visitor" means:

i. employee of a user possessing permission on standard form issued by a member of the Library staff to visit the facility; and

ii. person possessing permission on standard form issued by the Librarian to visit the facility.

(b) "Librarian" means the Librarian of the Supreme Court Library.

(c) "Library" means the North Carolina Supreme Court Library.

(d) "Library Committee" means that committee appointed and acting pursuant to G.S. 7A-13 of the General Statutes of North Carolina.

(e) "Library material" means any book, paper, document, map, magazine, pamphlet, newspaper, manuscript, film, periodical, or other item or material, regardless of physical form of characteristics, that is a part of the collection or holdings of the Library.

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

(g) "Rules" means any rules or regulations contained in the North Carolina Supreme Court Library Rules.

(h) "Staff" means any assistants or other persons or employees appointed by or working under the supervision of the Librarian of the Supreme Court Library. (Amended November 28, 1972; amended March 1, 2005.)

HOURS AND USE OF LIBRARY

Rule 3. Hours.

Except on State Holidays or when the Library Committee authorizes that it be closed, the Library shall be open to users and authorized visitors on Monday through Friday from eight-thirty o'clock in the morning until four-thirty o'clock in the afternoon. (Amended July 24, 1980; November 8, 1983, eff. January 1, 1984; amended March 1, 2004; amended March 1, 2005.)

Rule 4. Use during regular hours.

Any user or authorized visitor who acts in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice. (Amended March 1, 2005)

Rule 5. Use after hours.

Only members and employees of the Supreme Court and the Court of Appeals may enter the Library or use the material or facilities of the Library when the Library is not open for public use. (Amended April 14, 1975; July 24, 1980; September 1, 1982.)

Rule 6. Entrance and exits.

All visitors and users of the Library shall enter and leave the Library through an elevator except in emergency situations and times when an elevator is not in operation.

Rule 7. Conduct.

Smoking, consumption of food or beverages other than from water fountains in the Library, loud talking, boisterous or disorderly conduct, and the use of dictating equipment shall not be permitted in the Library.

USE OF MATERIAL

Rule 8. Clearing of tables.

At the end of each day the staff shall clear all tables and reshelve all unshelved books in the reading area of the Library; however, provided that no books shall be left on tables for more than two consecutive nights, the staff may leave material on tables overnight when the person using the material leaves on it a signed and dated request that it not be reshelved.

Rule 9. Abuse of material.

No person shall damage or abuse any Library material or equipment in any respect. Marking, writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, or breaking such material or equipment, or folding pages, closing a book with a writing instrument or other object within it, tearing out or removing any page or pocket part without authority, or stacking other books or heavy objects on an open book are included within this prohibition.

Rule 10. Replacement of lost materials.

Any person who unintentionally or inadvertently shall lose or misplace any Library material and for that reason fail to return it within the time that it is due to be returned shall, within thirty (30) days from such due date, make such replacement as will be acceptable to the Librarian in his discretion, or pay to the Library the fair value of the material as determined by the Librarian.

SERVICES

Rule 11. Copy service.

(a) All copies made by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies made in any one month does not exceed three hundred (300) pages, or with the permission of the Librarian regardless of the number of pages, such as made by the person holding positions listed in the Official Register if used in the discharge of their official duties shall be made without charge.

(c) Except as provided for in sections (a) and (b) of this Rule, patrons may make photocopies for ten cents ($.10) per page. (Amended July 24, 1980; amended effective November 2, 2004.)

Rule 12. Research service.

No member of the Library staff shall do law research for or give legal advice or counsel to any person except as requested by a member of the Supreme Court or the Court of Appeals for his own use, or as authorized by the Librarian.

BORROWING AND REMOVING MATERIAL

Rule 13. Who may borrow material.

The following persons only may borrow and remove material from the Library:

(a) Members and employees of the Supreme Court and the Court of Appeals, in person or upon his or her signed memorandum.

(b) The Attorney General and members of his staff who are members of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum.

(c) The Governor and members of the Council of State, in person or upon his or her signed memorandum.

(d) The President of the Senate, the Speaker of the House of Representatives, and the respective chairmen of the committees of the General Assembly, in person or upon his or her signed memorandum.

(e) The heads or duly constituted representatives of established agencies or institutions that offer reciprocal services to the Library and that are engaged in what the Librarian in his discretion deems to be worthy educational, historical, library, archival, or bibliographical activity for which they have a legitimate need to borrow the material requested.

(f) The Secretary-Treasurer of the North Carolina State Bar, Inc. (Amended July 24, 1980.)

Rule 14. Return of borrowed material.

Material borrowed from the Library shall be returned to the Library within the time provided below:

(a) Members of the Supreme Court and the Court of Appeals shall return borrowed material as early as possible, but in no event shall any item be retained for more than one week from the time of borrowing.

(b) Borrowers who are not members of the Supreme Court or the Court of Appeals shall return borrowed material before the closing of the Library on the day that the item is borrowed except when upon the borrower's written request stating good reason the Librarian or the Assistant Librarian in his or her respective discretion authorizes that any specific item be retained by the borrower until a later time as set by the Librarian or the Assistant Librarian.

Rule 15. Receipts for borrowed material.

Each person who borrows material from the Library shall give a receipt therefor on a form prescribed for that purpose by the Librarian and available in the Library.

Rule 16. Borrowing proscriptions and limitations.

The Librarian in his discretion may limit or proscribe the borrowing of old books, rare books, digests, indexes, general reference materials, looseleaf services, encyclopedias, advance sheets, and other materials that because of their particular value, nature, or frequent use should remain in the Library at all times or have only limited circulation.

Rule 17. Removal from the justice building.

No borrower, except a Judge of the Court of Appeals upon his written request, may remove any Library material from the Justice Building except when each of the following conditions exists:

(a) It is not reasonably possible for the person desiring to use the material to do so within the Justice Building.

(b) It is impracticable to copy the material by use of the facilities available in the Justice Building, or such copies reasonably would not serve the purpose of the person desiring to borrow the material.

(c) Material that is identical or substantially the same may not be borrowed and removed from the North Carolina State Library or any other public library in Raleigh.

(d) The material is not out of print and it reasonably could be replaced.

(e) The Library has more than one copy of the material.

Rule 18. Transportation of material.

Library materials may not be sent through State Interoffice Mail or transported by or through any other person, agency, or means that the Librarian in his discretion deems unsafe.

INTERNAL RULES

Rule 19. Policies and procedures.

The Librarian shall be responsible for the general administration of the Library, and he shall execute the policies established by the Library Committee.

PENALTY

Rule 20. Contempt of court.

Any person who intentionally and wilfully violates any North Carolina Supreme Court Library Rule shall, upon formal complaint filed in the Supreme Court by the Librarian, be subject to being adjudged in contempt of the Supreme Court.

RECORDS AND ANNUAL REPORT

Rule 21. Records and annual report.

The Librarian shall keep Library records in a form acceptable to the Library Committee, and on or before September 1 of each year he shall make to the Supreme Court a summary report of Library activities for the fiscal year that ended on the preceding June 30.

APPENDIX I

OFFICIAL REGISTER, STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.

(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.

(9) The Chairman of the Judicial Standards Commission.

(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

(11) The State President of the Department of Community Colleges.

(12) The Director of the Office of Administrative Hearings.

(13) The Chairman of the Administrative Review Commission. (Added November 28, 1972; amended July 24, 1980; July 19, 1982; November 8, 1983; June 21, 1984; March 18, 1986; September 12, 1988.)

APPENDIX I

OFFICIAL REGISTER
STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.
(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.
(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.
(4) The Judges of the Superior Court and the Judges of the District Courts.
(5) The District Attorneys and the Public Defenders.
(6) The State Librarian.
(7) The Director of the Division of Archives and History.
(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.
(9) The Chairman of the Judicial Standards Commission.
(10) The Secretary-Treasurer of the North Carolina State Bar.
(11) The State President of the Department of Community Colleges.
(12) The Director of the Office of Administrative Hearings.
(13) The Chairman of the Administrative Rules Review Commission. (Added November 25, 1977; amended July 24, 1980; July 19, 1982; November 6, 1985; June 21, 1988; March 18, 1986; September 12, 1988.)

Index to North Carolina Supreme Court Library Rules

A

ASSISTANT LIBRARIAN.
Defined, SupCtLibrary Rule 2.

AUTHORIZED VISITOR.
Defined, SupCtLibrary Rule 2.

B

BOISTEROUS CONDUCT.
Prohibited in library, SupCtLibrary Rule 7.

BORROWING MATERIAL.
Prescriptions and limitations.
  Authority of librarian, SupCtLibrary Rule 16.
Receipts for borrowed material, SupCtLibrary Rule 15.
Return of borrowed material, SupCtLibrary Rule 14.
Who may borrow, SupCtLibrary Rule 13.

C

CITATION OF RULES.
Short title, SupCtLibrary Rule 1.

CONDUCT IN LIBRARY, SupCtLibrary Rule 7.

COPIES.
Services, SupCtLibrary Rule 11.

D

DEFINITIONS, SupCtLibrary Rule 2.

DISORDERLY CONDUCT.
Prohibited in library, SupCtLibrary Rule 7.

E

ELEVATORS.
Entrance and exit by, SupCtLibrary Rule 6.

ENTRANCE, SupCtLibrary Rule 6.

EXITS, SupCtLibrary Rule 6.

F

FEES.
Copy service, SupCtLibrary Rule 11.

FOOD.
Consumption in library prohibited, SupCtLibrary Rule 7.

H

HOURS, SupCtLibrary Rule 3.
Use after hours, SupCtLibrary Rule 5.
Use during regular hours, SupCtLibrary Rule 4.

L

LIBRARIAN.
Borrowing material.
  Prescriptions and limitations.
    Authority of librarian, SupCtLibrary Rule 16.
Contempt.
  Violations of rules.
    Contempt of supreme court, SupCtLibrary Rule 20.
Defined, SupCtLibrary Rule 2.
Powers and duties generally, SupCtLibrary Rule 19.
Records.
  Duty to keep library records, SupCtLibrary Rule 21.
Report.
  Annual report to supreme court, SupCtLibrary Rule 21.
Violations of rules.
  Contempt of supreme court, SupCtLibrary Rule 20.

LIBRARY COMMITTEE.
Defined, SupCtLibrary Rule 2.

LIBRARY MATERIAL.
Abuse.
  Prohibited act, SupCtLibrary Rule 9.
Borrowing.
  See BORROWING MATERIAL.
Defined, SupCtLibrary Rule 2.
Lost materials.
  Replacement, SupCtLibrary Rule 10.
Removal from justice building, SupCtLibrary Rule 17.
Transportation of material, SupCtLibrary Rule 18.

O

OFFICIAL REGISTER, SupCtLibrary Appx I.
Defined, SupCtLibrary Rule 2.

R

RECORDS.
Librarian.
  Duty to keep library records, SupCtLibrary Rule 21.

REPORTS.
Librarian.
  Annual report to supreme court, SupCtLibrary Rule 21.

S

SERVICES.
Copy services, SupCtLibrary Rule 11.
Research services, SupCtLibrary Rule 12.

SMOKING.
Prohibited in library, SupCtLibrary Rule 7.

T

TABLES.
Clearing of tables, SupCtLibrary Rule 8.

TITLE OF RULES.
Short title, SupCtLibrary Rule 1.

U

USER.
Defined, SupCtLibrary Rule 2.

WORKERS' COMPENSATION RULES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

Effective June 1, 2000, as amended through August 1, 2006.

Article I. Administration

Rule
101. Location of offices and hours of business.
102. Transaction of business by the Commission.
103. Official forms.
104. Employer's report of injury.

Article II. Notice of Act

201. Notice of employment subject to the act.

Article III. Insurance

301. Proof of insurance coverage.

Article IV. Disability, Compensation, Fees

401. When disability begins for purpose of computing compensation.
402. Computation of daily wage.
403. Manner of payment of compensation.
404. Termination of compensation.
404A. Trial return to work.
405. Computation of compensation for amputations.
406. Discount table to be used in determining commuted values.
407. Fees for medical compensation.
408. Additional medical compensation.
409. Claims for death benefits.

Article V. Agreements

501. Agreements for payment of compensation.
502. Compromise settlement agreements.
503. Approval of agreement constitutes award.

Article VI. Contested Cases

601. Employer obligations upon notice, sanctions, and denial of liability.
602. Request for hearing.
603. Response to request for hearing.
604. Appointment of guardian *ad litem.*
605. Discovery.
606. Discovery — Post hearing.
607. Discovery of records and reports.
608. Statement about incident leading to claim.

Rule
609. Motions practice in contested cases.
610. Pre-trial conference and Pre-trial order.
611. Hearings before the Industrial Commission.
612. Depositions and additional hearings.
613. Dismissals and removals.
614. Attorneys retained for proceedings.
615. Disqualification of a Commissioner or Deputy Commissioner.
616. Foreign language interpreters.

Article VII. Appeals

701. Appeal to the Full Commission.
702. Appeal to the court of appeals.
702A. Remand from the appellate courts.
703. Review of Administrative Decisions.

Article VIII. Rules of the Commission

801. Waiver of the rules.
802. Sanctions.
803. Procedure for Workers' Compensation Rule making by the Industrial Commission.

Article IX. Report of Earnings

901. Check endorsement.
902. Notice.
903. Employee's obligation to report earnings.

Forms

Form
I. Distribution of third party funds with attorney.
IIa. Compromise settlement agreement (admitted liability, medical paid), and distribution of third party funds.
IIb. Compromise settlement agreement (denied liability, unpaid medicals) and distribution of third party funds.
IIIa. Compromise settlement agreement (admitted liability, medicals paid).
IIIb. Compromise settlement agreement (denied liability, unpaid medicals).

Index follows Rules.

ARTICLE I. ADMINISTRATION

Rule 101. Location of offices and hours of business.

The offices of the North Carolina Industrial Commission (hereinafter "Industrial Commission") are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The General Mailing Address is North Carolina Industrial Commission, 4319 Mail Service Center, Raleigh, NC 27699-4319. The same office hours will be observed by the Industrial Commission as are, or may be, observed by other State offices in Raleigh. The offices are open between the hours of 8:00 a.m. and 5:00 p.m. to accept documents for filing.

Rule 102. Transaction of business by the Commission.

The Industrial Commission will remain in continuous session subject to the call of the Chair to meet as a body for the purpose of transacting such business as may come before it.

In reviewing an Opinion and Award of a Deputy Commissioner or of a sole Commissioner acting as the hearing officer, the Full Commission may sit en banc or in panels of three.

Rule 103. Official forms.

(1) The Industrial Commission will supply, on request, forms identified by number and title as follows:

Form 17	Workers' Compensation Notice
Form 18	Notice of Accident to Employer and Claim of Employee or His Personal Representative or Dependents (N.C. Gen. Stat. § 97-22 through 24)
Form 18B	Claim by Employee or His Personal Representative or Dependents for Workers' Compensation Benefits for Lung Damage, Including Asbestosis, Silicosis, and Byssinosis (N.C. Gen. Stat. § 97-53)
Form 18M	Employee's Claim for Additional Medical Compensation
Form 19	Employer's Report of Employee's Injury to the Industrial Commission
Form 21	Agreement for Compensation for Disability Pursuant to N.C. Gen. Stat. § 97-82
Form 22	Statement of Days Worked and Earnings of Injured Employee (Wage Chart)
Form 24	Application to Terminate or Suspend Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-18.1
Form 25C	Authorization for Rehabilitation Professional to Obtain Medical Records of Current Treatment
Form 25D	Dentists' Itemized Statement of Charges for Treatment and Certification of Treatment of Disability
Form 25M	Physician's Itemized Statement of Charges for Treatment and Certification of Treatment
Form 25N	Notice to the Industrial Commission of Assignment of Rehabilitation Professional
Form 25R	Evaluation for Permanent Impairment
Form 25T	Itemized Statement of Charges for Travel
Form 25P	Itemized Statement of Charges for Drugs
Form UB-92	Hospital Bill
Form 26	Supplemental Agreement as to Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-82
Form 26D	Agreement for Compensation Under N.C. Gen. Stat. § 97-37
Form 28	Return to Work Report
Form 28B	Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation
Form 28T	Notice of Termination of Compensation by Reason of Trial Return to Work Pursuant to N.C. Gen. Stat. § 97-18.1(b) and N.C. Gen. Stat. § 97-32.1
Form 28U	Employee's Request that Compensation be Reinstated After Unsuccessful Trial Return to Work Pursuant to N.C. Gen. Stat. § 97-32.1
Form 29	Supplementary Report for Fatal Accidents
Form 30	Agreement for Compensation for Death
Form 30D	Notice of Death Award (Approval of Agreement)
Form 31	Application for Lump Sum Award
Form 33	Request that Claim be Assigned for Hearing
Form 33R	Response to Request that Claim be Assigned for Hearing
Form 36	Subpoena for Witness and Subpoena to Produce Items or Documents
Form 42	Application for Appointment of Guardian *Ad Litem*
Form 44	Application for Review

Form 50	Itemized Statement of Charge for Nursing
Form 51	Consolidated Fiscal Annual Report of "Medical Only" and "Lost Time" Cases
Form 60	Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)
Form 61	Denial of Workers' Compensation Claim Pursuant to N.C. Gen. Stat. § 97-18(c) and (d)
Form 62	Notice of Reinstatement of Compensation Pursuant to N.C. Gen. Stat. § 97-32.1 and N.C. Gen. Stat. § 97-18(b)
Form 63	Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim Pursuant to N.C. Gen. Stat. § 97-18(d)
Form 90	Report of Earnings
Form IZ-510	Medical Bill Analysis Used for Approval and Reduction of Medical Bills
Form MCS2	Petition for Order Referring Case to Mediated Settlement Conference
Form MCS4	Designation of Mediator
Form MCS5	Report of Mediator
Form MCS6	Mediator's Declaration of Interest and Qualifications
Form MCS7	Report of Evaluator

The mailing address for each Industrial Commission Form appears at the bottom right corner of the Form.

(2) The use of any printed forms other than those approved and adopted by the Industrial Commission is prohibited. Insurance carriers, self-insureds, attorneys and other parties may reproduce approved forms for their own use, provided:

(a) No statement, question, or information blank contained on the approved Industrial Commission's form is omitted from the substituted form.

(b) Such substituted form is substantially identical in size and format with the approved Industrial Commission's form.

(3) The following forms may be utilized in preparing routine orders for the signature of a Commissioner or Deputy Commissioner, and are appended at the end of these Rules:

Form I	Order for Third Party Recovery Distribution per N.C. Gen. Stat. § 97-10.2
Form IIa	Order Approving Compromise Settlement Agreement (admitted liability, medical paid) and Third Party Distribution
Form IIb	Order Approving Compromise Settlement Agreement (denied liability, unpaid medical) and Third Party Distribution
Form IIIa	Order for Approving Compromise Settlement Agreements (admitted liability, medical paid)
Form IIIb	Order for Approving Compromise Settlement Agreements (denied liability, unpaid medical)

(4) Copies of rules, forms and Industrial Commission Minutes can be obtained by contacting the Administrator's Office of the Industrial Commission, 4319 Mail Service Center, Raleigh, NC 27699-4319.

Rule 104. Employer's report of injury.

An employer shall immediately report to its carrier or administrator any injury or occupational disease, or allegation by an employee of an injury or occupational disease, sustained in the course of employment for which the attention of a physician is needed or actually sought. Within five days of knowledge of the injury or allegation, the employer or carrier/administrator or its successor in interest shall file with the Industrial Commission and provide a copy to the employee of a Form 19, *Employer's Report of Employee's Injury to the Industrial Commission*, if injury causes the employee to be absent from work for more than one day or the employee's medical compensation is greater than an amount which is established periodically by the Industrial Commission in its Minutes. The employer may record the employee's or another person's description of the injury on the Form 19 without admitting the truth of the information.

In addition to providing the Form 19 to the employee, the employer or carrier/administrator shall also provide a blank Form 18 for use by the employee.

The front of the Form 19 shall prominently display the following statement: "To the Employee: This Form 19 is not your claim for workers' compensation benefits. To make a claim, you must complete and sign the enclosed Form 18 and mail it to the Claims Section, North Carolina Industrial Commission, 4334 Mail Service Center, Raleigh, NC 28799-4334 within two years of the date of your injury or last payment of medical compensation. For occupational diseases, the claim must be filed within two years of the date of disability and the date your doctor told you that you have a work-related disease, whichever is later." (Amended effective March 1, 2001; amended effective August 1, 2006.)

ARTICLE II. NOTICE OF ACT

Rule 201. Notice of employment subject to the act.

(1) Pursuant to the provisions of N.C. Gen. Stat. § 97-93, all employers subject to the provisions of the Workers' Compensation Act shall post in a conspicuous location in places of employment a Form 17, Workers' Compensation Notice, to give notice to the employees that they are in an employment subject to the provisions of the Workers' Compensation Act and that their employer has obtained workers' compensation coverage or has qualified as self-insured for workers' compensation purposes.

(2) Should the employer allow its workers' compensation coverage to lapse or cease to qualify as a self-insured, the employer shall remove within five working days any Form 17 and any other notice indicating otherwise.

ARTICLE III. INSURANCE

Rule 301. Proof of insurance coverage.

Every employer subject to the provisions of the Act shall file with the Industrial Commission proof that it has obtained workers' compensation insurance pursuant to the insurance provisions of the Act. This requirement may be satisfied by:

(1) A notice from the employer's insurance carrier, through the North Carolina Rate Bureau, certifying that coverage has been received.

(2) A notice from the North Carolina Department of Insurance, through the Rate Bureau, certifying that the employer has qualified as a self-insured employer or as a member of a self-insurance fund pursuant to the Act.

(3) All employers have an affirmative obligation to report to the Rate Bureau any changes in coverage within 30 days.

(4) All employers must notify the Department of Insurance when it becomes a member of a self-insurance fund.

ARTICLE IV. DISABILITY, COMPENSATION, FEES

Rule 401. When disability begins for purpose of computing compensation.

(1) If the injured employee is not paid wages for the entire day on which the injury occurred, the seven-day waiting period prescribed by the Act shall include the day of injury regardless of the hour of the injury.

(2) If the injured employee is paid wages for the entire day on which he is injured and fails to return to work on his next regular workday because of the injury, the seven-day waiting period shall begin with the first calendar day following his injury, even though this may or may not be a regularly scheduled workday.

(3) All days, or parts of days, when the injured employee is unable to earn a full day's wages, or is not paid a full day's wages due to injury, shall be counted in computing the waiting period even though the days may not be consecutive, and even though these are not regularly scheduled workdays.

(4) If the permanent disability period, when added to the temporary disability period, exceeds 21 days, there is no waiting period.

Rule 402. Computation of daily wage.

In all cases involving a fractional part of a week, the daily wage shall be computed on the basis of one-seventh of the average weekly wage.

Rule 403. Manner of payment of compensation.

(1) All payments of compensation must be made directly to the employee, dependent, guardian or personal representative entitled thereto unless otherwise ordered by the Industrial Commission. At the employee's request, payment of compensation shall be mailed by first class mail, postage pre-paid, to an address specified by the employee, unless otherwise directed by the Industrial Commission.

(2) All payments of compensation must be made in strict accordance with the award issued by the Industrial Commission.

Rule 404. Termination of compensation.

(1) Payments of compensation undertaken pursuant to an award of the Industrial Commission shall continue until the terms of the award have been fully satisfied. In cases where the award is to pay compensation during disability, there is a rebuttable presumption that disability continues until the employee returns to suitable employment. No application to terminate or suspend compensation shall be approved without a formal hearing if the effect of such approval is to set aside the provisions of an award of the Industrial Commission.

(2) When an employer or carrier/administrator seeks to terminate or suspend compensation being paid pursuant to N.C. Gen. Stat. § 97-29 for a reason other than those specified in N.C. Gen. Stat. § 97-18(d), payment without prejudice, or N.C. Gen. Stat. § 97-18.1(b), trial return to work, the employer or carrier/administrator shall notify the employee and the employee's attorney of record, if any, on Form 24, "Application to Stop Payment of Compensation." The employer or carrier/administrator shall specify the legal grounds and the alleged facts supporting the application, and shall complete the blank space in the "Important Notice to Employee" portion of Form 24 by inserting a date 17 days from the date the employer or carrier/administrator deposits the completed Form 24 in the mail to the employee and the employee's attorney of record, if any. The original of the Form 24 and the attached documents shall be sent to the Industrial Commission at the same time and by the same method by which a copy of the Form 24 and attached documents are sent to the employee and the employee's attorney of record, if any. The Form 24 shall specify the number of pages of documents attached which are to be considered by the Industrial Commission. Failure to specify the number of pages may result in the refusal of the Industrial Commission to accept the same for filing. If the employee or the employee's attorney of record, if any, objects by the date inserted on the employer's Form 24, or within such additional reasonable time as the Industrial Commission may allow, the Industrial Commission shall set the case for an informal hearing, unless waived by the parties in favor of a formal hearing. A copy of any objection shall be sent, with any supporting documents, to the employer and carrier/administrator. The term "carrier/administrator" also includes any successor in interest.

(3) If an employee does not object within the allowed time, the Industrial Commission shall review the Form 24 and any attached documentation, and an Administrative Decision and Order may be rendered without an informal hearing as to whether compensation shall be terminated or suspended, except as provided in paragraph (6) below. Either party may seek review of the Administrative Decision and Order as provided by Rule 703.

(4) If the employee timely objects to the Form 24, the Industrial Commission shall conduct an informal hearing within 25 days of the receipt by the Industrial Commission of the Form 24, unless the time is extended for good cause shown. The informal hearing may be by telephone conference between the Industrial Commission and the parties or their attorneys of record, if any. When good cause is shown, the informal hearing may be conducted with the parties or their attorneys of record, if any, personally present with the Industrial Commission in Raleigh or such other location as is selected by the Industrial Commission. The Industrial Commission shall make arrangements for the informal hearing with a view towards conducting the hearing in the most expeditious manner under the circumstances. Except for good cause shown, the informal hearing shall be no more than 30 minutes, with each side given 10 minutes to present its case and five minutes for rebuttal. Notwithstanding the above, the employer or carrier/administrator may waive the right to an informal hearing, and proceed to a formal hearing by filing a request for hearing on a Form 33. A decision on

the application shall be made within five days after the completion of the informal hearing.

(5) Either party may appeal the Administrative Decision and Order of the Industrial Commission as provided by Rule 703. A Deputy Commissioner shall conduct a hearing which shall be a hearing *de novo*. The hearing shall be peremptorily set and shall not require a Form 33. The employer has the burden of producing evidence on the issue of the employer's application for termination or suspension of compensation. If the Deputy Commissioner reverses an order previously granting a Form 24 motion, the employer or carrier/administrator shall promptly resume compensation or otherwise comply with the Deputy Commissioner's decision, notwithstanding any appeal or application for review to the Full Commission under N.C. Gen. Stat. § 97-85.

(6) In the event the Industrial Commission is unable to reach a decision after an informal hearing, the Industrial Commission shall issue an order to that effect which shall be in lieu of a Form 33 and the case shall be placed on the formal hearing docket. If additional issues are to be addressed, the employer or carrier/administrator shall be required within 30 days of the date of the Administrative Decision and Order to file a Form 33 or to notify the Industrial Commission that a formal hearing is not currently necessary. The effect of placing the case on the docket shall be the same as if the Form 24 were denied, and compensation shall continue until such time as the case is decided by a Commissioner or a Deputy Commissioner following a formal hearing.

(7) Any Administrative Decision and Order shall be mailed to the non-prevailing party by certified mail.

(8) No order issued as a result of an informal Form 24 hearing shall terminate or suspend compensation retroactively to a date preceding the filing date of the filing of the Form 24. Compensation may be terminated retroactively without a formal hearing where there is agreement by the parties, where allowed by statute, or where the employee is incarcerated. Otherwise, retroactive termination or suspension of compensation to a date preceding the filing of a Form 24 may be ordered as a result of a formal hearing. Additionally, nothing shall impair an employer's right to seek a credit pursuant to N.C. Gen. Stat. § 97-42.

CASE NOTES

The presumption of plaintiff's continued disability was amply rebutted by defendants through witness testimony, videotaped surveillance of plaintiff, as well as medical evidence and strong evidence of fraud. Johnson v. Lowe's Cos., 143 N.C. App. 348, 546 S.E.2d 616, 2001 N.C. App. LEXIS 296 (2001), aff'd, 354 N.C. 358, 554 S.E.2d 336 (2001).

Cited in Crouse v. Flowers Baking Co., 123 N.C. App. 555, 473 S.E.2d 372 (1996).

Rule 404A. Trial return to work.

(1) Except as provided in subparagraph (7), when compensation for total disability being paid pursuant to N.C. Gen. Stat. § 97-29 is terminated because the employee has returned to work for the same or a different employer, such termination is subject to the trial return to work provisions of N.C. Gen. Stat. § 97-32.1. When compensation is terminated under these circumstances, the employer or carrier/administrator shall, within 16 days of the termination of compensation, file a Form 28T with the Industrial Commission and provide a copy of it to the employee and the employee's attorney of record, if any.

(2) If during the trial return to work period, the employee must stop working due to the injury for which compensation had been paid, the employee should complete and file with the Industrial Commission a Form 28U, without regard to whether the employer or carrier/administrator has filed a Form 28T as required by paragraph (1) above, and provide a copy of the completed form to the employer and carrier/administrator. A Form 28U shall contain a section which must be completed by the physician who imposed the restrictions or one of the employee's authorized treating physicians, certifying that the employee's injury for which compensation had been paid prevents the employee from continuing the trial return to work. If the employee returned to work with an employer other than the employer at the time of injury, the employee must complete the "Employee's Release and Request For Employment Information" section of a Form 28U. An employee's failure to provide a Form 28U does not preclude a subsequent finding by the Commission that the trial return to work was unsuccessful.

(3) Upon receipt of a properly completed Form 28U, the employer or carrier/administrator shall promptly resume payment of compensation for total disability. If the employee fails to provide the required certification of an authorized treating physician as specified in subsection 2 above, or if the employee fails to execute the "Employee's Release and Request" section of a Form 28U, if required pursuant to paragraph (2) above, the employer or carrier/administrator shall not be required to resume payment of compensation. Instead, in such circumstances, the employer or carrier/administrator shall promptly return a Form 28U to the employee and the employee's attorney of record, if any, along with a statement explaining the reason the Form 28U is being returned and the reason compensation is not being reinstated.

(4) The reinstated compensation shall be due and payable and subject to the provisions of N.C. Gen. Stat. § 97-18(g) on the date and for the period commencing on the date the employer or carrier/administrator receives a properly completed Form 28U certifying an unsuccessful return to work. Such resumption of compensation shall not preclude the employee's right to seek, nor the employer's or carrier/administrator's right to contest, the payment of compensation for the period prior or subsequent to such reinstatement. If it is thereafter determined that any temporary total or temporary partial compensation, including the reinstated compensation, was not due and payable, a credit shall be given against any other compensation determined to be owed.

(5) When the employer or carrier/administrator has received a properly completed Form 28U and contests the employee's right to reinstatement of total disability compensation, it may suspend or terminate compensation only as provided in N.C. Gen. Stat. § 97-18.1 and/or pursuant to the provisions of N.C. Gen. Stat. § 97-83 and N.C. Gen. Stat. § 97-84.

(6) Upon resumption of payment of compensation for total disability, the employer or carrier/administrator shall complete and file a Form 62 and/or such other forms as may be required by the Workers' Compensation Act or by Industrial Commission rule. A copy of the Form 62 shall be sent to the employee and the employee's attorney of record, if any.

(7) The trial return to work provisions do not apply to the following:

(a) "Medical only" cases, defined as cases in which the employee is not absent from work more than one day or in which medical expenses are less than the amount periodically established by the Industrial Commission in its Minutes;

(b) Cases in which the employee has missed fewer than eight days from work;

(c) Cases wherein the employee has been released to return to work by an authorized treating physician as specified in subsection 2 above without restriction or limitation except that if the physician, within 45 days of the employee's return to work date, determines that the employee is not able to perform the job duties assigned, then the employer or carrier/administrator must resume benefits. If within the same time period, the physician determines that the employee may work only with restrictions, then the employee is entitled to a resumption of benefits commencing as of the date of the report, unless the employer is able to offer employment consistent with the restrictions, in which case a trial return to work period shall be deemed to have commenced at the time of the employee's initial return to work;

(d) Cases wherein the employee has accepted or agreed to accept compensation for permanent partial disability pursuant to N.C. Gen. Stat. § 97-31, unless the trial return to work follows reinstatement of compensation for total disability under N.C. Gen. Stat. § 97-29; and

(e) Claims pending on or filed after 1 January 1995, when the employer or carrier/administrator contests a claim pursuant to N.C. Gen. Stat. § 97-18(d) within the time allowed thereunder.

(8) This Rule became effective on 15 February 1995, and applies to any employee who leaves work on or after that date due to a compensable injury.

CASE NOTES

Applied in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

When Employer Authorized to Cease Payments to Employee. — Having received a Form 28U from the injured employee, the employer could cease making payments only on the basis of G.S. 97-18.1, 97-83, and 97-84. Roberts v. Dixie News, Inc., — N.C. App. —, 658 S.E.2d 684, 2008 N.C. App. LEXIS 654 (2008).

Rule 405. Computation of compensation for amputations.

(1) Amputation of any portion of the bone of a distal phalange of a finger or toe at or distal to the visible base of the nail will be considered as equivalent to the loss of one-fourth (¼) of such finger or toe.

(2) Amputation of any portion of the bone of the distal phalange of a finger or toe proximal to the visible base of the nail will be considered as equivalent to the loss of one-half (½) of such finger or toe.

(3) Amputation through the forearm at a point so distal to the elbow as to permit satisfactory use of a prosthetic appliance with retention of full natural elbow function shall be considered amputation of the hand. Otherwise, it shall be considered amputation of the arm.

(4) Amputation through the lower leg at a point so distal to the knee as to permit satisfactory use of a prosthetic appliance with retention of full natural knee function shall be considered amputation of the foot. Otherwise, it shall be considered amputation of the leg.

Rule 406. Discount table to be used in determining commuted values.

The Industrial Commission in its discretion will designate the interest rate and methods of computation to be used in arriving at the commuted value of unaccrued compensation payments.

Rule 407. Fees for medical compensation.

(1) Subject to the provisions of N.C. Gen. Stat. § 97-25.3, "Preauthorization," the Industrial Commission shall adopt and publish a Fee Schedule, pursuant to the provisions of N.C. Gen. Stat. § 97-26(a), fixing maximum fees, except for hospital fees pursuant to N.C. Gen. Stat. § 97-26(b), which may be charged for medical, surgical, nursing, dental, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances. The fees prescribed in the applicable published Fee Schedule shall govern and apply in all cases. However, in special hardship cases where sufficient reason is demonstrated to the Industrial Commission, fees in excess of those so published may be allowed. Persons who disagree with the allowance of such fees in any case may make application for and obtain a full review of the matter before the Industrial Commission as in all other cases provided. Copies of this published Fee Schedule may be obtained from the Industrial Commission's authorized vendor.

(2) A provider of medical compensation shall submit its statement for services within 75 days of the rendition of the service or if treatment is longer, within 30 days after the end of the month during which multiple treatments were provided, or within such other reasonable period of time as allowed by the Industrial Commission. However, in cases where liability is initially denied but subsequently admitted or determined by the Industrial Commission, the time for submission of medical bills shall run from the time the health care provider received notice of the admission or determination of liability. Within 30 days of receipt of the statement, the employer, or carrier, or managed care organization, or administrator on its behalf, shall pay or submit the statement to the Industrial Commission for approval or send the provider written objections to the statement. If an employer, carrier/administrator or managed care organization disputes a portion of the provider's bill, it shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges through its contractual arrangement or through the Industrial Commission. If any bill for medical compensation services is not paid within 60 days after it has been approved by the Industrial Commission and returned to the responsible party, or, when the employee is receiving treatment through a managed care organization, within 60 days after the bill has been properly submitted to an insurer or managed care organization, there shall be added to such unpaid bill an amount equal to 10%, which shall be paid at the same time as, but in addition to, such bill, unless late payment is excused by the Industrial Commission. When the 10% addition to the bill is uncontested, payment shall be made to the provider without notifying or seeking approval from the Industrial Commission. When the 10% addition to the bill is contested, any party may request a

hearing by the Industrial Commission pursuant to N.C. Gen. Stat. § 97-83, and N.C. Gen. Stat. § 97-84.

(3) When the responsible party seeks an audit of hospital charges, and has paid the hospital charges in full, the payee hospital, upon request, shall provide all reasonable access and copies of appropriate records, without charge or fee, to the person(s) chosen by the payor to review and audit the records.

(4) The responsible employer or carrier/administrator shall pay the statements of medical compensation providers to whom the employee has been referred by the authorized treating physician, unless said physician has been requested to obtain authorization for referrals or tests; provided, that compliance with such request does not unreasonably delay the treatment or service to be rendered to the employee.

(5) It is the responsibility of the carrier, self-insured employer, group insured as certified by the North Carolina Department of Insurance, and statutory self-insured (state agency or political subdivision) to submit on a yearly basis a Form 51, Consolidated Fiscal Annual Report of "Medical Only" and "Lost Time" Cases.

(6) Employees shall be entitled to reimbursement for sick travel when the travel is medically necessary and the mileage is 20 or more miles, round trip, at a rate to be established periodically by the Industrial Commission in its Minutes. Employees shall be entitled to lodging and meal expenses, at a rate to be periodically established by the Industrial Commission in its Minutes, when it is medically necessary that the employee stay overnight at a location away from the employee's usual place of residence. An employee shall be entitled to reimbursement for the costs of parking or a vehicle for hire, when the costs are medically necessary, at the actual costs of the expenses, unless the Industrial Commission determines the expenses were not reasonable.

(7) Any employer/carrier/administrator denying a claim in which medical care has previously been authorized shall be responsible for all costs incurred prior to the date notice of denial is provided to each health care provider to whom authorization has been previously given.

CASE NOTES

Attorney's Fees. — Although a trial court had authority under G.S. 97-88.1, 97-90(c), 97-91, and Workers' Comp. R. N.C. Indus. Comm'n 407(1), 2003 Ann. R. N.C. 829 to award attorneys' fees based on the amount of a worker's medical compensation, the trial court could not reduce the amount of compensation paid to the medical providers in order to fund the fee award. Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

Rule 408. Additional medical compensation.

(1) The Industrial Commission may enter an order as contemplated by N.C. Gen. Stat. § 97-25.1 providing for additional medical compensation on its own motion or pursuant to a stipulation of the parties or by approval of an agreement of the parties for additional medical compensation reflected in a Form 21 or a Form 26.

(2) If the parties have not reached an agreement regarding additional medical compensation, an employee may file a claim with the Industrial Commission for an order pursuant to the terms of N.C. Gen. Stat. § 97-25.1, for payment of additional medical compensation within two years of the date of the last payment of medical or indemnity compensation, whichever shall last occur. The claim may be made on a Form 18M or by written request to the Industrial Commission. The filing of this claim tolls the time limit contained in this paragraph and in N.C. Gen. Stat. § 97-25.1. The original and one copy of the claim must be filed with the Industrial Commission's Office of the Executive Secretary, one copy must be provided to the employer or carrier/administrator, and one copy must be provided to the attorney of record, if any.

(3) Upon receipt of the claim, the Industrial Commission will notify the employer or carrier/administrator that the claim has been received by providing a copy of a Form 18M or a written claim. The employer or carrier/administrator shall, within 30 days, send to the Industrial Commission and to the employee and the employee's attorney of record, if any, a written statement as to whether the employee's request is accepted or denied. If the request is denied, the employer or carrier/administrator shall state in writing the grounds for the denial and shall attach any supporting documentation to the statement of denial.

(4) In cases where the employee's right to additional medical compensation is contested, the Form 18M, Request for Additional Medical Compensation, shall be

treated as a Motion to the Executive Secretary for future medical compensation. Defendants shall have 30 days to respond. An administrative ruling shall thereafter be made subject to the right of either party to appeal such administrative decision by filing a Form 33, Request for Hearing, pursuant to the 15 day time limitation contained in Rule 703. An appeal of the Administrative Decision shall have the effect of staying the decision, provided that the stay may be dissolved in the discretion of the Commission for good cause shown.

(5) This Rule applies to injuries by accident occurring on or after July 5, 1994.

Rule 409. Claims for death benefits.

(1) Report of Fatalities

(a) Any person claiming entitlement to death benefits under the Act shall give written notice to the employer of the occurrence of death allegedly arising out of and in the course of employment in accordance with N.C. Gen. Stat. § 97-22.

(b) An employer shall notify the Commission of the occurrence of a death resulting from an injury or occupational disease allegedly arising out of and in the course of employment by timely filing a Form 19 within five days of knowledge thereof. In addition, an employer or carrier/administrator shall file with the Industrial Commission a Form 29, "Supplementary Report for Fatal Accidents," within 45 days of knowledge of a death or allegation of death resulting from an injury or occupational disease arising out of and in the course of employment.

(2) Identifying Beneficiaries

(a) An employer or carrier/administrator shall make a good faith effort to discover the names and addresses of decedent's beneficiaries under N.C. Gen. Stat. § 97-38 and identify them on the Form 29.

(b) In all cases involving minors or incompetents who are potential beneficiaries, a guardian *ad litem* shall be appointed pursuant to Rule 604.

(c) If an issue exists as to whether a person is a beneficiary under N.C. Gen. Stat. § 97-38, the employer or carrier/administrator and/or any person asserting a claim for benefits may file a Form 33 Request for Hearing for a determination by a Deputy Commissioner.

(3) Liability Accepted by Employer

(a) If the employer or carrier/administrator accepts liability for a claim involving an employee's death and there are no apparent issues necessitating a hearing for determination of beneficiaries and/or their respective rights, the parties shall submit an Agreement for Compensation for Death executed by all interested parties or their representatives on Industrial Commission Form 30. All agreements must be submitted to the Industrial Commission on a Form 30 as set forth in Rule 501(4), (5) and (6).

(b) Said agreement shall be submitted along with all relevant supporting documents, including death certificate of the employee, any relevant marriage certificate and birth certificates for any dependents.

(4) Liability Denied by Employer

(a) If the employer or carrier/administrator denies liability for a claim involving an employee's death, the employer or carrier/administrator shall send a letter of denial to all potential beneficiaries, their attorneys of record, if any, all heath care providers that have submitted bills to the employer or carrier/administrator, and the Industrial Commission. The denial letter shall specifically state the reasons for the denial and shall further advise of a right to hearing.

(b) Any potential beneficiary or the employer or carrier/administrator may request a hearing as provided in Rule 602.

(5) Payment of Death Benefits

(a) Upon approval of the Industrial Commission of a Form 30, Agreement for Compensation for Death, or the issuance of a final order of the Industrial Commission directing payment of death benefits pursuant to N.C. Gen. Stat. § 97-38, payment may be made by the employer or carrier/administrator directly to the beneficiaries, with the following exceptions: (1) any applicable award of attorney fees shall be paid directly to the attorney; and (2) benefits due to a minor or incompetent.

(b)(i) Subject to the discretion of the Industrial Commission, any benefits due to a minor pursuant to N.C. Gen. Stat. § 97-38 may be paid directly to the parent as natural guardian of the minor for the use and benefit of the minor if the minor remains in the physical custody of the parent as natural guardian. If the minor is not in the physical custody of the parent as natural guardian, the Industrial Commission may order that payment be made through some other proper person appointed by a court of competent jurisdiction.

(ii) In order to protect the interests of an incompetent beneficiary, the Industrial Commission in its discretion may order that benefits be paid to the beneficiary's duly appointed guardian for the beneficiary's exclusive use and benefit, or to the Clerk of Court in the county in which he resides for the beneficiary's exclusive use and benefit as determined by the Clerk of Court.

(iii) Upon a change in circumstances, any interested party may request that the Industrial Commission amend the terms of any award with respect to a minor or incompetent to direct payment to another party on behalf of the minor or incompetent. When a beneficiary reaches the age of 18, any remaining benefits shall be paid directly to the beneficiary.

(c) In the case of commuted benefits, only those sums which have not accrued at the time of the entry of the Order are subject to commutation.

(6) Procedure for Award of Death Benefits Based on Stipulated Facts

(a) Where the parties seek a written opinion and award from the Commission regarding the payment of death benefits in uncontested cases in lieu of presenting testimony at a hearing before a Deputy Commissioner, the parties may make application to the Commission for a written opinion by filing a written request with the Dockets Director.

(b) The parties shall file the following information by joint stipulation, affidavit or certified document:

a. a stipulation regarding all jurisdictional matters;

b. the decedent's name, social security number, employer, insurance carrier or servicing agent, and the date of the injury giving rise to this claim;

c. a Form 22 or stipulation as to average weekly wage;

d. any affidavits regarding dependents;

e. the death certificate;

f. I.C. Form 29;

g. Guardian *ad Litem* forms, if any beneficiary is a minor or incompetent;

h. proof of beneficiary status, such as marriage license, birth certificate, or divorce decree;

i. medical records, if any;

j. a statement of payment of medical expenses incurred, if any; and

k. a funeral bill or stipulation as to payment of the funeral benefit.

(c) Upon receipt of said information and notice to potential beneficiaries, the Deputy Commissioner shall render a written Opinion and Award.

(7) Any attorney seeking fees for the representation of an uncontested claim shall file an affidavit or itemized statement in support of an award of attorney's fees.

ARTICLE V. AGREEMENTS

Rule 501. Agreements for payment of compensation.

(1) To facilitate the prompt payment of compensation within the time prescribed in N.C. Gen. Stat. § 97-18, the Industrial Commission will accept memoranda of agreements on Industrial Commission forms.

(2) No agreement for permanent disability will be approved until the material medical and vocational records known to exist in the case have been filed with the Industrial Commission. When requested by the Industrial Commission, the parties shall file any additional documentation necessary to determine whether the employee is receiving the disability compensation to which he or she is entitled and that an employee qualifying for disability compensation under both N.C. Gen. Stat. § 97-29 or § 97-30 and N.C. Gen. Stat. § 97-31 has the benefit of the more favorable remedy.

(3) All memoranda of agreements must be submitted to the Industrial Commission in triplicate on Industrial Commission forms, as specified in paragraph (6) below. Agreements in proper form and conforming to the provisions of the Workers' Compensation Act will be approved by the Industrial Commission and a copy returned to the employer or carrier/administrator and a copy sent to the employee, unless amended by award, in which event a copy of the award will be returned with the agreement.

(4) The employer or carrier/administrator, or the attorney of record, if any, shall provide the employee and the employee's attorney of record, if any, a copy of a Form 21,

Form 26, Form 26D, and Form 30 when the employee signs said forms, and the employer or carrier/administrator will send a copy of a Form 28B to the employee and the employee's attorney of record, if any, within 16 days after the last payment of compensation for either temporary or permanent disability, pursuant to N.C. Gen. Stat. § 97-18.

(5) All memoranda of agreements for cases which are currently calendared for hearing before a Commissioner or Deputy Commissioner shall be sent directly to that Commissioner or Deputy Commissioner. Before a case is calendared, or once a case has been continued, or removed, or after the filing of an Opinion and Award, all memoranda of agreements shall be directed to the Claims Section of the Industrial Commission.

(6) After the employer or carrier/administrator has received a memorandum of agreement which has been signed by the employee and employee's attorney of record, if any, it shall have 20 days within which to submit the memorandum of agreement to the Industrial Commission for review and approval or within which to show good cause for not submitting the memorandum of agreement signed only by the employee; provided, however, that for good cause shown the 20 day period may be extended.

CASE NOTES

Cited in Crouse v. Flowers Baking Co., 123 N.C. App. 555, 473 S.E.2d 372 (1996); Atkins v. Kelly Springfield Tire Co., 154 N.C. App. 512, 571 S.E.2d 865, 2002 N.C. App. LEXIS 1443 (2002), cert. granted, 357 N.C. 61, 579 S.E.2d 284 (2003) (decided prior to 2005 amendment to this section).

Rule 502. Compromise settlement agreements.

(1) All compromise settlement agreements must be submitted to the Industrial Commission for approval. Only those agreements deemed fair and just and in the best interest of all parties will be approved.

(2) No compromise agreement will be approved unless it contains the following language or its equivalent:

(a) Where liability is admitted, that the employer or carrier/administrator undertakes to pay all medical expenses to the date of the agreement.

(b) Where liability is denied, that the employer or carrier/administrator undertakes to pay all unpaid medical expenses to the date of the agreement. However, this requirement may be waived in the discretion of the Industrial Commission. When submitting an agreement for approval, the employee or employee's attorney, if any, shall advise the Commission in writing of the amount of the unpaid medical expenses.

(c) That the employee knowingly and intentionally waives the right to further benefits under the Workers' Compensation Act for the injury which is the subject of this agreement.

(d) That the employer or carrier/administrator will pay all costs incurred.

(e) That no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released.

(f) That the employee has, or has not, returned to a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease.

(g) Where the employee has not returned to a job or position at the same or a greater wage as was being earned prior to the injury or occupational disease, that the employee has, or has not, returned to some other job or position, and, if so, the description of the particular job or position, the name of the employer and the average weekly wage earned. This subsection of the Rule shall not apply where the employee is represented by counsel or, even if the employee is not represented by counsel, where the employee certifies that partial wage loss due to an injury or occupational disease is not being claimed.

(h) Where the employee has not returned to a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease, the agreement shall summarize the employee's age, educational level, past vocational training, past work experience, and any impairment, emotional, mental or physical, which predates the current injury or occupational disease. The parties will be relieved of this duty only upon a showing that providing such information creates an unreasonable burden upon them. This subsection of the Rule shall not apply where employee is represented by counsel or, even if the employee is not represented by counsel, where the employee certifies that total wage loss due to an injury or occupational disease is not being claimed.

(3) No compromise agreement will be considered unless the following additional requirements are met:

(a) The material medical, vocational, and rehabilitation reports known to exist, including but not limited to those pertinent to the employee's future earning capacity, must be submitted with the agreement to the Industrial Commission by the employer, the carrier/administrator, or the attorney for the employer.

(b) The parties and all attorneys of record must have signed the agreement.

(c) The settlement agreement must contain a list of all of the known medical expenses of the employee related to the injury to the date of the settlement agreement, including medical expenses that the employer or insurance carrier disputes, when the employer or carrier has not agreed to pay all medical expenses of the employee related to the injury up to the date of the settlement agreement.

(d) If there are unpaid medical expenses which the employer or insurance carrier agree to pay under the settlement agreement, the agreement must contain a list of these unpaid medical expenses, if known, that will be paid by the employer or insurance carrier.

(e) The settlement agreement must contain a finding that the positions of the parties to the agreement are reasonable as to the payment of medical expenses.

(4) When a settlement has been reached, the written agreement must be submitted to the Industrial Commission within a reasonable time. All compromise settlement agreements which are currently calendared for hearing before a Commissioner or Deputy Commissioner shall be sent directly to that Commissioner or Deputy Commissioner at the Industrial Commission. Before a case is calendared, or once a case has been continued, or removed, or after the filing of an Opinion and Award, all compromise settlement agreements shall be directed to the Executive Secretary of the Industrial Commission.

(5) Once a compromise settlement agreement has been approved by the Industrial Commission, the employer or carrier/administrator shall furnish an executed copy of said agreement to the employee or his attorney of record, if any.

(6) An attorney seeking fees in connection with a Compromise Settlement Agreement shall submit to the Commission a copy of the fee agreement with the client.

CASE NOTES

Finalizing Settlement Agreement. — Signed memorandum of settlement fully complied with the workers' compensation rules, and was a valid compromise settlement agreement subject to approval by the Industrial Commission, even though the worker had changed his mind after reaching the agreement at a settlement conference and had not signed a clincher agreement. Lemly v. Colvard Oil Co., 157 N.C. App. 99, 577 S.E.2d 712, 2003 N.C. App. LEXIS 372 (2003).

Under the sequence of Workers' Comp. R. N.C. Indus. Comm'n art. X, R. 502(1) and N.C. Mediated Settlement & Neutral Evaluation Conferences, N.C. Indus. Comm'n R. 4(d), in the settlement of a workers' compensation claim against a county, the preaudit certificate required under G.S. 159-28, certifying that a county has unencumbered funds with which to pay an obligation, will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the North Carolina Industrial Commission, so an otherwise valid memorandum of agreement settling such a claim is not rendered void by the fact that it does not bear a pre-audit certificate, and an agreement to prepare a formalized settlement compromise agreement for the Industrial Commission's consideration does not require a preaudit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement. Lee v. Wake County, 165 N.C. App. 154, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, 607 S.E.2d 275 (2004).

Findings of Fact and Conclusions of Law on Remand. — North Carolina Industrial Commission did not err by vacating an order approving a settlement agreement on remand and then awarding full disability benefits effective to the date of the approval of the settlement agreement, without making findings of fact or conclusions of law to support the award, as the commission's conclusions of law were merely a formalization of the appellate court's conclusions of law so that independent fact-finding and conclusions of law were inappropriate. Smythe v. Waffle House, — N.C. App. —, 643 S.E.2d 407, 2007 N.C. App. LEXIS 807 (2007).

Employee's Unpaid Medical Expenses. — Where an injured employee and his employer entered into a clincher agreement to settle the employee's claim after the employee was injured on the job and the employee then sought payment of additional out-of-pocket expenses after the agreement was signed, the employee was not entitled to reimbursement for his unreimbursed out-of-pocket medical expenses. Stevenson v. Noel Williams Masonry, Inc., 148 N.C. App. 90, 557 S.E.2d 554, 2001 N.C. App. LEXIS 1268 (2001).

Where an employee suffered a back injury and entered into a compromise settlement agreement with an insurance carrier, the North Carolina Industrial Commission erred by not setting aside the agreement for failure to comply with Workers' Comp. R. N.C. Indus. Comm'n art. V, R. 502(2)(h), because: (1) the employee had not returned to work and was unrepresented; (2) the agreement did not contain the required biographical and vocational information; and (3) the special deputy commissioner did not verify with the employee the information contained in defense counsel's memo before approving the agreement. Kyle v. Holston Group, — N.C. App. —, 656 S.E.2d 667, 2008 N.C. App. LEXIS 282 (2008).

Quoted in Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474, 2001 N.C. App. LEXIS 271 (2001).

Rule 503. Approval of agreement constitutes award.

An agreement for the payment of compensation approved by the Industrial Commission shall thereupon become an award of the Industrial Commission and shall be a part of the record in any further proceedings in the matter.

CASE NOTES

Cited in Atkins v. Kelly Springfield Tire Co., 154 N.C. App. 512, 571 S.E.2d 865, 2002 N.C. App. LEXIS 1443 (2002), cert. granted, 357 N.C. 61, 579 S.E.2d 284 (2003) (decided prior to 2005 amendment to this section); Smythe v. Waffle House, — N.C. App. —, 643 S.E.2d 407, 2007 N.C. App. LEXIS 807 (2007).

ARTICLE VI. CONTESTED CASES

Rule 601. Employer obligations upon notice, sanctions, and denial of liability.

1. The employer or its insurance carrier shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation as provided in N.C. Gen. Stat. § 97-18(b), (c), or (d).

2. When an employee files a claim for compensation with the Commission, the Commission may order reasonable sanctions against the employer or its insurance carrier which does not, within 30 days following notice from the Commission of the filing of the claim, or 90 days when a disease is alleged to be from exposure to chemicals, fumes, or other materials or substances in the workplace, or within such reasonable additional time as the Commission may allow, do one of the following:

(1) Notify the Commission and the employee in writing that it is admitting the employee's right to compensation and, if applicable, satisfy the requirements for payment of compensation under N.C. Gen. Stat § 97-18(b).

(2) Notify the Commission and the employee that it denies the employee's right to compensation consistent with N.C. Gen. Stat § 97-18(c).

(3) Initiate payments without prejudice and without liability and satisfy the requirements of N.C. Gen. Stat § 97-18(d).

For purposes of this Rule, reasonable sanctions shall not prohibit the employer or its insurance carrier from contesting the compensability of and its liability for the claim. Requests for extensions of time to comply with this rule may be addressed to the Executive Secretary.

3. If the employer or insurance carrier denies liability in any case, a detailed statement of the basis of denial must be set forth in a letter of denial or Form 61, which shall be sent to the plaintiff or his attorney of record, if any, all known health care providers which have submitted bills to the employer/carrier, and the Industrial Commission.

The detailed statement of the basis of denial shall set forth a statement of the facts, as alleged by the employer, concerning the injury or any other matter in dispute; a statement identifying the source, by name or date and type of document, of the facts alleged by the employer; and a statement explaining why the facts, as alleged by the employer, do not entitle the employee to workers' compensation benefits.

CASE NOTES

Burden of Proof. — Workers' Comp. R. N.C. Indus. Comm'n art. VI, R. 601 was properly enacted under G.S. 97-80, was presumed valid, and did not shift the burden of proof to the employer by requiring it to come forward with any evidence to rebut an employee's claim. D'Aquisto v. Mission St. Joseph's

Health Sys., 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005), rev'd on other grounds, review improvidently denied, in part, 360 N.C. 567, 633 S.E.2d 89 (2006).

Rule 602. Request for hearing.

Contested claims shall be set on the hearing docket only upon the written request of one of the parties, unless the Industrial Commission orders on its own motion, a hearing or rehearing of the case in dispute. The request for hearing shall contain the following:

(1) The basis of the disagreement between the parties, including a statement of the specific issues raised by the requesting party.

(2) The date of the injury.

(3) The part of the body injured.

(4) The city and county where the injury occurred.

(5) The names and addresses of all doctors and other expert witnesses whose testimony is needed by the requesting party.

(6) The names of all lay witnesses to be called to testify for the requesting party.

(7) An estimate of the time required for the hearing of the case.

(8) The telephone number(s) and address(es) of the party(ies) requesting the hearing.

A Form 33, Request for Hearing, completed in full, shall constitute compliance with this Rule. A copy of the Request for Hearing shall be forwarded to the self-insured employer or insurance carrier if not represented, or to the defendant's attorney, if one has been retained.

Rule 603. Response to request for hearing.

No later than 45 days from receipt of the Request for Hearing, the self-insured employer, insurance carrier, or counsel for the defendant(s) shall file with the Industrial Commission a response to the Request for Hearing.

This response shall contain the following:

(1) The basis of the disagreement between the parties, including a statement of the specific issues raised by the plaintiff which are conceded and the specific issues raised by the plaintiff which are denied.

(2) The date of the injury, if it is contended to be different than that alleged by the plaintiff.

(3) The part of the body injured, if it is contended to be different than that alleged by the plaintiff.

(4) The city and county where the injury occurred, if they are contented to be different than that alleged by the plaintiff.

(5) The names and addresses of all doctors and other expert witnesses whose testimony is needed by the defendant(s).

(6) The names of all lay witnesses known by the defendant(s) whose testimony is to be taken.

(7) An estimate of the time required for the hearing of the case.

(8) The telephone number(s) and address(es) of the party(ies) responding to the Request for Hearing.

Utilization of a Form 33R, Response to Request for Hearing, which is completed in full, shall be the sole means of compliance with this Rule. A copy of the Response to Request for Hearing shall be forwarded to all opposing parties or their attorneys, if such have been retained. In the event of a request for hearing by a defendant, the employee shall not be required to respond. Extensions of time within which to file a response shall be granted for good cause shown.

Rule 604. Appointment of guardian *ad litem.*

(1) In all cases where it is proposed that minors or incompetents shall sue by their guardian *ad litem,* the Industrial Commission shall appoint such guardian *ad litem* upon the written application of a reputable person closely connected with such minor or incompetent; but if such person will not apply, then, upon the application of some reputable citizen; and the Industrial Commission shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

(2) In no event, however, shall any compensation be paid directly to the guardian *ad litem.* Rather, compensation payable to a minor or incompetent shall be paid as

provided in N.C. Gen. Stat. § 97-48 and N.C. Gen. Stat. § 97-49. The use of the word "guardian" in N.C. Gen. Stat. § 97-49 does not mean a guardian *ad litem*.

Rule 605. Discovery.

In addition to depositions and production of books and records provided for in N.C. Gen. Stat. § 97-80, parties may obtain discovery by the use of interrogatories as follows:

(1) Any party may serve upon any other parties written interrogatories, up to 30 in number, including subparts thereof, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available from the party interrogated.

Interrogatories may, without leave of the Industrial Commission, be served upon any party after the filing of a Form 18, Form 18B, or Form 33, or after approval of Form 21.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them and the objections signed by the party making them. The party on whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after service of the interrogatories. The parties may stipulate to an extension of time to respond to the interrogatories. A motion to extend the time to respond shall represent that an attempt to reach agreement with the opposing party to informally extend the time for response has been unsuccessful and the opposing parties' position or that there has been a reasonable attempt to contact the opposing party to ascertain its position.

If there is an objection to or other failure to answer an interrogatory, the party submitting the interrogatories may move the Industrial Commission for an order compelling answer. If the Industrial Commission orders answer to an interrogatory within a time certain and no answer is made or the objection is still lodged, the Industrial Commission may issue an order with appropriate sanctions, including but not limited to the sanctions specified in Rule 37 of the North Carolina Rules of Civil Procedure.

(2) Interrogatories may relate to matters which are not privileged which are relevant to an issue presently in dispute or which the requesting party reasonable believes may later be disputed. Signature of a party or attorney serving interrogatories constitutes a certificate by such person that he or she has personally read each of the interrogatories, that no such interrogatory will oppress a party or cause any unnecessary expense or delay, that the information requested is not known or equally available to the requesting party and that the interrogatory relates to an issue presently in dispute or which the requesting party reasonably believes may later be in dispute. A party may serve an interrogatory, however, to obtain verification of facts relating to an issue presently in dispute. Answers to interrogatories may be used to the extent permitted by the rules of evidence.

(3) Additional methods of discovery as provided by the North Carolina Rules of Civil Procedure may be used only upon motion and approval by the Industrial Commission or by agreement of the parties.

(4) Notices of depositions, discovery requests and responses pertinent to a pending motion, responses to discovery following a motion or order to compel, and post-hearing discovery requests and responses shall be filed with the Commission, as well as served on the opposing party. Otherwise, discovery requests and responses, including interrogatories and requests for production of documents, shall not be filed with the Commission.

(5) Sanctions may be imposed under this Rule for failure to comply with a Commission order compelling discovery. A motion by a party or its attorney to compel discovery under this Rule and Rule 607 shall represent that informal means of resolving the discovery dispute have been attempted in good faith and state briefly the opposing parties' position or that there has been a reasonable attempt to contact the opposing party and ascertain its position.

CASE NOTES

Discovery Sanction Proper. — G.S. 97-80(a) gave the North Carolina Industrial Commission the power to make rules consistent with the Workers' Compensation Act for carrying out its provisions, Workers' Comp. R. N.C. Indus. Comm'n 605(1), provided that the commission was allowed to order discovery and impose discovery sanctions, and Workers' Comp. R. N.C. Indus. Comm'n 802 provided that "failure to comply" with the Workers' Compensation Rules may have subjected the violator to any of the sanctions outlined in G.S. 1A-1, N.C. R. Civ. P. 37; a discovery sanction which struck the employer's defenses was proper and was affirmed where the sanction was imposed three and a half months after the employer had been ordered to respond to the interrogatories and was warned that his refusal to answer may have resulted in sanctions. Joyner v. Mabrey Smith Motor Co., 161 N.C. App. 125, 587 S.E.2d 451, 2003 N.C. App. LEXIS 1994 (2003).

Rule 606. Discovery — Post hearing.

Discovery may not be conducted after the initial hearing on the merits of a case unless allowed by order of a Commissioner or Deputy Commissioner.

Rule 607. Discovery of records and reports.

Upon written request, any party shall furnish, without cost, the requesting party a copy of any and all medical, vocational and rehabilitation reports, employment records, Industrial Commission forms, and written communications with medical providers in its possession, within 30 days of the request, unless objection is made within that time period. This obligation exists whether or not a request for hearing has been filed. This obligation is a continuing one, and any such reports and records which come into the possession of a party after receipt of a request pursuant to this Rule shall be provided to the requesting party within 15 days from its receipt of these reports and records.

Upon receipt of a request, an insurer or administrator for an employer's workers' compensation program shall inquire of the employer concerning the existence of records encompassed by the request.

Rule 608. Statement about incident leading to claim.

(1) At the outset of taking a statement, the employer or his agent shall advise the employee that the statement is being taken to be used in part to determine whether the claim will be paid or denied. Any plaintiff who gives his employer, or its carrier, or any agent either a written or recorded statement of the facts and circumstances surrounding his injury shall be furnished a copy of such statement within 45 days after request. Further, any plaintiff who shall give a written or recorded statement of the facts and circumstances surrounding his injury shall, without request, be furnished a copy no less than 45 days from the filing of a Form 33 Request for Hearing. Such copy shall be furnished at the expense of the person, firm or corporation at whose direction the statement was taken.

(2) If any person, firm or corporation fails to comply with this rule, then an order may be entered by a Commissioner or Deputy Commissioner prohibiting that person, firm or corporation, or its representative, from introducing the statement into evidence or using any part of it.

Rule 609. Motions practice in contested cases.

(1) Motions brought before the Commission shall be addressed as follows:

(a) All motions in cases which are currently calendared for hearing before the Full Commission or Deputy Commissioner shall be sent directly to the Chair of the Full Commission panel or Deputy Commissioner before whom the case is pending.

(b) Motions filed before a case is calendared before a Deputy Commissioner, or once a case has been continued, or removed from a Deputy Commissioner calendar, or after the filing of an Opinion and Award when the time for taking appeal has run, shall be directed to the Executive Secretary of the Industrial Commission. Motions to reconsider or amend an Opinion and Award, made prior to giving notice of appeal to the Full Commission, shall be directed to the Deputy Commissioner who authored the Opinion and Award.

(c) Motions filed after notice of appeal to the Full Commission has been given but prior to the calendaring of the case shall be directed to the Chair of the Industrial Commission.

(d) If a case has been continued from the Full Commission hearing docket, motions shall be directed to the Chair of the panel of Commissioners who ordered the continuance.

(e) Motions filed after the filing of an Opinion and Award by the Full Commission but prior to giving notice of appeal to the Court of Appeals shall be directed to the Commissioner who authored the Opinion and Award.

(2) A motion shall state with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party's position, if known. Service shall be made on all opposing attorneys of record, or on all opposing parties, if not represented.

(3) Motions to continue or remove a case from the hearing calendar on which the case is set must be made well in advance of the scheduled hearing and may be made in written or oral form. In all cases the moving party must provide just cause for the motion and state that the other parties have been advised of the motion and relate the position, if known, of the other parties regarding the motion. Oral motions must be followed with a written confirmation from the moving party.

(4) The responding party to a motion shall have 10 days after a motion is served during which to file and serve copies of response in opposition to the motion. The Industrial Commission may shorten or extend the time for responding to any motion.

(5) Notwithstanding the provisions of paragraph (4) above, a motion may be acted upon at any time by the Commission, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken and who is adversely affected by the action may request that it be reconsidered, vacated, or modified. Motions will be determined without oral argument, unless the Industrial Commission orders otherwise.

(6) In all cases where correspondence relative to a case before the Industrial Commission is sent to the Industrial Commission, copies of such correspondence shall be contemporaneously sent by the same method of transmission to the opposing party or, if represented, to opposing counsel. Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case, or to cast the opposing party or counsel in a bad light, with the exception of the following instances:

(a) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the Commission's instructions;

(b) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;

(c) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

(d) Any other communication permitted by law or the rules or procedures of the Commission.

At no time may written communications, whether addressed directly to the Commission or copied to the Commission, be used as an opportunity to cast the opposing party or counsel in a bad light.

(7) All motions made before the Industrial Commission must include a proposed Order to be considered by the Industrial Commission.

(8) Except as otherwise expressly provided by statute, rule, or by order of the Commission, in computing any period of time prescribed or allowed by the Commission's Rules, by order of the Commission, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of any document, three days shall be added to the prescribed period.

CASE NOTES

Panel of the North Carolina Industrial Commission Which Heard An Employer's Appeal. — from a decision by a deputy commissioner which awarded workers' compensation benefits to an employee was not barred from finding that the appeal was untimely because the chairman of the Commission had denied the employee's motion to dismiss the appeal. Cornell v. Western & Southern Life Ins. Co., 162 N.C. App. 106, 590 S.E.2d 294, 2004 N.C. App. LEXIS 4 (2004).

Stated in Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474, 2001 N.C. App. LEXIS 271 (2001)

Rule 610. Pre-trial conference and Pre-trial order.

(1) A Commissioner or Deputy Commissioner may order the parties to appear at a pre-trial conference to determine specific matters. This conference may be conducted at such place and by such method as the Commissioner or Deputy Commissioner deems appropriate, including conference telephone calls.

(2) Any party may request a pre-trial conference when that party deems that such a conference would aid in settling the case or resolving some issues prior to trial. Requests for such pre-trial conferences shall be directed to the Deputy Commissioner before whom the claim has been calendared, or to the Team Coordinator for the geographical area, if any.

(3) A Commissioner or a Deputy Commissioner may issue a Pre-Trial Order requiring the parties to submit a Pre-trial Agreement. The parties shall have 15 days following the hearing within which to schedule the taking of medical depositions unless otherwise extended by the Commission. Such Agreement shall be prepared in a form which substantially complies with the Order on Final Pre-Trial Conference adopted in the North Carolina Rules of Practice for the Superior and District Courts. Should the parties fail to comply with a Pre-Trial Order, the Commissioner or Deputy Commissioner may remove the case from the hearing docket. Should the parties thereafter comply with the Pre-Trial Order after the removal of the case, the Pre-Trial Agreement must be directed to the Commissioner or Deputy Commissioner who removed the case from the docket; and the Commissioner or Deputy Commissioner will order the case returned to the hearing docket as if a Request for Hearing had been filed on the date of the Order to return the case to the hearing docket. No new Form 33 Request for Hearing is required.

Rule 611. Hearings before the Industrial Commission.

(1) The Industrial Commission may on its own motion order a hearing or rehearing of any case in dispute.

(2) The Industrial Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Industrial Commission, and conducive to an early and just resolution of disputed issues.

(3) In setting contested cases for hearing, cases in which the payment of workers' compensation benefits is at issue shall take precedence over those cases in which the payment of workers' compensation benefits is not at issue.

(4) The Industrial Commission will give reasonable notice of hearings in every case. Postponement or continuance of a duly scheduled hearing will rest entirely in the discretion of a Commissioner or Deputy Commissioner. Where a party has not notified the Industrial Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party shall constitute notice to the party's attorney.

(5) The only parts of the Industrial Commission file in a contested case which are a part of the record on which a decision will be rendered are prior Opinion and Awards, form agreements, awards, and orders by the Industrial Commission; provided, however, that if provisions of the Workers' Compensation Act designate other documents as part of the record, such documents shall also be a part of the record. Any other documents which the parties wish to have included in the record must be introduced and received into evidence.

(6) Hearing costs shall be assessed in each case set for hearing, including those cases which are settled after being calendared and notices mailed, and shall be payable upon receipt of a statement from the Industrial Commission.

(7) In the event of inclement weather or natural disaster, hearings shall be cancelled if the proceedings in the General Court of Justice in the county in which the hearings are set are cancelled.

Rule 612. Depositions and additional hearings.

(1) When additional testimony is necessary to the disposition of a case, a Commissioner or Deputy Commissioner may order the deposition of witnesses to be taken on or before a day certain not to exceed 60 days from the date of the ruling; provided, the time allowed may be enlarged for good cause shown. The costs of such depositions shall be borne by defendants for those medical witnesses who examined plaintiff at defendants' expense, in those instances in which defendants are requesting the depositions, and in any other case which, in the discretion of the Commissioner or Deputy Commissioner, it is deemed appropriate.

(2) In cases where a party, or an attorney for either party, refuses to stipulate medical reports and the case must be reset or depositions ordered for testimony of medical witnesses, a Commissioner or Deputy Commissioner may in his discretion assess the costs of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation.

(3) Except under unusual circumstances, all lay evidence must be offered at the initial hearing. Lay evidence can only be offered after the initial hearing by order of a Commissioner or Deputy Commissioner. The costs of obtaining lay testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission.

CASE NOTES

In General. — Attorney's fees were appropriately assessed against injured employee's counsel who initially refused to stipulate as to a physician's permanent impairment rating but then decided to stipulate to the physician's amended impairment rating and through error failed to timely notify the insurance company's attorney of his change in position before a deposition of the physician had occurred. Hawley v. Wayne Dale Constr., 146 N.C. App. 423, 552 S.E.2d 269, 2001 N.C. App. LEXIS 944 (2001).

Applied in Gregory v. W.A. Brown & Sons, — N.C. App. —, — S.E.2d —, 2008 N.C. App. LEXIS 1543 (Aug. 19, 2008). .

CASE NOTES

Cited in Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

Rule 613. Dismissals and removals.

1. Dismissals

(a) No claim filed under the Workers' Compensation Act shall be dismissed without prejudice at plaintiff's instance except upon order of the Industrial Commission and upon such terms and conditions as justice requires; provided, however, that no voluntary dismissal shall be granted after the record in a case is closed.

(b) Unless otherwise ordered by the Industrial Commission, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal to refile his claim.

(c) Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission.

2. Removals

(a) A claim may be removed from the hearing docket by motion of the party requesting the hearing or by the Industrial Commission upon its own motion.

(b) A removed case may be reinstated by motion of either party; provided that cases wherein the issues have materially changed since the Order of Removal or where the motion to reinstate is filed more than one year after the Order of Removal, a Form 33 Request for Hearing will be required.

(c) When a plaintiff has not requested a hearing within two years of the filing of an Order of Removal requested by the plaintiff or necessitated by the plaintiff's conduct, and not pursued the claim, upon proper notice and an opportunity to be heard, any claim may be dismissed with prejudice by the Industrial Commission on its own motion or by motion of any party.

CASE NOTES

Dismissal Without Notice Improper. — It was improper to dismiss a workers' compensation case unless the affected party was given notice and an opportunity to be heard; a deputy commissioner's sua sponte order dismissing an employee's claim without notice was improper and was reversed. Jackson v. Flambeau Airmold Corp., 165 N.C. App. 875, 599 S.E.2d 919, 2004 N.C. App. LEXIS 1503 (2004).

Dismissals for Failure to Prosecute. — When dismissing a worker's claim with prejudice for his failure to prosecute, under Workers' Comp. R. N.C. Indus. Comm'n 613(1)(c), a deputy commissioner and the North Carolina Industrial Commission had to consider (1) whether the worker acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the employer and insurer caused by the worker's failure to prosecute, and (3) the reason, if one existed, that sanctions short of dismissal would not suffice, and, as neither the deputy commissioner nor the Commission made findings of fact or conclusions of law regarding these factors, their dismissal of the worker's claim was insufficient as a matter of law, and the Commission erred as a matter of law in summarily affirming the deputy commissioner. Lee v. Roses, 162 N.C. App. 129, 590 S.E.2d 404, 2004 N.C. App. LEXIS 14 (2004).

Cited in Harvey v. Cedar Creek BP, 149 N.C. App. 873, 562 S.E.2d 80, 2002 N.C. App. LEXIS 299 (2002).

Rule 614. Attorneys retained for proceedings.

(1) Any attorney who is retained by a party in a proceeding before the Industrial Commission shall immediately file a notice of appearance with the Industrial Commission. A copy of this notice shall be served on all other counsel and on all unrepresented parties. Thereafter, all notices required to be served on a party shall be served upon the attorney. No direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its behalf, without the attorney's permission except as permitted by law or Industrial Commission Rules.

(2) Any attorney who wishes to withdraw from representation in a proceeding before the Industrial Commission shall file with the Industrial Commission, in writing:

(a) A Motion to Withdraw which shall contain a statement of reasons for the request and that the request has been served on the client.

(b) A Motion to Withdraw before an award is made shall state whether the withdrawing attorney requests an attorney fee from the represented party once an award of compensation is made or approved.

(3) An attorney may withdraw from representation only by written order of the Industrial Commission. The issuance of an award of the Industrial Commission does not release an attorney as the attorney of record.

CASE NOTES

Employer's Appeal Dismissed As Untimely. — Panel of the North Carolina Industrial Commission which heard an employer's appeal from a decision by a deputy commissioner which awarded workers' compensation benefits to an employee was not barred from finding that the appeal was untimely because the chairman of the Commission had denied the employee's motion to dismiss the appeal, and the record supported the panel's findings that the appeal was untimely because it was filed more than 15 days after the deputy commissioner faxed his decision to a law firm that represented the employer and that counsel's failure to file the appeal on time should not be excused under the doctrine of excusable neglect. Cornell v. Western & Southern Life Ins. Co., 162 N.C. App. 106, 590 S.E.2d 294, 2004 N.C. App. LEXIS 4 (2004).

Rule 615. Disqualification of a Commissioner or Deputy Commissioner.

In their discretion, Commissioners or Deputy Commissioners may recuse themselves from the hearing of any case before the Industrial Commission. For good cause shown, a majority of the Full Commission may remove a Commissioner or Deputy Commissioner from hearing a case.

Rule 616. Foreign language interpreters.

(1) *Services of Foreign Language Interpreters Required.* When a person who does not speak or understand the English language is called to testify in a hearing, other than in an informal hearing conducted pursuant to N.C. Gen. Stat. § 97-18.1, the person,

whether a party or a witness, shall be assisted by a qualified foreign language interpreter.

(2) *Qualifications of Interpreters.* To qualify as a foreign language interpreter, a person must possess sufficient experience and education, or a combination of experience and education, speaking and understanding English and the foreign language to be interpreted, to qualify as an expert witness pursuant to N.C. Gen. Stat. § 1C-1, Rule 702. A person qualified as an interpreter under this Rule shall not be interested in the claim and must make a declaration under oath or affirmation to interpret accurately, truthfully and without any additions or deletions, all questions propounded to the witness and all responses thereto.

(3) *Notice to Industrial Commission and Opposing Party of Need for Interpreter.* Any party who is unable to speak or understand English, or who intends to call as a witness a person who is unable to speak or understand English, shall so notify the Industrial Commission and the opposing party, in writing, not less than 21 days prior to the date of the hearing. The notice shall state with specificity the language(s) that must be interpreted for the Commission.

(4) *Designation of Interpreter by Employer or Insurer.* Upon receiving or giving the notice required in paragraph (3) of this Rule, the employer or insurer shall retain a qualified, disinterested interpreter, either agreed upon by the parties or approved by the Industrial Commission, to appear at the hearing and interpret the testimony of all persons for whom the notice in paragraph (3) has been given or received.

(5) *Interpreter Fees.* The interpreter's fee shall constitute a cost as contemplated by N.C. Gen. Stat. § 97-80. A qualified interpreter who interprets testimony for the Industrial Commission shall be entitled to payment of the fee agreed upon by the interpreter and employer or insurer that retained the interpreter. Except in cases where a claim for compensation has been prosecuted without reasonable ground, the fee agreed upon by the interpreter and employer or insurer shall be paid by the employer or insurer. Where it is ultimately determined by the Commission that the request for an interpreter was unfounded, attendant costs may be assessed against the movant.

ARTICLE VII. APPEALS

Rule 701. Appeal to the Full Commission.

(1) A letter expressing an intent to appeal shall be considered notice of appeal to the Full Commission within the meaning of N.C. Gen. Stat. § 97-85, provided that it clearly specifies the Order or Opinion and Award from which appeal is taken.

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. The time for filing a notice of appeal from the decision of the Deputy Commissioner under these rules shall be tolled until a timely motion to amend the decision has been ruled upon by the Deputy Commissioner.

(3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

(4) Appellant's Form 44 and brief in support of his grounds for appeal shall be filed in triplicate with the Industrial Commission, with a certificate indicating service on appellee by mail or in person, within 25 days after receipt of the transcript, or receipt of notice that there will be no transcript. Thereafter, appellee shall have 25 days from service of appellant's brief within which to file a reply brief in triplicate with the Industrial Commission, with written statement of service of copy by mail or in person on appellant. When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired. A party who fails to file a

brief will not be allowed oral argument before the Full Commission. If both parties appeal, they shall each file an appellant's and appellee's brief on the schedule set forth herein. The parties may file with the Docket Director a written stipulation to a single extension of time for each party, not to exceed 30 days, if the matter has not been calendared for hearing.

(5) After notice of appeal has been given to the Full Commission, any motions related to the issues before the Full Commission shall be filed in triplicate with the Full Commission, with service on the other parties.

(6) No new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits.

(7) Cases should be cited by North Carolina Reports and, preferably, to Southeastern Reports. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute unworthy acts or motives to opposing counsel.

(8) The Industrial Commission or any one of the parties with permission of the Industrial Commission may waive oral argument before the Full Commission. In the event of such waiver, the Full Commission will file a decision, based on the record, assignments of error and briefs.

(9) A plaintiff appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.

(10) Briefs to the Full Commission shall not exceed 35 pages, excluding attachments. No page limit shall apply to the length of attachments. Briefs shall be prepared entirely using a 12 point font, shall be double spaced, and shall be prepared with non-justified right margins. Each page of the brief shall be numbered at the bottom right of the page. When quoting or paraphrasing testimony or other evidence in the transcript of the evidence, a parenthetic entry in the text, to include the exact page number location within the transcript of the evidence of the information being referenced shall be placed at the end of the sentence citing the information [Example: (T.p.38)]. When quoting or paraphrasing testimony or other evidence in the transcript of a deposition, a parenthetic entry in the text to include the name of the person deposed and exact page number location within the transcript of the deposition of the information being referenced shall be placed at the end of the sentence citing the information. [Example: (Smith p.15)].

CASE NOTES

Change of Condition. — Where evidence of a change of condition, specifically, a substantial change in physical capacity to earn wages, occurring after a final award of compensation, predated the decision of the full Industrial Commission, the employee was precluded from introducing it at a subsequent hearing under G.S. 97-47. Hunt v. N.C. State Univ., 159 N.C. App. 111, 582 S.E.2d 380, 2003 N.C. App. LEXIS 1425 (2003).

Failure to State Grounds for Appeal. — That portion of Workers' Comp. R. N.C. Indus. Comm'n 701, 2005 Ann. R. N.C. 919, 943, which required an appellant to state, with particularity, the grounds for appeal could not have been waived by the Full North Carolina Industrial Commission; a worker's failure to file any document stating her grounds for appeal with particularity resulted in abandonment of her grounds for appeal. Roberts v. Wal-Mart Stores, Inc., 173 N.C. App. 740, 619 S.E.2d 907, 2005 N.C. App. LEXIS 2299 (2005).

Excusing lack of compliance with the requirements of Workers' Comp. R. N.C. Indus. Comm'n 701(2) under the waiver of rules provided in Workers' Comp. R. N.C. Indus. Commn. 801 was erroroneous; although lack of strict compliance was permitted, the claimant had completely failed to comply with any aspect of Workers' Comp. R. N.C. Indus. Comm'n 701(2). Wade v. Carolina Brush Mfg. Co., — N.C. App. —, 652 S.E.2d 713, 2007 N.C. App. LEXIS 2370 (2007).

Industrial Commission is competent to modify conclusion of Deputy Commissioner to which no error was assigned by the plaintiff. Timmons v. North Carolina DOT, 132 N.C. App. 377, 511 S.E.2d 659 (1999), rev'd on other grounds, 351 N.C. 177, 522 S.E.2d 62 (1999).

Workers' Comp. R. N.C. Indus. Comm'n 701 required an employee appealing a disfigurement award to appear before the full industrial commission; by adopting a deputy commissioner's findings, without viewing the employee or having a stipulated description of the employee's disfigurement, the commission failed to base its factual findings on competent evidence. Ray v. Pet Parlor, 169 N.C. App. 236, 609 S.E.2d 256, 2005 N.C. App. LEXIS 517 (2005).

Illustrative Cases. — Since an employee's recovery should be based on his actual loss of wages, the full Industrial Commission erred when it refused to reconsider the amount of the employee's average weekly wages, even though the issue allegedly was not properly preserved, where it was mistakenly stipulated by the parties that the employee's average weekly wage was higher than the amount claimed by the employer in its affidavit. Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

Where the motion of the husband of a murdered employee for attorney fees was denied by the deputy commissioner, the issue of entitlement to attorney fees was preserved, although it was not raised as an assignment of error on appeal to the Industrial Commission from the deputy commissioner's denial of benefits. Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

Cited in Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

Rule 702. Appeal to the court of appeals.

(1) Except as otherwise provided in N.C. Gen. Stat. § 97-86, in every case appealed to the North Carolina Court of Appeals, the Rules of Appellate Procedure shall apply. The running of the time for filing and serving a notice of appeal is tolled as to all parties by a timely motion filed by any party to amend, to make additional findings, or to reconsider the decision, and the full time for appeal commences to run and is to be computed from the entry of an Order upon any of these motions, in accordance with Rule 3 of the Rules of Appellate Procedure.

(2) If the parties cannot agree on the record on appeal, appellant shall furnish the Chair of the Industrial Commission, or his designee, one copy of the proposed record on appeal, objections and/or proposed alternative record on appeal along with a timely request to settle the record on appeal. The hearing to settle the record on appeal shall be held at the offices of the Industrial Commission or by telephone conference.

(3) The amount of the appeal bond shall be set by the Chair, or his designee, and may be waived in accordance with N.C. Gen. Stat. § 97-86.

Rule 702A. Remand from the appellate courts.

When a case is remanded to the Commission from the appellate courts, each party may file a statement with the Full Commission, supported by a brief if appropriate, setting forth its position on the actions or proceedings, including evidentiary hearings or depositions, required to comply with the court's decision. This statement shall be filed within 30 days of the issuance of the court's mandate and shall be filed with the Commissioner who authored the Full Commission decision or the Chairman of the Industrial Commission if the Commissioner who authored the decision is no longer a member of the Industrial Commission.

Rule 703. Review of Administrative Decisions.

(1) Orders, Decisions, and Awards made in a summary manner, without detailed findings of fact, including Decisions on applications to approve agreements to pay compensation and medical bills, applications to approve the termination or suspension of compensation, applications for change in treatment or providers of medical compensation, applications to change the interval of payments, and applications for lump sum payments of compensation may be reviewed by filing a Motion for Reconsideration with the Industrial Commission and addressed to the Administrative Officer who made the Decision or may be appealed by requesting a hearing within 15 days of receipt of the Decision or receipt of the ruling on a Motion to Reconsider. These issues may also be raised and determined at a subsequent hearing.

(2) Motions for Reconsideration shall not stay the effect of the Order, Decision or Award; provided, that the Administrative Officer making the Decision or a Commissioner may enter an Order staying its effect pending the ruling on the Motion for Reconsideration or pending a Decision by a Commissioner or Deputy Commissioner following a formal hearing. In determining whether or not to grant a stay, the Commissioner or Administrative Officer will consider whether granting the stay will frustrate the purposes of the Order, Decision, or Award.

(3) Any review made by requesting a hearing shall be made to the Industrial Commission and filed with the Industrial Commission's Docket Director. The Industrial Commission shall designate a Commissioner or Deputy Commissioner to hear the review. The Commissioner or Deputy Commissioner hearing the matter shall consider all issues *de novo*, and no issue shall be considered moot solely because the Order has been fully executed during the pendency of the hearing.

CASE NOTES

Automatic Stay. — The effect of a deputy commissioner's order to produce documents was not automatically stayed by an appeal from that order. Woody v. Thomasville Upholstery Inc., 146 N.C. App. 187, 552 S.E.2d 202, 2001 N.C. App. LEXIS 857 (2001), cert. denied, 354 N.C. 371, 557 S.E.2d 538 (2001).

Panel of the North Carolina Industrial Commission Which Heard An Employer's Appeal. — from a decision by a deputy commissioner which awarded workers' compensation benefits to an employee was not barred from finding that the appeal was untimely because the chairman of the Commission had denied the employee's motion to dismiss the appeal. Cornell v. Western & Southern Life Ins. Co., 162 N.C. App. 106, 590 S.E.2d 294, 2004 N.C. App. LEXIS 4 (2004).

Quoted in Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474, 2001 N.C. App. LEXIS 271 (2001).

Cited in Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002).

ARTICLE VIII. RULES OF THE COMMISSION

Rule 801. Waiver of the rules.

In the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.

CASE NOTES

Commission's Authority. — The full Industrial Commission had the authority to modify a conclusion of the Deputy Industrial Commissioner, even though the employee did not assign error to that conclusion, where the Commission ordered that the employee was entitled to be provided by the employer with a life care plan, whereas the Deputy had concluded that the employee was not so entitled. Timmons v. North Carolina DOT, 130 N.C. App. 745, 504 S.E.2d 567 (1998), reaff'd on recons., 132 N.C. App. 377, 511 S.E.2d 659 (1999), rev'd on other grounds, 351 N.C. 177, 522 S.E.2d 62 (1999).

Construction with Other Provisions. — The Industrial Commission erred by concluding that excusable neglect existed where plaintiff represented himself before the Deputy Commissioner and was unacquainted with the complexities of the Workers' Compensation Act; furthermore, the Commission did not have the authority, under this rule, to excuse plaintiff from complying with G.S. 97-85 and thus disregard the holdings of the appellate court as to what constituted "excusable neglect." Moore v. City of Raleigh, 135 N.C. App. 332, 520 S.E.2d 133 (1999).

Failure to State Grounds for Appeal Under Rule 701(2). — Excusing lack of compliance with the requirements of Workers' Comp. R. N.C. Indus. Comm'n 701(2) under the waiver of rules provided in Workers' Comp. R. N.C. Indus. Commn. 801 was erroroneous; although lack of strict compliance was permitted, the claimant had completely failed to comply with any aspect of Workers' Comp. R. N.C. Indus. Comm'n 701(2). Wade v. Carolina Brush Mfg. Co., — N.C. App. —, 652 S.E.2d 713, 2007 N.C. App. LEXIS 2370 (2007).

Rule 802. Sanctions.

(1) Upon failure to comply with any of the aforementioned rules, the Industrial Commission may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or his counsel whose conduct necessitates the order.

(2) Failure to timely file forms as required by either these Rules or pursuant to the Act may result in fines or other appropriate sanctions.

CASE NOTES

Discovery Sanction Proper — G.S. 97-80(a) gave the North Carolina Industrial Commission the power to make rules consistent with the Workers' Compensation Act for carrying out its provisions, Workers' Comp. R. N.C. Indus. Comm'n 605(1), provided that the commission was allowed to order discovery and impose discovery sanctions, and Workers' Comp. R. N.C. Indus. Comm'n 802 provided that "failure to comply" with the Workers' Compensation Rules may have subjected the violator to any of the sanctions outlined in G.S. 1A-1, N.C. R. Civ. P. 37; a discovery sanction which struck the employer's defenses was proper and was affirmed where the sanction was imposed three and a half months after the employer had been ordered to respond to the interrogatories and was warned that his refusal to answer may have resulted in sanctions. Joyner v. Mabrey Smith Motor Co., 161 N.C. App. 125, 587 S.E.2d 451, 2003 N.C. App. LEXIS 1994 (2003).

Quoted in Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999); Hawley v. Wayne Dale Constr., 146 N.C. App. 423, 552 S.E.2d 269, 2001 N.C. App. LEXIS 944 (2001).

Rule 803. Procedure for Workers' Compensation Rule making by the Industrial Commission.

Prior to adopting, deleting, or amending any Workers' Compensation Rule of the Industrial Commission which affects the substantive rights of parties, the Industrial Commission will give at least 30 days' notice of the proposed change in rules. Such notice will be given by publishing, in a newspaper or newspapers of general circulation in North Carolina, notice of such proposed change. Such notice will include an invitation to any interested party to submit in writing any objection, suggestion or other comment with respect to the proposed rule change or to appear before the Full Commission at a time and place designated in the notice for the purpose of being heard with respect to the proposed rule change.

ARTICLE IX. REPORT OF EARNINGS

Rule 901. Check endorsement.

If a self-insured employer, carrier or third party administrator places "check endorsement" language on the back of an employee's check, the following language (or similar language approved by the Industrial Commission) shall be used:

> By endorsing this check, I certify that I have not worked for or earned wages from any business or individual during the period covered by this check, or that I have reported any earnings to the employer/carrier paying me workers' compensation benefits. I understand that making a false statement by endorsing this benefit check may result in civil or criminal penalties.

Rule 902. Notice.

A self-insured employer, carrier or third party administrator shall not use check endorsement language on the back of an employee's workers' compensation benefit check unless the employee has been provided the following Notice sent by certified mail return receipt requested:

Notice to Employee Receiving Workers' Compensation Benefits

This NOTICE is intended to advise you of important information you need to know if you are receiving workers' compensation benefits.

Please TAKE NOTICE of the following:

(1) When you are receiving weekly workers' compensation benefits, you must report any earnings you receive to the insurance company (or employer if the employer is self-insured) that is paying you the benefits. "Earnings" include any cash, wages or salary received from self-employment or from any employment other than the employment where you were injured. Earnings also include commissions, bonuses, and the cash value for all payments received in any form other than cash (e.g., a building custodian receiving a rent-free apartment). Commission bonuses, etc., earned before disability but received during the time you are also receiving workers' compensation benefits do not constitute earnings that must be reported.

(2) You must report any work in any business, even if the business lost money or if profits or income were reinvested or paid to others.

(3) Your endorsement on a benefit check or deposit of the check into an account is your statement that you believe that you are entitled to receive workers' compensation benefits. Your signature on a benefit check is a further affirmation that you have made no material false statement or concealed any material fact regarding your right to receive the benefit check.

(4) Making false statements for purpose of obtaining workers' compensation benefits may result in civil and criminal penalties.

Rule 903. Employee's obligation to report earnings.

A self-insured employer, carrier or third party administrator may require the employee to complete a Form 90 Report of Earnings when reasonably necessary but not more than once every six months.

The Form 90 must be sent to the employee by certified mail, return receipt requested, and include a self-addressed stamped envelope for the return of the Form. When the employee is represented by an attorney, the Form 90 shall be sent to the attorney for the employee and not to the employee.

The employee shall complete and return the Form 90 Report of Earnings within 15 days after receipt of a Form 90. If the employee fails to complete and return the Report of Earnings within 30 days of receipt of the Form, the self-insured employer, carrier or third party administrator may seek an Order from the Executive Secretary allowing the suspension of benefits. The self-insured employer, carrier or third party administrator shall not suspend benefits without Commission approval. If the Commission suspends benefits for failure to complete and return a Form 90 Report of Earnings, the self-insured employer, carrier or third party administrator shall immediately reinstate benefits to the employee with back payment as soon as the Report of Earnings is submittted by the employee. If benefits are not immediately reinstated, the employee should submit a written request for an Order from the Executive Secretary instructing the self-insured employer, carrier or third party administrator to reinstate benefits. If the employee's earnings report does not indicate continuing eligibility for partial or total disability compensation, then the self-insured employer, carrier or third party administrator may apply to the Commission to terminate or modify benefits pursuant to Commission procedure, including filing a Form 24, 36 and 33.

FORMS

Form I. Distribution of third party funds with attorney.

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants. NAME, THIRD PARTY TORT-FEASOR.

ORDER DIRECTING DISTRIBUTION OF THIRD PARTY RECOVERY.

FILED:

Application for an order directing distribution of third party funds in this case has been submitted to the Industrial Commission.

APPEARANCES

Plaintiff:

Defendants:

Third Party Tort-Feasor:

* * * * * * * * *

Pursuant to the provisions of N.C. Gen. Stat. § 97-10.2, the third party funds shall be distributed as follows:

1. The sum of $____ shall be paid the workers' compensation carrier in full settlement of its subrogation interest.
2. The sum of $____ shall be paid plaintiff.
3. An attorney fee not to exceed 33⅓ percent of the third party funds shall be deducted from such funds and paid directly to plaintiff's counsel. This fee shall be paid by the parties in proportion to the amount each receives out of the recovery, as by statute provided.
4. The sum of $________, to plaintiff's counsel in reimbursement for litigation expenses and costs, from the shares of the parties in proportion to the amount each receives out of the recovery.

The workers' compensation carrier shall pay the costs due the Industrial Commission.

____

Form IIa. Compromise settlement agreement (admitted liability, medical paid), and distribution of third party funds.

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants. NAME, THIRD PARTY TORT-FEASOR; NAME, THIRD PARTY CARRIER.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT AND DIRECTING DISTRIBUTION OF THIRD PARTY RECOVERY.

FILED:

A compromise settlement agreement and an application for an order directing distribution of third party funds in this case have been submitted to the Industrial Commission.

APPEARANCES

Plaintiff:

Defendants:

Third Party Tort-Feasor:

* * * * * * * *

After giving due consideration to all matters involved in this case, and upon defendants' stated or implied representation that all known medical reports concerning the subject injury have been submitted to the Industrial Commission, per Rule 502(3)(a), the undersigned is of the opinion that the compromise settlement agreement is fair and equitable, probably in the best interest of all parties, and should be APPROVED.

IT IS THEREFORE ORDERED that the third party funds in the amount of $____ be distributed in accordance with N.C. Gen. Stat. § 97-10.2, as follows:

1. The sum of $____, subject to counsel fee, shall be paid the workers' compensation carrier in full settlement of its subrogation interest.
2. The sum of $____, subject to counsel fee, shall be paid plaintiff.
3. An attorney fee in the amount of $____ is hereby approved and shall be deducted from the compensation paid by the parties, in proportion to the amount each receives out of the recovery as by statute provided.
4. The sum of $________, to plaintiff's counsel in reimbursement for litigation expenses and costs, from the shares of the parties in proportion to the amount each receives out of the recovery.
5. The workers' compensation carrier shall pay the costs due the Industrial Commission.

Compliance with the agreement, together with the foregoing provisions of this Order, shall fully acquit and discharge defendants from any further liability under the Workers' Compensation Act by reason of plaintiff's injury by accident giving rise hereto.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

____

Form IIb. Compromise settlement agreement (denied liability, unpaid medicals) and distribution of third party funds.

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants. NAME, THIRD PARTY TORT-FEASOR.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT AND DIRECTING DISTRIBUTION OF THIRD PARTY RECOVERY.

FILED:

A compromise settlement agreement and an application for an order directing distribution of third party funds in this case has been submitted to the Industrial Commission.

APPEARANCES

Plaintiff:

Defendants:

Third Party Tort-Feasor:

* * * * * * * * *

After giving due consideration to all matters involved in this case, and upon defendants' stated or implied representation that all known medical reports concerning the subject injury have been submitted to the Industrial Commission per Rule 502(3)(a), the undersigned is of the opinion that the compromise settlement agreement is fair and equitable, probably in the best interest of all parties, and should be APPROVED.

It is expressly recognized that plaintiff's claim is strongly contested, that defendants are not by the agreement admitting, nor is the Industrial Commission finding liability and that plaintiff, by accepting the agreement which provides for payment only of unpaid medical bills, is avoiding the risk that the claim will be totally denied by the Industrial Commission.

Pursuant to the provisions of N.C. Gen. Stat. § 97-10.2, the third party funds shall be distributed as follows:

1. The sum of $____, subject to counsel fee, shall be paid the workers' compensation carrier in full settlement of its subrogation interest.
2. The sum of $____, subject to counsel fee, shall be paid plaintiff.
3. An attorney fee in the amount of $____ is hereby approved and shall be deducted from the compensation paid by the parties, in proportion to the amount each receives out of the recovery, as by statute provided.
4. The sum of $________, to plaintiff's counsel in reimbursement for litigation expenses and costs, from the shares of the parties in proportion to the amount each receives out of the recovery.
5. The workers' compensation carrier shall pay the costs due the Industrial Commission.

Compliance with the agreement, together with the foregoing provisions of this Order, shall fully acquit and discharge defendants from any further liability under the Workers' Compensation Act by reason of plaintiff's injury by accident giving rise hereto.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

____

Form IIIa. Compromise settlement agreement (admitted liability, medicals paid).

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT.

FILED:

A compromise settlement agreement in this case has been submitted to the Industrial Commission.

APPEARANCES

Plaintiff:

Defendants:

* * * * * * * *

The parties now have executed and submitted for approval a compromise settlement agreement. That agreement is incorporated herein by reference, and is approved in the amount of $____. Compliance with the terms of the agreement shall discharge defendants from further liability under the Workers' Compensation Act by reason of the injury giving rise to this claim.

An attorney's fee of $____ is approved for plaintiff's counsel. This amount shall be deducted from the sum due plaintiff and paid directly to plaintiff's counsel.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

Defendants shall pay the costs.

Form IIIb. Compromise settlement agreement (denied liability, unpaid medicals).

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT.

FILED:

A compromise settlement agreement in this case has been submitted to the Industrial Commission.

APPEARANCES

Plaintiff:

Defendants:

* * * * * * * *

The parties now have executed and submitted for approval a compromise settlement agreement. That agreement is incorporated herein by reference, and is approved in the amount of $____. Compliance with the terms of the agreement shall discharge defendants from further liability under the Workers' Compensation Act by reason of the injury giving rise to this claim.

It is expressly recognized that plaintiff's claim is strongly contested, that defendants are not by this agreement admitting, nor is the Industrial Commission finding liability and that plaintiff, by accepting the agreement which provides for payment only of unpaid medical bills, is avoiding the risk that the claim will be totally denied by the Commission.

An attorney's fee of $____ is approved for plaintiff's counsel. This amount shall be deducted from the sum due plaintiff and paid directly to plaintiff's counsel.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

Defendants shall pay the costs.

____

Index to Workers' Compensation Rules of the North Carolina Industrial Commission

A

AGREEMENTS.
Approval.
  Constituting award, ICWorkComp Rule 503.
Compensation for death, ICWorkComp Rule 409.
Compromise settlement agreements, ICWorkComp Rule 502.
Payment of compensation, ICWorkComp Rule 501.

AMPUTATIONS.
Computation of compensation, ICWorkComp Rule 405.

APPEAL BOND.
Appeal to court of appeals, ICWorkComp Rule 702.

APPEALS.
Administrative decisions, ICWorkComp Rule 703.
Commission.
  Appeal to full commission, ICWorkComp Rule 701.
Court of appeals, ICWorkComp Rule 702.
Remand from appellate courts, ICWorkComp Rule 702A.
Termination or suspension of compensation, ICWorkComp Rule 404.

APPEARANCE, NOTICE OF.
Attorney retained for proceedings, ICWorkComp Rule 614.

APPLICATION TO STOP PAYMENT OF COMPENSATION, ICWorkComp Rule 404.

ATTORNEYS AT LAW.
Contested cases.
  Retaining for proceeding, ICWorkComp Rule 614.

B

BRIEFS.
Appeals to full commission, ICWorkComp Rule 701.

C

CHECK ENDORSEMENT LANGUAGE.
Warning as to false statements by endorsing, ICWorkComp Rule 901.
  Notice to employee, ICWorkComp Rule 902.

COMMISSION.
Forms.
  Supplying, ICWorkComp Rule 103.
Hours of business, ICWorkComp Rule 101.
Location of offices, ICWorkComp Rule 101.

COMMISSION —Cont'd
Transaction of business, ICWorkComp Rule 102.

COMPENSATION.
Computation.
  Amputations, ICWorkComp Rule 405.
  When disability begins, ICWorkComp Rule 401.
Death benefits, ICWorkComp Rule 409.
Discount tables.
  Use in determining commuted values, ICWorkComp Rule 406.
Fees.
  Medical treatment, ICWorkComp Rule 407.
    Additional compensation, ICWorkComp Rule 408.
Payment.
  Agreements, ICWorkComp Rule 501.
  Death benefits, ICWorkComp Rule 409.
  Manner of payment, ICWorkComp Rule 403.
Reinstated compensation, ICWorkComp Rule 404A.
Termination, ICWorkComp Rule 404.
Wages.
  Computation of daily wage, ICWorkComp Rule 402.

COMPROMISE SETTLEMENT AGREEMENTS, ICWorkComp Rule 502.
Order approving, ICWorkComp Forms IIIa, IIIb.

COMPUTING TIME, ICWorkComp Rule 609.

CONTESTED CASES.
Attorneys at law.
  Retaining for proceeding, ICWorkComp Rule 614.
Commissioner or deputy commissioner.
  Disqualification, ICWorkComp Rule 615.
Denial of liability, ICWorkComp Rule 601.
Depositions, ICWorkComp Rule 612.
Discovery, ICWorkComp Rule 605.
  Post hearing, ICWorkComp Rule 606.
Dismissals, ICWorkComp Rule 613.
Guardian ad litem.
  Appointment, ICWorkComp Rule 604.
Hearings.
  Additional hearings, ICWorkComp Rule 612.
  Industrial commission, ICWorkComp Rule 611.
  Request, ICWorkComp Rule 602.
    Response to, ICWorkComp Rule 603.
Interpreters.
  Foreign language interpreters, ICWorkComp Rule 616.
Medical records, ICWorkComp Rule 607.
Motions practice, ICWorkComp Rule 609.
Pretrial conference, ICWorkComp Rule 610.
Pre-trial orders, ICWorkComp Rule 610.
Rehabilitation records, ICWorkComp Rule 607.
Removals, ICWorkComp Rule 613.
Statement upon incident leading to claim, ICWorkComp Rule 608.

CONTINUANCES.
Motions in contested cases, ICWorkComp Rule 609.

COURT OF APPEALS.
Appeals to, ICWorkComp Rule 702.
Remand from, ICWorkComp Rule 702A.

COVERAGE BY ACT.
Posting by notice, ICWorkComp Rule 201.

D

DAILY WAGE.
Computation, ICWorkComp Rule 402.

DEATH BENEFITS.
Claims for, ICWorkComp Rule 409.

DEATH RESULTING FROM INJURY OR OCCUPATION DISEASE.
Employer to notify commission, ICWorkComp Rule 409.

DENIAL OF LIABILITY, ICWorkComp Rule 601.

DEPOSITIONS.
Contested cases, ICWorkComp Rule 612.

DISABILITY.
When disability begins.
  Purpose of computing compensation, ICWorkComp Rule 401.

DISCOVERY.
Contested cases, ICWorkComp Rule 605.
  Post hearing, ICWorkComp Rule 606.
  Records and reports, ICWorkComp Rule 607.

E

EMPLOYER'S INJURY REPORT, ICWorkComp Rule 104.

F

FALSE STATEMENTS WHEN ENDORSING CHECK.
Warning to employee, ICWorkComp Rule 901.
  Notice to employee, ICWorkComp Rule 902.

FEES.
Medical treatment, ICWorkComp Rule 407.
  Additional compensation, ICWorkComp Rule 408.

FOREIGN LANGUAGE INTERPRETERS.
Contested cases, ICWorkComp Rule 616.

FORM 24.
Application to stop payment of compensation, ICWorkComp Rule 404.

FORM 44 APPLICATION FOR REVIEW, ICWorkComp Rule 701.

FORM 90 REPORT OF EARNINGS.
Requiring employee to complete, ICWorkComp Rule 903.

FORMS.
Order approving compromise settlement agreement.
  Admitted liability, medical paid, ICWorkComp Form IIIa.

FORMS —Cont'd
Order approving compromise settlement agreement —Cont'd
  Denied liability, unpaid medical, ICWorkComp Form IIIb.
Supplying by commission, ICWorkComp Rule 103.
Third party recovery.
  Order approving compromise settlement agreement.
    Admitted liability, medical paid, ICWorkComp Form IIa.
    Denied liability, unpaid medical, ICWorkComp Form IIb.
  Order directing distribution, ICWorkComp Form I.

FRAUD.
Warning as to false statements by endorsing check, ICWorkComp Rule 901.
  Notice to employee, ICWorkComp Rule 902.

G

GUARDIAN AD LITEM.
Appointment, ICWorkComp Rule 604.
  Death benefit claims, ICWorkComp Rule 409.

H

HEARINGS.
Contested cases.
  Additional hearings, ICWorkComp Rule 612.
  Industrial commission, ICWorkComp Rule 611.
  Request for hearing, ICWorkComp Rule 602.
    Response to, ICWorkComp Rule 603.
Termination or suspension of compensation, ICWorkComp Rule 404.

HOSPITAL CHARGES, ICWorkComp Rule 407.

I

INSURANCE.
Proof of coverage, ICWorkComp Rule 301.

INTERPRETERS.
Foreign language interpreters, ICWorkComp Rule 616.

INTERROGATORIES.
Discovery by use of, ICWorkComp Rule 605.

M

MEDICAL FEES, ICWorkComp Rule 407.
Additional compensation, ICWorkComp Rule 408.

MOTIONS.
Contested cases, ICWorkComp Rule 609.

N

NOTICE.
Appeal to full commission, ICWorkComp Rule 701.
Appearance, attorney retained for proceedings, ICWorkComp Rule 614.

NOTICE —Cont'd
Coverage by act.
  Posting, ICWorkComp Rule 201.
Death benefits, entitlement to, ICWorkComp Rule 409.
Duties of employer upon filing of claim, ICWorkComp Rule 601.
Termination or suspension of compensation.
  Form 24, application to stop payment of compensation, ICWorkComp Rule 404.

O

OFFICES.
Hours of business, ICWorkComp Rule 101.
Location, ICWorkComp Rule 101.

ORDERS.
Pre-trial orders, ICWorkComp Rule 610.
Proposed order included in motion, ICWorkComp Rule 609.

P

PRETRIAL CONFERENCE.
Contested cases, ICWorkComp Rule 610.

PRE-TRIAL ORDERS.
Submission of pre-trial agreement, ICWorkComp Rule 610.

R

RECORD ON APPEAL TO COURT OF APPEALS.
Parties unable to agree, ICWorkComp Rule 702.

RECORDS.
Contested cases.
  Medical and rehabilitation records, ICWorkComp Rule 607.

REINSTATED COMPENSATION, ICWorkComp Rule 404A.

REMAND FROM APPELLATE COURTS, ICWorkComp Rule 702A.

REMOVAL OF CASE FROM HEARING CALENDAR, ICWorkComp Rule 613.
Motions in contested cases, ICWorkComp Rule 609.

REPORT OF EARNINGS.
Requiring employee to complete, ICWorkComp Rule 903.

REPORT OF INJURY.
Employer's duty, ICWorkComp Rule 104.

RETURN TO WORK.
Trial return to work, ICWorkComp Rule 404A.

RULES.
Procedure for rulemaking, ICWorkComp Rule 803.

S

SANCTIONS.
Failure to comply with rules, ICWorkComp Rule 802.

SICK TRAVEL REIMBURSEMENT, ICWorkComp Rule 407.

STIPULATED FACTS.
Award of death benefits based on, procedure, ICWorkComp Rule 409.

SUSPENSION OF COMPENSATION, ICWorkComp Rule 404.

T

TERMINATION OF COMPENSATION, ICWorkComp Rule 404.

THIRD PARTIES.
Forms.
  Order directing distribution of recovery, ICWorkComp Form I.
Order approving compromise settlement agreement, ICWorkComp Forms IIa, IIb.

TIME.
Computing, ICWorkComp Rule 609.

TRIAL RETURN TO WORK, ICWorkComp Rule 404A.

W

WAGES.
Computation of daily wage, ICWorkComp Rule 402.

WAIVER OF RULES, ICWorkComp Rule 801.

WITHDRAWAL OF ATTORNEY FROM PROCEEDINGS, ICWorkComp Rule 614.

NOTICE—Cont'd
Coverage-by-law,
  Posting, ICWorkComp Rule 301.
Death benefits, entitlement to, ICWorkComp Rule 409.
Duties of employer upon filing of claim, ICWorkComp Rule 301.
Termination or suspension of compensation,
  Form 24, application to stop payment of compensation, ICWorkComp Rule 405.

O

OFFICES.
Hours of business, ICWorkComp Rule 101.
Location, ICWorkComp Rule 101.

ORDERS.
Pre-trial orders, ICWorkComp Rule 610.
Proposed order included in motion, ICWorkComp Rule 609.

P

PRETRIAL CONFERENCE.
Contested cases, ICWorkComp Rule 610.

PRE-TRIAL ORDERS.
Submission of pre-trial agreement, ICWorkComp Rule 610.

R

RECORD ON APPEAL TO COURT OF APPEALS.
Parties unable to agree, ICWorkComp Rule 702.

RECORDS.
Contested cases,
  Medical and rehabilitation records, ICWorkComp Rule 607.

REINSTATED COMPENSATION, ICWorkComp Rule 404A.

REMAND FROM APPELLATE COURTS, ICWorkComp Rule 702A.

REMOVAL OF CASE FROM HEARING CALENDAR, ICWorkComp Rule 613.
Motions in contested cases, ICWorkComp Rule 609.

REPORT OF EARNINGS.
Requiring employee to complete, ICWorkComp Rule 903.

REPORT OF INJURY.
Employer's duty, ICWorkComp Rule 104.

RETURN TO WORK.
Trial return to work, ICWorkComp Rule 404A.

RULES.
Procedure for rulemaking, ICWorkComp Rule 903.

S

SANCTIONS.
Failure to comply with rules, ICWorkComp Rule 802.

SICK TRAVEL REIMBURSEMENT, ICWorkComp Rule 407.

STIPULATED FACTS.
Award of death benefits based on, procedure, ICWorkComp Rule 409.

SUSPENSION OF COMPENSATION, ICWorkComp Rule 405.

T

TERMINATION OF COMPENSATION, ICWorkComp Rule 405.

THIRD PARTIES.
Forms.
  Order denying claim for third party, ICWorkComp Form 1.
Order approving compromise settlement agreement, ICWorkComp Forms IIa, IIb.

TIME.
Computing, ICWorkComp Rule 609.

TRIAL RETURN TO WORK, ICWorkComp Rule 404A.

W

WAGES.
Computation of daily wage, ICWorkComp Rule 402.

WAIVER OF RULES, ICWorkComp Rule 801.

WITHDRAWAL OF ATTORNEY FROM PROCEEDINGS, ICWorkComp Rule 615.

RULES FOR MEDIATED SETTLEMENT AND NEUTRAL EVALUATION CONFERENCES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

Effective June 1, 2000.

Rule
1. Order for mediated settlement conference.
2. Selection of mediator.
3. The mediated conference.
4. Duties of parties, representatives, and attorneys.
5. Sanctions.
6. Authority and duties of mediators.
7. Compensation of the mediator.
8. Mediator certification and decertification.

Rule
9. Rules for neutral evaluation.
10. Waiver of rules.
11. Motions.
12. Miscellaneous.

Form
A. Addendum A — I.C. Form MSC5.

Index follows Rules.

Rule 1. Order for mediated settlement conference.

(a) *Mediation upon agreement of the parties.* If the parties to a workers' compensation claim or state tort claim agree to mediate their claim, they may schedule and proceed with mediation on their own, or they may submit a request for a mediation order pursuant to Rule 1(d). No order from the Commission is necessary if the parties mutually agree to mediate, but the mediator shall file a report of mediation with the Commission as required by Rule 6(b)(4). If the parties proceed with mediation in the absence of an order from the Commission, and the Commission thereafter enters a mediation order, the parties shall timely notify the Commission that they have agreed upon the selection of a mediator or, if the mediation conference has been completed, that they request to be excused from any further mediation obligations pursuant to Rule 1(g).

(b) *Referral Upon Receipt of a Form 33 Request for Hearing.* In any case in which the Commission receives a Form 33 Request for Hearing, the Commission shall order that disputed case to a mediated settlement conference.

(c) *By Order of the Commission.* Commissioners, Deputy Commissioners, the Commission's Dispute Resolution Coordinator, and such other employees as the Commission Chairman may designate from time to time may, by written order, require the parties and their representatives to attend a mediated settlement conference concerning a dispute within the tort and workers' compensation jurisdiction of the Commission. Requests to dispense with or defer a mediation conference shall be addressed to the Dispute Resolution Coordinator. Unless the context otherwise requires, references to the "Commission" in these rules shall mean the Dispute Resolution Coordinator.

(d) *Mediation upon request of a party.* If a case is not otherwise ordered to a mediated settlement conference, a party may move the Commission to order such a conference. Such motion shall state the reasons why the order should be allowed and, if the case is pending on the hearing docket, whether the party prefers for the case to be set for hearing on the next docket, for it to not be heard until further notice from the parties, or for it to not be set before a specified date. The motion shall be served on non-moving parties. Responses may be filed in writing with the Commission within 10 days after the date of the service of the motion. The Commission may require that any motion for a mediation order be submitted on a form provided by the Commission.

(e) *Timing of the order.* The order requiring mediation may be issued whenever it appears that the parties have a dispute arising under the Workers' Compensation Act or Tort Claims Act.

(f) *Content of order.* The Commission's order shall (1) require that the mediated settlement conference be held in the case, that pertinent documents be exchanged and that any specified discovery be completed prior to the conference; (2) establish a deadline for the pre-conference exchange of documents and other discovery, and for the completion of the conference; (3) provide a period within which the parties may select a mediator by mutual agreement (see Rule 2); (4) state the rate of compensation of the

Commission-appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Commission (see Rule 7); and, (6) may specify a date for an Industrial Commission hearing should the parties fail to reach a settlement.

(g) *Motion to dispense with or defer mediated settlement conference.* Mediation may be dispensed with or canceled by the Commission, but may not be dispensed with or canceled by the parties or the mediator, unless the parties have agreed, subject to Commission approval, on a full and complete resolution of all disputed issues set forth in the request for hearing filed in the case, and have given notice of the settlement to the Dispute Resolution Coordinator. As used herein, the terms "dispensed with" and "canceled" shall mean and refer to setting aside or rescinding the mediation order(s) entered in the case, or excusing the parties from their obligations under the order(s) or these rules. Within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the date of the Commission's order entered pursuant to Rules 1(c) and 1(d), a party may move to dispense with or defer the conference. Such motion shall state the reasons the relief is sought, and must be received by the Dispute Resolution Coordinator within the applicable 21 or 55 day deadline. For good cause shown, the Commission may grant the motion. However, failure to file a motion to dispense with mediated settlement conference within the above stated 21 or 55 day deadline and after a mediator has been appointed may result in the moving party or parties, or other responsible person, being required to pay an administrative fee of up to $100.00 to the Commission.

(h) *Exemption from mediated settlement conference.* In order to provide for the most efficacious use of mediation and neutral evaluation procedures, the Commission may specify, by type or kind, those cases to be ordered into or excluded from mediation and neutral evaluation procedures. The State shall not be compelled to participate in a mediation or neutral evaluation procedure with a prison inmate.

(i) *Motion to authorize the use of neutral evaluation procedures.* The parties may move the Commission to authorize the use of a neutral evaluation procedure in lieu of a mediated settlement conference. The Commission may require that such motion be filed on a form provided by the Commission, and such motion shall be filed within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the order requiring a mediated settlement conference entered pursuant to Rules 1(c) and 1(d), and shall state:

(1) that all parties consent to the motion.

(2) that the neutral and the parties have agreed upon the selection and all terms of compensation of the neutral selected;

(3) the name, address and telephone number of the neutral selected by the parties;

(4) the names of all persons and entities the parties have agreed to excuse from attending the proceeding; and

(5) such other information as may be required by the Commission.

If the parties are unable to agree to the selection of a neutral or the persons excused from attending, then the Commission shall deny the motion for authorization to use a neutral evaluation procedure and the parties shall attend the mediated settlement conference as originally ordered by the Commission. If the parties are able to timely agree on the above matters, then the Commission may order the use of a neutral evaluation proceeding. Provided, however, that the Commission will not order the use of a neutral evaluation proceeding in any case in which the plaintiff is not represented by counsel.

(j) *Cases involving plaintiffs not represented by counsel.* Unless an unrepresented plaintiff requests that the plaintiff's case be mediated, the Commission shall enter an order dispensing with mediation. (Effective January 1, 1990; Amended effective August 20, 1998.)

Rule 2. Selection of mediator.

(a) *By agreement of parties.* The parties may choose a mediator by agreement within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days after the Commission's order entered pursuant to Rules 1(c) and 1(d), unless otherwise specified therein, subject to the Commission's authority to remove the mediator selected by the parties for specific reasonable cause. The mediator selected shall either meet the qualifications specified in Rule 8, or be a person who, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of the issues in the action. Such stipulation may be transmitted by either party, shall be dated as of the date it is transmitted to the Commission, and the stipulation must be received by the Dispute Resolution Coordinator within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the mediation order entered pursuant to Rules 1(c) and 1(d), and shall include the name, address and telephone number of the mediator selected by agreement, shall state whether the mediator is certified by the Dispute Resolution Commission, and if not, whether the mediator is a member of the Bar and/or has any other certification, training or experience pertinent to his or her ability to mediate a case. The 21 or 55 day deadline may be extended by the Dispute Resolution Coordinator upon request of the parties.

(b) *Appointment by commission.* If the parties fail to notify the Commission of their selection of a mediator within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of a mediation order entered pursuant to Rules 1(c) and 1(d), as set forth above, the Commission shall appoint a mediator to hold a mediated settlement conference in that case. The Commission shall appoint mediators from a list of mediators eligible for appointment maintained by the Commission which shall consist of those mediators who attain the qualifications in Rule 8 and request inclusion on such list. In the absence of any suggestions by the parties with regard to the appointment of mediators, mediators shall generally be selected for specific cases by random order or by a system which attempts to assign each mediator to an equal number of cases over a period of time, unless the Commission determines in its discretion that, because of unusual circumstances, a particular mediator should be chosen in a particular case.

If the parties request the approval of a selected mediator after the appointment of another mediator by the Commission, the Commission may require one or more of the parties, or other responsible person(s), to pay a substitution of mediator fee to the Commission of up to $100.00.

(c) *Mediator's list.* To assist parties in the selection of mediators by agreement, the Commission shall maintain a list of mediators eligible for appointment by the Commission in compensation and tort cases, and a list of mediators who are not eligible for appointment, but who may be selected by the parties and approved by the Commission The Commission shall provide copies of these lists to parties on request, and may charge a reasonable fee for maintaining and distributing these lists.

(d) *Disqualification of mediator.* Any party may move the Commission for an order disqualifying a mediator. For good cause, such order shall be entered. If the mediator is disqualified, an order shall be entered for the selection of a replacement mediator pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves. (Effective January 1, 1990; Amended effective August 20, 1998.)

Rule 3. The mediated conference.

(a) *Where conference is to be held.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) *When conference is to be held.* Subject to the Commission's orders, the conference shall be held at the time agreed to by the parties and the mediator, or if the parties do not agree, at the time specified by the mediator.

(c) *Request to extend date of completion.* A party, or the mediator, may request that the Commission extend the deadline for completion of the conference. The Commission may grant the request and extend the completion deadline orally or by written order.

(d) *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(e) *The mediated settlement conference is not to delay other proceedings.* A mediated settlement conference shall not be cause for the delay of other proceedings in the case, including completion of discovery, and the filing or hearing of motions except by order of the Commission. However, no depositions shall be taken following a Commission order requiring mediation until mediation is concluded, except by agreement of the parties or order of the Commission.

(f) *Inadmissibility of mediation proceedings.* Evidence of statements made and conduct occurring in a mediation conference shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediation conference.

No mediator shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse. (Effective January 1, 1990; Amended effective August 20, 1998.)

Rule 4. Duties of parties, representatives, and attorneys.

(a) *Attendance.* The following persons shall physically attend a mediated settlement conference:

(1) *Parties.*

(A) All individual parties;

(B) Employers. In a workers' compensation case, a representative of the employer at the time of injury is required to attend only if (1) the employer, instead of or in addition to the insurance company or administrator, has decision-making authority with respect to settlement, or (2) the employer is offering the claimant employment and the suitability of that employment is in issue, or (3) the employer and the claimant have agreed to simultaneously mediate non-compensation issues arising from the injury, or (4) the Commission orders the employer representative to attend the mediation conference.

(C) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action; and

(D) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel or Attorney General's Office counsel responsible for the case and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law, proposed settlement terms can be approved only by a board, the representative shall authority to negotiate on behalf of the party and to make a recommendation to that board.

(2) *Attorneys.* The parties' counsel of record; provided, that appearance by counsel does not dispense with or waive the required attendance of the parties listed above;

(3) *Insurance company representatives.* A representative of each defendant's primary workers' compensation or liability insurance carrier or self-insured which may be obligated to pay all or part of any claim presented in the action. Each such carrier or self-insured shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has the authority to make a decision on behalf of such carrier or self-insured or who has been authorized to negotiate on behalf of such carrier or self-insured and can promptly communicate during the conference with persons who have such decision making authority; and

(4) *Other parties and persons.* By order of the Commission other representatives of parties, employers or, carriers obligated to pay all or part of any claim presented in the action not required to attend the conference pursuant to the above rules may be required to attend the conference if the Commission determines that the person's attendance may be necessary for purposes of resolving the matters in dispute in the subject action. All (i) employers and (ii) carriers who may be obligated to pay all or part of any claim presented in the action and who are not required to attend a mediation conference pursuant to these rules or Commission orders, are nevertheless allowed to attend the mediation conference if they elect to do so. If, during a mediation conference, the mediator determines that the attendance of one or more additional persons is necessary to resolve the matters in dispute in the subject action, the mediator may recess the conference, and then reconvene the conference at a later date and time in order to allow for the attendance of the additional person or persons.

(b) *Waiver of attendance requirement.*

(1) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4(d), or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(A) In the absence of an order by the Dispute Resolution Coordinator, only by agreement of all parties and persons required to attend and the mediator; or

(B) By order of the Dispute Resolution Coordinator, upon motion of a party and notice to all parties and persons required to attend and the mediator

(2) Appearance by telephone: The Dispute Resolution Coordinator or the mediator, with the consent of the parties, may in appropriate cases allow a party or insurance carrier representative who is required to attend a mediated settlement conference under these rules to attend by telephone, conference call or speaker telephone, at the discretion of the mediator, provided that the person(s) so attending shall bear all costs of such telephone calls, that the mediator may communicate directly with the insurance representative with regard to the matters discussed in mediation, and that the mediator may set a subsequent conference at which all persons will be required to physically attend. The failure to properly appear by telephone in accordance with this rule may subject the responsible party to sanctions pursuant to Rule 5.

(c) *Notice of mediation order.* Within seven days after the receipt of an order for Mediated Settlement Conference, the carrier or self-insured named in the order shall provide a copy of the order to the employer and all other carriers which may be obligated to pay all or part of any claim presented in the workers' compensation case or any related third-party tortfeasor claims, and shall provide the mediator and the other parties in the action with the name, address and telephone number of all such carriers.

(d) *Finalizing agreement.* If an agreement is reached in the mediation conference, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted in proper form for Industrial Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.

(e) *Payment of mediator's fee.* The mediator's fee shall be paid at the conclusion of the settlement conference, unless otherwise provided by Rule 7, or by agreement with the Mediator. Sanctions may be assessed if the mediator's fee is not paid in a timely fashion.

(f) *Related cases.* Upon application by any party or person, the Commission may order that an attorney or record, party or representative of an insurance carrier that may be liable for all or any part of a claim pending in an Industrial Commission case shall, upon reasonable notice, attend a mediated settlement conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any disputed issuers concerning such an order shall be addressed to the Commission's Dispute Resolution Coordinator. Unless otherwise ordered, any attorney, party or carrier representative that properly attends a mediated settlement conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Requests that a party, attorney of record, or insurance carrier representative in a related case attend a mediated settlement conference in an Industrial Commission case shall be addressed to the court or agency in which the related case is pending, provided that all parties in the Industrial Commission case consent to the requested attendance. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

CASE NOTES

County agent's authority to settle claim. — Second half of N.C. Mediated Settlement & Neutral Evaluation Conferences, N.C. Indus. Comm'n R. 4(a)(1)(D), standing alone, did not place a county worker settling a workers' compensation claim against the county on constructive notice of the possibility that the authority of a county agent settling the claim might be limited. Lee v. Wake County, 165 N.C. App. 154, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, 607 S.E.2d 275 (2004).

Finalizing Agreement. — Signed memorandum of settlement fully complied with the workers' compensation rules, and was a valid compromise settlement agreement subject to approval by the industrial commission, even though the worker had not signed a clincher agreement. Lemly v. Colvard Oil Co., 157 N.C. App. 99, 577 S.E.2d 712, 2003 N.C. App. LEXIS 372 (2003).

Under the sequence of Workers' Comp. R. N.C. Indus. Comm'n art. X, R. 502(1) and N.C. Mediated Settlement & Neutral Evaluation Conferences, N.C. Indus. Comm'n R. 4(d), in the settlement of a workers' compensation claim against a county, the pre-audit certificate required under G.S. 159-28, certifying that a county has unencumbered funds with which to pay an obligation, will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the North Carolina Industrial Commission, so an otherwise valid memorandum of agreement settling such a claim is not rendered void by the fact that it does not bear a pre-audit certificate, and an agreement to prepare a formalized settlement compromise agreement for the Industrial Commission's consideration does not require a pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement. Lee v. Wake County, 165 N.C. App. 154, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, 607 S.E.2d 275 (2004).

Rule 5. Sanctions.

If a person or party whose attendance is required by Rule 4 fails to attend, or cancels without Commission approval, a duly ordered mediated settlement conference without good cause, or otherwise violates these rules without good cause, the Commission may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys' fees, mediator fees and expenses incurred by persons attending the conference, contempt, or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure. Any sanctions that may be assessed against a party under these rules including, but not limited to, mediation conference postponement fees and sanctions for the unauthorized cancellation or failure to appear at a mediation conference, may be assessed against the party or the party's principal or attorney depending on whose conduct necessitated the assessment of sanctions. (Effective January 1, 1990; Amended effective August 20, 1998.)

Rule 6. Authority and duties of mediators.

(a) *Authority of mediator.*

(1) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed. Except as set forth in these rules, there shall be no audio, video, electronic or stenographic record made of the negotiations or discussions that occur at the mediated settlement conference.

(2) *Private consultation.* The mediator may meet and consult privately with any party or parties or their counsel prior to or during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the parties, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) *Duties of mediator.*

(1) *Information to the parties.* The mediator shall define and describe the following to the parties at the beginning of the conference:

(A) The process of mediation;

(B) The differences between mediation and other forms of conflict resolution;

(C) The costs of the mediated settlement conference;

(D) The facts that the mediated settlement conference is not a trial or hearing, the mediator is not acting in the capacity of a Commissioner or Deputy Commissioner, the mediator will not act in the capacity of a Commissioner or Deputy Commissioner in the subject case at any time in the future, and the parties retain their right to a hearing if they do not reach a settlement;

(E) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(F) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(G) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code and Rule 3(f) above;

(H) The duties and responsibilities of the mediator and the parties; and,

(I) The fact that any agreement reached will be reached by mutual consent of the parties.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(4) *Reporting results of conference.* In all cases within the Commission's jurisdiction, whether mediated voluntarily or pursuant to an order of the Commission, the mediator shall report the results of the conference on a form provided by the Commission. If an agreement was reached, the report shall state whether the issue or matter under mediation will be resolved by Industrial Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket, and shall identify the persons designated to file or submit for approval such agreement, or dismissal. A copy of the Commission's Report of Mediator form is attached to these rules as Addendum A. The mediator shall not attach a copy of the parties' memorandum of agreement to the mediator's report transmitted to the Commission and, except as set forth above or as may be ordered by the Commission, the mediator shall not disclose the terms of settlement in the mediator's report. The Commission may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by the Commission.

(5) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the conference, in consultation with the parties, and conduct it prior to the conference completion deadline set out in the Commission's order, and prior to the date of any hearing before a Deputy Commissioner if the case is scheduled for hearing after the mediator is appointed. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limits are changed by the Commission.

(6) *Standards of Conduct.* All mediators conducting mediation conferences pursuant to these rules shall adhere to the Standards of Conduct for Mediators adopted by the N.C. Dispute Resolution Commission. (Effective January 1, 1990; Amended effective August 20, 1998.)

Rule 7. Compensation of the mediator.

(a) *By agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) *By commission order.* When the mediator is appointed by the Commission, the mediator's compensation shall be as follows.

(1) *Conference Fees.* The mediator shall be paid by the parties at the rate of $125.00 per hour for mediation services at the conference.

(2) *Administrative Fees.* The parties shall pay to the mediator a one time, per case administrative fee of $125.00, unless otherwise ordered by the Commission. The mediator's administrative fee shall be paid in full unless, within 10 days after the date that the mediator has been appointed, written notice is given to the mediator and the Dispute Resolution Coordinator that the issues for which a request for hearing had been filed have been fully resolved or the hearing request has been withdrawn.

(3) *Postponement Fees.* As used herein, the term "postpone" shall mean to reschedule or otherwise not proceed with a scheduled mediation conference after that conference has been scheduled to convene on a specific date. After a conference is scheduled to convene on a specific date it may not be postponed without the requesting party first notifying all other parties concerning the grounds for the requested postponement, or without the consent and approval of the mediator or the Dispute Resolution Coordinator. If a mediation conference is postponed without good cause, or as a result of a settlement, within seven days of a mediation conference, the mediator shall be paid a postponement fee unless, upon application of the party or parties charged with the fee, the fee is waived by the Commission. Unless the Commission otherwise orders, the postponement fee shall be $225.00 if the mediation conference is postponed within three days of the scheduled conference, and $125.00 if the mediation conference is postponed four to seven days prior to a scheduled conference. Postponement fees shall be paid in equal shares by the party or parties requesting the postponement unless otherwise ordered by the Commission.

(c) *Payment by parties.* Payment shall be due upon completion of the conference; provided, that the State shall be billed at the conference and pay within 30 days of receipt of the billing, and insurance companies or carriers whose written procedures do not provide for payment of the mediator at the conference may pay within 15 days of the conference. Unless otherwise agreed to by the parties or ordered by the Commission, costs of the mediated settlement conference shall be allocated to the parties, as follows: one share by plaintiff(s); one share by the workers' compensation defendant-employer or its insurer, or if more than one employer or carrier is involved, or if there is a dispute between employer(s) or carrier(s), one share by each separately represented entity; one share by participating third-party tort defendants or their carrier, or if there are conflicting interests among them, one share from each such defendant or group of defendants having shared interests; and, one share by the defendant State agency in a State Tort Claims Act case. Parties obligated to pay a share of the costs shall be responsible for equal shares; provided, however, that in workers' compensation claims the defendant shall pay the plaintiff's share, as well as its own, and the defendant shall be reimbursed for the plaintiff's share when the case is concluded from benefits that may be determined to be due to the plaintiff, and the defendant may withhold funds from any award for this purpose. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

Rule 8. Mediator certification and decertification.

(a) *Party selection.* The parties may select any person as their mediator by mutual consent, with or without the qualifications in (b); provided, that the Commission may, for good cause, bar any persons from holding themselves out as a mediator of cases within its jurisdiction or from receiving a fee for mediation of such cases.

(b) *Appointment of mediators.* If parties have agreed or been ordered to mediate, and cannot agree on the selection of a mediator, the Commission shall appoint a mediator from a list of persons who hold current certification from the Dispute Resolution Commission that they are qualified to carry out mandatory mediations in the Superior Courts of the State, and who have filed a declaration with the Commission, on forms provided by it, stating that:

(1) If an attorney, that declarant remains a member in good standing of the North Carolina State Bar;

(2) The declarant agrees to accept and perform mediations of disputes before the Commission with reasonable frequency when called upon for the fees and at the rates of payment specified by the Commission;

(3) If the declarant desires to be appointed by the Commission to mediate workers' compensation cases, that he or she has completed N.C. State Bar approved continuing legal education course(s) on workers' compensation law during the previous two years totalling not less than six hours.

A mediator making such declaration shall immediately notify the Commission when any of the facts declared are no longer accurate. The Commission may require a new declaration on a periodic or intermittent basis. The Commission shall delete from such lists any mediator whose certification from the Dispute Resolution Commission has expired or been revoked. The Commission may charge an administrative fee to defray the costs of maintaining said lists and referring cases to mediators.

(c) *Mediator lists.* The Commission may maintain and provide to parties separate lists of mediators who have successfully completed mediation training certified by the Dispute Resolution Commission, and who desire to hold mediations in disputes arising under the Workers' Compensation Act and the State Tort Claims Act.

(d) *Failure of Mediator to Appear at Conference.* In the event that a mediator fails to appear at a scheduled mediation conference without good cause the mediator shall not be entitled to the administrative fee for the case and may be deleted from the Commission's list of mediators qualified for appointments for a period of six months. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

Rule 9. Rules for neutral evaluation.

(a) *Nature of neutral evaluation.* Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to a hearing. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) *When conference is to be held.* The provisions applicable to the scheduling of mediation conferences set forth in Rule 3(b) shall also be applicable to neutral evaluation proceedings.

(c) *Pre-conference submissions.* No later than 15 days prior to the date established for the neutral evaluation conference to begin, each party may, but is not required to, furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than 10 pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Commission.

(d) *Replies to pre-conference submissions.* No later than five days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information not exceeding five pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Commission.

(e) *Conference procedure.* Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

(f) *Modification of procedure.* Subject to the approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation, or such procedures may be modified by order of the Commission. The modified procedures may include the presentation of submissions in writing or by telephone in lieu of the physical appearance at a neutral evaluation conference, and may also include revisions to the time periods and page limitations concerning the parties' submissions.

(g) *Evaluator's duties.*

(1) *Evaluator's opening statement.* At the beginning of the conference the evaluator shall define and describe the following points to the parties:

(A) The facts that the neutral evaluation conference is not a hearing, the evaluator is not acting in the capacity of a Commissioner or Deputy Commissioner, the neutral will not act in the capacity of a Commissioner or Deputy Commissioner in the subject case at any time in the future, the evaluator's opinions are not binding on any party, and the parties retain their right to a hearing if they do not reach a settlement.

(B) The fact that any settlement reached will be only by mutual consent of the parties.

(C) The process of the proceeding;

(D) The differences between the proceeding and other forms of conflict resolution;

(E) The costs of the proceeding;

(F) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code and Rule 3(f) above; and

(G) The duties and responsibilities of the neutral and the participants.

(2) *Oral report to parties by evaluator.* In addition to the written report to the Commission required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement values and options, the strengths and weaknesses of the parties claims and defenses if the case proceeds to a hearing. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Commission thereof.

(3) *Report of evaluator to Commission.* Within 10 days after the completion of the neutral evaluation conference, the evaluator shall submit to the Dispute Resolution Coordinator a written report using a form prepared and distributed by the Commission, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties,

whether the issue or matter will be resolved by Industrial Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket, and shall identify the persons designated to file or submit for approval such agreement, or dismissal. The Commission may require the neutral to provide statistical data for evaluation of the settlement conference programs on forms provided by the Commission.

(h) *Evaluator's authority to assist negotiations.* If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Commission as if such settlement discussions had not occurred.

(i) *Finalizing agreement.* If before the conclusion of the neutral evaluation conference and the evaluator's report to the Commission the parties are able to reach an agreement, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Commission, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted in proper form for Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.

(j) *Applicability of mediation rules and duties.* All provisions and duties applicable to mediation settlement conferences set forth in Rules 3 through 7 of these rules which are not in conflict with the provisions and duties of Rule 9 herein shall be incorporated by reference and shall be applicable to neutral evaluation conferences conducted under these rules.

(k) *Ex parte communications prohibited.* Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(l) *Adherence to standards of conduct for neutrals.* All neutrals conducting neutral evaluation conferences pursuant to these rules shall adhere to any applicable standards of conduct which may be adopted by the N.C. Dispute Resolution Commission. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

Rule 10. Waiver of rules.

In the interest of justice, or to comply with the law from time to time as it may be amended or declared, the Commission may waive any requirement of these rules. (Effective January 1, 1990; Amended effective August 20, 1998.)

Rule 11. Motions.

Unless otherwise indicated, motions pursuant to these rules shall be addressed to the Commission's Dispute Resolution Coordinator (unless the applicable order provides otherwise) and served on all parties to the claim and the settlement procedure. Responses may be filed with the Commission within 10 days after the date of receipt of the motion. Notwithstanding the Commission may act upon oral motions, or act upon motions prior to the expiration of the 10 day response period. Motions will be decided without oral argument unless otherwise ordered. Any appeals from orders issued pursuant to a motion under these rules shall be addressed to the attention of the Commission Chair or the Chair's designee for appropriate action. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

Rule 12. Miscellaneous.

Throughout these rules any reference to the number of days within which any act may be performed shall mean and refer to calendar days, and shall include Saturdays, Sundays and legal holidays. Provided, however, that if the last day (a) to file a motion, (b) to give notice of the selection of a mediator, or (c) for a pro se plaintiff to give notice that the plaintiff requests mediation is a Saturday, Sunday or legal holiday, the motion or notice may be filed or given on the next day that is not a Saturday, Sunday or legal holiday. (Effective January 1, 1990; Amended effective August 20, 1998.)

Form A. Addendum A — I.C. Form MSC5.

NORTH CAROLINA INDUSTRIAL COMMISSION

John C. Schafer
Dispute Resolution Coordinator
430 North Salisbury Street
Raleigh, NC 27611

I.C. File No. ____________
Carrier No. ____________
________________ County

________________, Plaintiff
v.
________________, Defendant
________________, Carrier

REPORT OF MEDIATOR

Mediator ____________ telephone ____________ fax ____________
Address ____

The undersigned mediator reports the following results of a mediated settlement conference in this case:

Conference ________ was held. ________ was not held. If not held, the reasons were: ____________. Number of sessions held: ________ Date conference was completed: ____________

Names of parties, attorneys, insurance representatives or others who were absent: ____

The parties reached: ________ agreement on all issues. ________ an impasse. ________ agreement on the following issues: ____.

If this case was not settled in mediation, the parties estimate that the length of the hearing in this case will be ____________.

Issues settled to be disposed by: ________ clincher ________ other agmt. ________ voluntary dismissal ________ removal from hearing docket

The person who will submit the agreement/clincher/dismissal to the Commission is ____________________
____________________, who will submit it by ____________________ (date).

Mediator's Fee

PREPARATION FEE: $ ____________________

($100.00 for appointed mediator unless settled and cancelled more than seven days before the conference date.)

MEDIATION FEE: $ ____________________

Total time spent in Mediation Settlement Conference: ________ hours
($100.00 per hour for appointed mediator, billed in quarter hour segments.)

OTHER FEE (Postponement fee, etc., if any) $ ____________________

TOTAL FEE $ ____________________

Mediator's Federal Tax ID No. ____________________

All fees to the mediator have been paid except as follows:

Party owing fee	Amount owed	Address of party

I have mailed this report to the Commission within seven days of the conclusion of the mediated settlement conference.

This the ________ day of ______________, __________, ____________________
Mediator

This report is to be returned to the Commission in all cases, whatever the mediation results.

Index to Rules for Mediated Settlement and Neutral Evaluation Conferences of North Carolina

A

ADMINISTRATIVE FEES.

Rate when mediator appointed by commission, ICMediatedSettlmt Rule 7(b).

AGREEMENT OF PARTIES.

Final agreement, ICMediatedSettlmt Rule 2(d).

Mutual agreement to mediate in absence of court order, ICMediatedSettlmt Rule 1(a).

Selection of mediator, ICMediatedSettlmt Rule 2(a).

APPOINTMENT OF MEDIATOR BY COMMISSION, ICMediatedSettlmt Rule 2(b).

C

CALENDAR DAYS.

Reference to number of days to perform act, ICMediatedSettlmt Rule 12.

COMPENSATION OF MEDIATOR, ICMediatedSettlmt Rule 7.

COMPUTATION OF TIME FOR WHICH ACT TO BE PERFORMED.

Reference to number of days is to calendar days including Saturdays, Sundays and legal holidays, ICMediatedSettlmt Rule 12.

CONFERENCE FEES.

Allocation to parties, ICMediatedSettlmt Rule 7(c).

Rate when mediator appointed by commission, ICMediatedSettlmt Rule 7(b).

D

DEFERRING CONFERENCE.

Motion, ICMediatedSettlmt Rule 1(g).

  To whom motion addressed, ICMediatedSettlmt Rule 1(c).

DEPOSITIONS.

Not to be taken following order for mediation, ICMediatedSettlmt Rule 2(e).

DISCOVERY.

Conference not to delay completion, ICMediatedSettlmt Rule 2(e).

Statements made and conduct occuring during settlement proceedings, ICMediatedSettlmt Rule 2(f).

DISPENSING WITH OR CANCELING CONFERENCE.

Motion, ICMediatedSettlmt Rule 1(g).

  To whom motion addressed, ICMediatedSettlmt Rule 1(c).

Plaintiffs not represented by counsel, ICMediatedSettlmt Rule 1(j).

E

EVIDENCE OF STATEMENTS AND CONDUCT DURING SETTLEMENT PROCEEDINGS, ICMediatedSettlmt Rule 2(f).

EXEMPTION FROM CONFERENCE OR NEUTRAL EVALUATION PROCEDURES, ICMediatedSettlmt Rule 1(h).

F

FINALIZING AGREEMENT, ICMediatedSettlmt Rule 2(d).

Neutral evaluation conference, ICMediatedSettlmt Rule 9(i).

FORM 33 REQUEST FOR HEARING.

Order to mediate upon receipt by commission, ICMediatedSettlmt Rule 1(b).

H

HOLIDAYS.

Reference to number of days to perform act, ICMediatedSettlmt Rule 12.

M

MEDIATED SETTLEMENT CONFERENCE.

Allocation of costs of conference, ICMediatedSettlmt Rule 7(c).

Attendance.

  Telephone, conference call or speaker phone, ICMediatedSettlmt Rule 4(b).

  Waiver of requirement, ICMediatedSettlmt Rule 4(b).

Costs, allocation to parties, ICMediatedSettlmt Rule 7(c).

Delay of other proceedings prohibited, ICMediatedSettlmt Rule 2(e).

Dispensing with, canceling or deferring, motion, ICMediatedSettlmt Rule 1(g).

Evidence of statements made and conduct occuring during conference.

  Inadmissibility, ICMediatedSettlmt Rule 2(f).

Exemption, ICMediatedSettlmt Rule 1(h).

Scheduling by mediator, ICMediatedSettlmt Rule 6(a).

MEDIATORS.

Administrative fees.

  Rate when appointed by commission, ICMediatedSettlmt Rule 7(b).

Agreement of parties as to selection, ICMediatedSettlmt Rule 2(a).

Bias, prejudice or impartiality.

  Disclosure to parties, ICMediatedSettlmt Rule 6(b).

MEDIATORS —Cont'd
Compelling to testify or produce statements or conduct occuring during proceedings.
Prohibition, ICMediatedSettlmt Rule 2(f).
Compensation.
Agreement of parties as to mediator, ICMediatedSettlmt Rule 7(a).
Appointed by commission, ICMediatedSettlmt Rule 7(b).
Payment by parties, ICMediatedSettlmt Rule 7(c).
Conduct, standards, ICMediatedSettlmt Rule 6(b).
Conference fees.
Rate when appointed by commission, ICMediatedSettlmt Rule 7(b).
Fee payment, ICMediatedSettlmt Rule 2(e).
Compensation generally, ICMediatedSettlmt Rule 7.
Conference, administrative and postponement fees.
Rate when appointed by commission, ICMediatedSettlmt Rule 7(b).
Payment by parties, ICMediatedSettlmt Rule 7(c).
Postponement fees.
Rate when appointed by commission, ICMediatedSettlmt Rule 7(b).
Standards of conduct, ICMediatedSettlmt Rule 6(b).
Stipulation.
Agreement of parties as to selection, ICMediatedSettlmt Rule 2(a).

MOTIONS.
Dispensing with, canceling or deferring conference, ICMediatedSettlmt Rule 1(g).
To whom motion addressed, ICMediatedSettlmt Rule 1(c).
Neutral evaluation procedures, authorization, ICMediatedSettlmt Rule 1(i).
Request to order conference, ICMediatedSettlmt Rule 1(d).

N

NEUTRAL EVALUATION, ICMediatedSettlmt Rule 9.
Assistance to parties by evaluator, ICMediatedSettlmt Rule 9(h).
Conduct standards for neutrals, ICMediatedSettlmt Rule 9(l).
Duties of evaluator, ICMediatedSettlmt Rule 9(g).
Exparte communication between neutral and parties, ICMediatedSettlmt Rule 9(k).
Finalizing agreement, ICMediatedSettlmt Rule 9(i).
Information submitted prior to conference, ICMediatedSettlmt Rule 9(c).
Mediation rules and duties, applicability, ICMediatedSettlmt Rule 9(j).
Modification of procedures by agreement, ICMediatedSettlmt Rule 9(f).
Nature, ICMediatedSettlmt Rule 9(a).
Opening statement by evaluator, ICMediatedSettlmt Rule 9(g).
Oral report to parties, ICMediatedSettlmt Rule 9(g).

NEUTRAL EVALUATION —Cont'd
Pre-conference submissions by parties, ICMediatedSettlmt Rule 9(c).
Procedure for conference, ICMediatedSettlmt Rule 9(e).
Replies to pre-conference submissions by parties, ICMediatedSettlmt Rule 9(d).
Scheduling, ICMediatedSettlmt Rule 9(b).
Standards of conduct for neutrals, ICMediatedSettlmt Rule 9(l).
When conference to held, ICMediatedSettlmt Rule 9(b).
Written report to commission, ICMediatedSettlmt Rule 9(g).

NEUTRAL EVALUATION PROCEDURES.
Exemption, ICMediatedSettlmt Rule 1(h).
Motion to authorize, ICMediatedSettlmt Rule 1(i).

NOTICE OF MEDIATION ORDER, ICMediatedSettlmt Rule 2(c).

O

ORDER TO MEDIATE, ICMediatedSettlmt Rule 1(c).
Content, ICMediatedSettlmt Rule 1(f).
Notice, ICMediatedSettlmt Rule 2(c).
Receipt of form 33 request for hearing, ICMediatedSettlmt Rule 1(b).
Request to order conference, ICMediatedSettlmt Rule 1(d).
Time for issuing, ICMediatedSettlmt Rule 1(e).

P

PLAINTIFFS NOT REPRESENTED BY COUNSEL.
Order dispensing with mediation, ICMediatedSettlmt Rule 1(j).

POSTPONEMENT FEES.
Rate when mediator appointed by commission, ICMediatedSettlmt Rule 7(b).

PRIVATE CONSULTATION BY MEDIATOR, ICMediatedSettlmt Rule 6(a).

R

REPORT OF RESULTS OF CONFERENCE.
Mediator's report, ICMediatedSettlmt Rule 6(b).
Neutral evaluation conference, ICMediatedSettlmt Rule 9(g).

REQUEST TO ORDER CONFERENCE, ICMediatedSettlmt Rule 1(d).

RESPONSE TO REQUEST TO ORDER CONFERENCE.
Time for filing, ICMediatedSettlmt Rule 1(d).

S

SANCTIONS, ICMediatedSettlmt Rule 5.
Failure to pay mediator's fee, ICMediatedSettlmt Rule 2(e).

SATURDAYS.
Reference to number of days to perform act, ICMediatedSettlmt Rule 12.

STIPULATION.
Electronic or stenographic recorded final agreement, ICMediatedSettlmt Rule 2(d).
Selection of mediator by agreement, ICMediatedSettlmt Rule 2(a).

SUNDAYS.
Reference to number of days to perform act, ICMediatedSettlmt Rule 12.

T

TIME IN WHICH TO PERFORM ACT.
Reference to number of days is to calendar days including Saturdays, Sundays and legal holidays, ICMediatedSettlmt Rule 12.

V

VIOLATION OF RULES.
Sanctions, ICMediatedSettlmt Rule 5.

RULES OF THE INDUSTRIAL COMMISSION RELATING TO THE LAW-ENFORCEMENT OFFICERS', FIREMEN'S, RESCUE SQUAD WORKERS' AND CIVIL AIR PATROL MEMBERS' DEATH BENEFITS ACT

(Pursuant to authority contained in G.S. 143-166.4, the North Carolina Industrial Commission hereby adopts the following rules:)

Rule
I. Location of offices and hours of business.
II. Transaction of business by the Commission.
III. Determination of claims by the Industrial Commission.
Rule
IV. Appeal to the Full Commission.
V. Amendment of rules.
Index follows Rules.

Rule I. Location of offices and hours of business.

The offices of the Industrial Commission are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The same office hours as are or may be observed by other State offices in Raleigh will be observed by the Industrial Commission.

(The effective date of this rule is November 1, 1977.)

Rule II. Transaction of business by the Commission.

The Commission will remain in continuous session subject to the call of the Chairman to meet as a body for the purpose of transacting such business as may come before it.

Rule III. Determination of claims by the Industrial Commission.

1. Upon application or request to the Industrial Commission for an award under the provisions of the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act, the Full Commission will determine whether sufficient information or evidence is contained in the Commission's workers' compensation or other files upon which to base an Order for the payment of benefits. If the Full Commission is satisfied that such an Order should be issued, it will, without conducting a formal hearing, file an appropriate Award directing the payment of benefits.

The Full Commission, on joint request of the interested parties or for good cause shown, may in its discretion, order or approve a settlement for less than the maximum amount set forth in G.S. 143-166.3.

2. If the Full Commission is of the opinion that it has insufficient information or evidence before it upon which basis an award for the payment of benefits should be issued, the Full Commission will place the case upon the Commission's hearing docket in the county where the incident giving rise to the death is alleged to have occurred. The case will thereafter be set for hearing before a Hearing Commissioner or Hearing Deputy Commissioner in such county or in such other county as the Full Commission may direct, due notice of the hearing being given to all parties and to the Attorney General of the State of North Carolina who may appear as amicus curiae.

3. The Hearing Commissioner or Hearing Deputy Commissioner before whom the case is set for hearing, in his discretion, may order the parties to appear at a reasonable time and place for a pre-trial hearing to determine such matters as he deems necessary. The Hearing Commissioner or Deputy Commissioner will, having received all evidence pertinent to the case, thereafter proceed to file a Decision and Award in the case in which benefits are awarded or denied. Such Decision will be sent to all parties.

4. The Commission may, of its own motion, order a rehearing of any case.

5. The Commission will give reasonable notice of hearing in every case. Postponement or continuance of a scheduled hearing will rest entirely in the discretion of the Commission.

6. In all cases where it is suitable that infants or incompetents sue by their guardian ad litem, the Commission will appoint such guardian ad litem upon the written application of a reputable disinterested person closely connected with such infant or incompetent. But, if such person will not apply, then, upon the like application of some reputable citizen; and the Commission will make such appointment only after due inquiry as to the fitness of the person to be appointed.

7. Any claimant who gives to the opposing party or an agent of that party a written or recorded statement of the facts and circumstances surrounding his claim shall be furnished by the opposing party a copy of such statement within ten days upon request. Further, any claimant who has given such a statement shall, without request, be furnished by the opposing party a copy thereof immediately following a denial of his claim or no less than ten days prior to a pending hearing.

Such copy shall be furnished at the expense of the party to whom the statement was given.

If any party fails to comply with this rule, then an Order may be entered by the hearing officer prohibiting that party from introducing designated matters into evidence.

8. In the absence of written notice of appeal from the Decision and Award filed in such a case by the Hearing Commissioner or Hearing Deputy Commissioner within fifteen days from receipt of such award, the award as filed will be binding on the parties.

(The effective date of this rule is August 1, 1979.)

Rule IV. Appeal to the Full Commission.

1. In any case in which Decision is filed by Hearing Commissioner or Hearing Deputy Commissioner, appeal may be made to the Full Commission by giving written notice of appeal to the Commission within fifteen days from receipt of the Decision, with written statement of service of copy by mail or in person on opposing party or parties.

2. Upon receipt of notice of appeal, the Commission will supply to the appellant and to appellee a transcript of the record upon which is based the Decision and Award from which appeal is being taken to the Full Commission. The appellant shall, within ten days of receipt of transcript of the record, file with the Commission a written statement of the particular grounds for the appeal, with written statement of service of copy by mail or in person on opposing party or parties, unless such statement of grounds, in the discretion of the Commission, is waived.

Particular grounds for appeal not set forth will be deemed to be abandoned and argument thereon will not be heard before the Full Commission.

A nonappealing party is not required to file conditional assignments of error in order to preserve his rights for possible further appeals.

3. When an appeal is made to the Full Commission, appellant's brief, if any, in support of his ground for appeal shall be filed in triplicate with the Commission, with written statement of service of copy by mail or in person on appellee no less than 25 days after receipt of the transcript of the hearing. Appellee shall have 25 days in which to file reply brief, if any, in triplicate with the Commission, with written statement of service of copy by mail or in person on opposing party or parties.

Any motions by either party shall be filed in triplicate with the Full Commission, with written statement of service of copy by mail or in person on opposing party or parties.

4. No new evidence will be presented to or heard by the Full Commission.

5. Ruling on a motion for a new hearing to take additional evidence will be governed by the general law of the State for the granting of new trials on the grounds of newly discovered evidence. Such motion must be written, supported by affidavit, and may be argued before the Full Commission at the time of the hearing on appeal.

6. The parties, or either of them, may waive oral argument before the Full Commission. In the event of such waiver, a Decision based on the record, exceptions, and briefs, if any, will be given by the Full Commission.

(The effective date of this rule is August 1, 1979.)

Rule V. Amendment of rules.

The Commission reserves the right, in its discretion, to amend its Rules at any time, with or without notice. Copies of the Rules are on file at the Office of the Secretary of State and at the Office of the Attorney General, and may be obtained therefrom in the usual manner.

Index to Rules of the Industrial Commission Relating to the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act

---

A

AMENDMENT OF RULES, ICDeathBenefits Rule V.

APPEALS.
Full commission, ICDeathBenefits Rule IV.

C

CLAIMS.
Determination.
  Procedure, ICDeathBenefits Rule III.
Written or recorded statement, ICDeathBenefits Rule III.

H

HEARINGS.
Appeals.
  Full commission, ICDeathBenefits Rule IV.
Claims, ICDeathBenefits Rule III.
Failure to appeal, ICDeathBenefits Rule III.
Rehearings, ICDeathBenefits Rule III.

HOURS OF BUSINESS, ICDeathBenefits Rule I.

O

OFFICES.
Hours of business, ICDeathBenefits Rule I.
Location, ICDeathBenefits Rule I.

R

REHEARINGS, ICDeathBenefits Rule III.

S

SESSIONS, ICDeathBenefits Rule II.

T

TRANSACTION OF BUSINESS BY COMMISSION, ICDeathBenefits Rule II.

NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR MANAGED CARE ORGANIZATIONS

Effective January 1, 1996.

Rule
I. Purpose.
II. Definitions.
III. Qualification by Department of Insurance.
IV. Qualification and revocation.
V. Notice to Commission.
VI. Contract provisions.
Rule
VII. Information for employee/patient.
VIII. Inclusive provider panels.
IX. Quality assurance and utilization review.
X. Waiver.
Index follows Rules.

Rule I. Purpose.

These rules are intended to facilitate the timely and cost-effective delivery of appropriate medical compensation services to fulfill the employer's duty to provide such services as are reasonably necessary to effect a cure, give relief, or shorten the period of disability resulting from compensable injuries through the use of Managed Care Organizations (MCOs). These rules do not affect existing, informal lists or "employer networks" of providers assembled by employers or insurers for their own referrals. *N.C. Gen. Stat. §§ 97-2(19), (20) and (21); 97-25; 97-25.2; 97-25.3(e); 97-26(b), (c), and (g); and 97-25.4(a).*

Rule II. Definitions.

As used in these rules, unless context otherwise dictates:

(1) *Managed care organization (MCO).* A preferred provider organization (PPO) or a health maintenance organization (HMO) regulated under Chapter 58 of the General Statutes. *N.C. Gen. Stat. §§ 97-2(21) and 58-50-50.*

(2) *Health care provider (provider).* Any medical doctor, chiropractor, other physician, hospital, pharmacy, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist and any other person or firm providing medical care pursuant to the Workers' Compensation Act. Payment for services rendered for a workers' compensation patient shall be controlled by contract between the provider and MCO, or if none, by the Commission's Medical Fee Schedules. *N.C. Gen. Stat. §§ 97-2(20); 97-26(b) and (c).*

(3) *Employer.* Any person, firm, corporation, or governmental entity obligated by the Workers' Compensation Act to pay or provide indemnity or medical compensation, **including any insurance carrier**, self-insurance fund, third party administrator or other person, firm or corporation undertaking to pay or adjust claims on behalf of the employer's employees. *N.C. Gen. Stat. §§ 97-2(3) and 97-25.2.*

(4) *Commission.* The North Carolina Industrial Commission and its employees acting on its behalf. *N.C. Gen. Stat. §§ 97-77 and 97-79.*

(5) *Workers' compensation act.* The North Carolina Workers' Compensation Act, Chapter 97, Article 1 *(N.C. Gen. Stat. §§ 97-1 — 97-101)*, as interpreted and applied by the rules and decisions of the Commission and the courts of North Carolina and the United States.

(6) *Employer network.* As used in Rule I., means any group of providers assembled by or for an entity liable for medical compensation which agrees to accept the referrals of that entity's workers' compensation patients, and from among whom an adjuster, officer, employee, or insured patient of the entity chooses the initial provider; provided, the entity has no right to sell the services of the providers to a third party. *N.C. Gen. Stat. § 97-25.*

Rule III. Qualification by Department of Insurance.

Prior to provision of any service for workers' compensation patients pursuant to an MCO contract with any employer, an MCO shall comply with the applicable requirements of N.C. Gen. Stat. Chapter 58, Insurance, and the regulations promulgated pursuant thereto, in addition to these rules, except as they may be interpreted to specifically conflict with the Workers' Compensation Act and these rules; provided, that MCOs with such existing contracts on the effective date of these rules shall comply with this rule on or before February 1, 1996. In the absence of effective and binding regulations administered by the N.C. Department of Insurance setting appropriate and sufficient requirements and standards for health care provider contracts, accessibility of providers, financial ability to meet contract commitments, quality management or quality assurance programs, health care provider credentialing, conflicts of interest, records and examinations, internal auditing, confidentiality and other appropriate matters, every MCO offering medical compensation services shall comply with temporary orders or provisional regulations issued by the Commission, consonant with the Workers Compensation Act, pending further formal rulemaking by the Commission or the Department of Insurance. *N.C. Gen. Stat. §§ 7-2(21) and 97-25.2.*

Rule IV. Qualification and revocation.

Upon receipt of documents complying with Rule V., nothing otherwise appearing, the Commission will issue a letter to the MCO acknowledging receipt and stating that the MCO is qualified to contract to serve workers compensation patients while it holds an MCO certificate from the Department of Insurance, subject to renewal at a specified time, not exceeding three (3) years. For good cause, including, but not limited to, ineffective delivery of medical services, failure to comply with applicable laws, rules or regulations, and failure to timely respond to lawful orders of the Commission or other regulatory authorities, the Commission may suspend or revoke an MCO's permission to deal with any particular workers' compensation patients, employers or providers, groups or classes of them, or all of them. *N.C. Gen. Stat. § 97-25.2.*

Rule V. Notice to Commission.

Upon contracting with an employer to provide medical compensation services, the MCO shall provide to the Commission (1) a copy of that portion of the contract containing the provisions specified in Rule VI, and the method for determining payment to the MCO, excluding those of its terms kept confidential by the N.C Department of Insurance, initialed by the employer; (2) a copy of its current certificate(s) issued annually by the N.C. Department of Insurance pursuant to N.C Gen. Stat. Chapter 58; (3) the name and address of all owners or shareholders, or related groups of owners or shareholders, holding more than 10% interest in the MCO and whether they are or have any relationship with a provider. Persons or firms are related, for the purposes of this rule, if either has a financial interest in the other shares officers, agents, or employees; or, if natural persons, are first cousins or closer in kinship. An MCO subject to these rules shall report its medical compensation expenditures annually on I.C. Form 51. *N.C. Gen. Stat. § 97-25.2.*

Rule VI. Contract provisions.

An MCO's contract with an employer subject to these rules shall include these provisions: (1) the principal place(s) of employment of the covered employees, including address(es) and phone number(s) of the workplace(s); (2) the name, title, mailing address, phone number, fax number, and e-mail address, if any, of an officer or responsible employee of the MCO empowered to assent to the treatment or referral of covered employees, capable of obtaining and providing complete business, administrative and medical records generated pursuant to the contract, and empowered to resolve routine disputes with patients, employers and providers under the Commission's jurisdiction; (3) the name, title, mailing address, phone number, fax number, and e-mail address, if any, of an adjuster, officer, agent or employee of the employer empowered to negotiate the resolution of routine medical compensation disputes, and receive orders of the Commission on behalf of the employer; (4) an acknowledgment that the MCO is bound by applicable requirements of N.C. Gen. Stat. Chapters 58 and 97 and these rules, and subject to orders of the Commission to the same extent as the employer; (5) the agreement of the employer that it will cooperate and actively assist in furnishing its employees and supervisors with a phone number and instructions for obtaining emergency treatment and/or contacting the MCO upon injury to any employee during the workday or on the employer's premises requiring physician attention, and with furnishing to its injured employees the information and card hereinafter required in Rule VII; (6) specify a dispute resolution plan in accordance with N.C. Gen. Stat. § 97-25.2 and 11 N.C. Admin. Code 12.0914, including provisions for notice of decision in appeals within 30 days, or within 72 hours of appeal when the regular appeals process would cause a delay in the rendering of health care that would be detrimental to the health of the employee; (7) describe physician panels, including specialties represented, and the employee's right to select his or her attending physician from the appropriate panel, and to subsequently change attending physicians once within the members of the panel; (8) whether the MCO or employer will be responsible for securing the services of "out of network" providers when needed. *N.C. Gen. Stat. § 97-25.2.*

Rule VII. Information for employee/patient.

The employer shall inform employees of its arrangements with an MCO for providing medical compensation through its usual means of communicating company policies and benefit information, and provide a wallet-size card bearing a phone number to be contacted in case of a work-related injury, and otherwise complying with Department of Insurance regulations. As soon as reasonably possible following the injury, the employer or MCO shall provide to the employee a printed explanation of the system being utilized for his care, suitable for sharing with emergency, "out-of-network", and referral physicians, which shall be filed with any Form 19 submitted to the Commission; provided, that electronic filers may otherwise notify the Commission of the identity of the MCO. This statement shall include the following information: (1) The offices to contact concerning medical treatment for the injury, including a telephone number; (2) if known at that time, the employee's chosen treating physician, including a phone number for seeking medical assistance outside normal business hours if the injury might cause such a need; (3) the applicable methods for choosing and changing treating physicians and resolving disputes concerning physicians or treatment pursuant to N.C. Gen. Stat. § 97-25.2; (4) that the MCO can make available physicians in all the fields and specialties licensed by the State of North Carolina; (5) the employer's obligation to pay for treatment for which the employee/patient is referred to the MCO, whether or not the employer admits liability for the injury per N.C. Gen. Stat. § 97-90(e); (6) the employee's duty to cooperate in treatment, and right to secure treatment at his or her own expense that does not interfere with the treating physician's treatment; and, (7) the I.C. File Number, if known when filed. Information for providers concerning billing may be included, labeled as such.

Rule VIII. Inclusive provider panels.

As soon as reasonably possible following onset or injury, and upon a patient's first request to change attending physician, the MCO shall provide the patient with a list of reasonably accessible and available panel physicians qualified to treat or manage the primary condition for which the employer has accepted liability or authorized treatment from which the employee may select the attending physician. The employer and MCO shall provide for reasonable access and availability to all medical compensation services, and include in its panels, or otherwise make available for the employee's choice, one or more physicians representing all specialties available in the community that are licensed to provide foreseeably necessary treatment for the patient's primary compensable condition, if a physician of that specialty meets the MCO's reasonable credentialing criteria for that specialty and is willing to contract to provide their services on a non-discriminatory basis. *N.C. Gen. Stat. §§ 97-2(19), 97-2(20), 97-25 and 97-25.2.*

Rule IX. Quality assurance and utilization review.

An MCO subject to these rules shall comply with the requirements of the N.C. Department of Insurance for quality assurance and utilization review plans, and upon request, provide the Commission with copies of records generated by, or utilized in, the operation of those programs, and copies of plans or amendments to plans not yet filed with the Department of Insurance.

Rule X. Waiver.

For good cause, and in its discretion, subject to statutory requirements, the Commission may waive adherence to any of these Rules. *N.C. Gen. Stat. § 97-80(a).*

Index to Rules of Managed Care Organizations

C

COMMISSION.
Notice to, ICManagedCare Rule V.
Waiver, ICManagedCare Rule X.

CONTRACT PROVISIONS, ICManagedCare Rule VI.

D

DEFINITIONS, ICManagedCare Rule II.

DEPARTMENT OF INSURANCE.
Qualification by, ICManagedCare Rule III.

E

EMPLOYEE INFORMATION, ICManagedCare Rule VII.

I

INFORMATION FOR EMPLOYEE!PATIENT, ICManagedCare Rule VII.

N

NOTICE TO COMMISSION, ICManagedCare Rule V.

P

PATIENT INFORMATION, ICManagedCare Rule VII.
Available physicians, ICManagedCare Rule VIII.

PHYSICIANS.
List of available physicians, ICManagedCare Rule VIII.

PROVIDERS.
List of available providers, ICManagedCare Rule VIII.

PURPOSE, ICManagedCare Rule I.

Q

QUALIFICATION.
Department of insurance, ICManagedCare Rule III.
Generally, ICManagedCare Rule IV.

QUALITY ASSURANCE, ICManagedCare Rule IX.

R

REVOCATION, ICManagedCare Rule IV.

U

UTILIZATION REVIEW, ICManagedCare Rule IX.

W

WAIVER, ICManagedCare Rule X.

MEDICO-LEGAL GUIDELINES

TABLE OF CONTENTS

Preamble to Medico-Legal Guidelines
History Leading to the Proposed Revision of the NC Medico-Legal Code
Recent Revisions
Physician Complaints
Attorney Complaints
Scope
Professional Liability
Treating Versus Non-Treating Witnesses
I. INTRODUCTION
II. SPECIFIC REGULATIONS
III. DEFINITIONS
    A. "Physician" Defined
    B. "Medical Record" Defined
    C. "Medical Report" Defined
    D. "Independent Medical Examination" Defined
    E. "Medical Witness" Defined
        1. "Retained Expert Witness" Defined
        2. "Fact Expert Witness" Defined
        3. "Independent Expert Witness" Defined
IV. SPECIFIC SITUATIONS
    A. Medical Records
        1. Ownership of Medical Records
        2. Inspection and Copying of Medical Records
        3. Requesting Medical Records or a Medical Report From a Treating Physicians
        4. Special Considerations for Substance Abuse Diagnosis and Treatment Records
    B. Consultation and Testimony
        1. Consultations
        2. Physician Deposition Testimony
V. TRIAL SITUATIONS
    A. Subpoenas
        1. Witness Subpoenas
        2. Subpoenas for Medical Records
    B. Notice for Trial
        1. Initial Trial Settings
        2. Fact Expert Witness Availability
        3. Final Trial Calendar
        4. Court Appearance
    C. Medical Witnesses
        1. Generally
        2. Fees
VI. JOINT COMMITTEE OF NC MEDICAL SOCIETY AND NC BAR ASSOCIATION
VII. APPENDICIES

Preamble to Medico-Legal Guidelines

History Leading to the Proposed Revision of the N.C. Medico-Legal Code

Since the adoption of the original Medico-Legal Code by the North Carolina Bar Association and North Carolina Medical Society in 1956, the environment in which the physician and lawyer interact has changed radically. With the introduction of standard rules of civil procedure and evidence, the broad bounds of contact between attorney, witnesses, and parties were defined. Adoption and subsequent revision of Rules of Professional Conduct further defined the lawyer's ethical conduct and served as a guide in contact with physicians. Physicians, largely unfamiliar with these legal rules and guides, reacted only within the boundaries of professional respect, dignity, decorum, and the ethical principles of their health care profession. With the rise in importance and frequency of medical litigation, the professions have scrutinized attorney and physician conduct and have reached a consensus that there is a need to revise their inter-professional code. The Code was previously revised in 1972, 1986, and 1991 in attempts to update the original 1956 Code. The 1991 version was called "The Medico-Legal Guidelines of North Carolina" (the term "Guidelines" as used hereafter refers to all such versions as well as this document).

Recent Revisions

In 1997, the Joint Committee of the North Carolina Medical Society and North Carolina Bar Association decided the Guidelines should be updated for two reasons.[1] First, the practices of medicine and law had changed dramatically since 1991.[2] Second, the Guidelines had not been effective in resolving certain recurring disputes between physicians and attorneys.[3] Significant revisions were made, and finally, in 2000, the Medical Society and the Bar Association adopted the 2000 Medico-Legal Guidelines.

More recently, the Medico-Legal Liaison Committee updated the Guidelines to incorporate HIPAA privacy regulations and update other cited authorities. The 2005 Medico-Legal Guidelines are the product of this latest endeavor.

---

[1] The Joint Committee delegated this task to the Bar Association Medico-Legal Liaison Committee.

[2] Other health care professionals are now licensed to perform medical services which were traditionally provided only by physicians. Major changes in the health insurance industry have altered traditional health care delivery systems. Alternative Dispute Resolution is now employed to resolve many claims involving physicians which were previously resolved in litigation. Technological advances challenge medical and legal attempts to protect confidential medical information and patient/client rights to privacy.

[3] Despite the presence of the Guidelines, recurring disputes persist between physicians and lawyers in the litigation context. Some of these disputes have been addressed to the Joint Committee of the North Carolina Medical Society and North Carolina Bar Association for dispute resolution. Other disputes have been explored by the North Carolina Bar Association Medico-Legal Liaison Committee, which conducted public hearings prior to preparing a new draft version of the North Carolina Medico-Legal Guidelines. The Committee invited speakers to the hearings who had experienced difficulty with the implementation of the Guidelines, and believed that the Guidelines needed change.

Physician Complaints

Physicians complain about attorney misuse of subpoena power and failure to pay expert witness fees of both treating and retained medical expert witnesses. In the case of treating physicians, this complaint arises often when the physician testifies pursuant to subpoena and without a fee agreement with the subpoenaing attorney, and the subpoenaing party does not prevail at trial.[4]

Physicians complain that they are uncertain of their legal duties in certain areas. Physicians are frequently confused about the duties attendant to their release of confidential medical information. They are not certain as to when they may, may not, and when they must release confidential medical records or speak with an attorney about a patient. They are often unsure about what services to bill for, whom to bill, and how to ensure payment resulting from services rendered in legal cases involving medical issues. They complain that they receive conflicting responses from lawyers regarding their duties and rights.[5]

Treating physicians, who may be potential defendants in professional liability litigation, complain that attorneys investigating those claims mislead them. The climate of inter-professional mistrust created in the professional liability context invades all areas of litigation.

Attorney Complaints

Attorneys complain that physicians fail to comply with subpoenas for their records or presence as a witness, that they fail to provide complete medical records, and that they bill excessively for medical records, consultation and testimony. Attorneys also complain that treating physicians refuse or are reluctant to consult with their patient's attorney or to provide live testimony on behalf of their patient. These areas of conflict cause problems for patients and attorneys, who of necessity rely on medical evidence in cases involving medical factual issues.

---

[4] N.C. Gen. Stat. § 7A-314 (2005) addresses the discretionary award of expert witness fees as costs in civil cases, but does not compel parties to seek a judicial determination of expert witness fees or who is to pay them. N.C. Gen. Stat. § 7A-454 (2005) addresses under what circumstances a court may order payment of expert witnesses who testify on behalf of indigent criminal defendants. N.C. Rule of Evidence 706 governs who shall pay, and what amount, shall be paid to expert witnesses appointed by the Court in civil and criminal actions. N.C. Gen. Stat. § 15-7 (2005) governs the payment of physicians appointed to conduct post-mortem examinations of homicide victims. In cases before the Industrial Commission, expert witness fees are set by the Commissioner or Deputy Commissioner hearing the case. See N.C. Gen. Stat. §§ 97-90 and 97-26.1 (2005).

[5] This occurs, in part, because the law is unclear in certain areas and uncertain in others. See Footnote 48 regarding the subpoena of medical records by way of example.

Scope

Throughout its history, the scope of various versions of the Guidelines was limited to physician-attorney interactions. The Guidelines did not apply to other health care professionals, and also did not apply to a physician who was a party-defendant in a malpractice action. The Guidelines did not distinguish between treating and non-treating medical expert witnesses. The Guidelines did not complement and did not reference specific rules of conduct required by laws or regulations in areas such as workers' compensation, criminal prosecutions, or cases involving drug and alcohol abuse medical records. The newly adopted Guidelines have made some changes in these areas.

Professional Liability

Historically, the Guidelines have not addressed the interaction between attorneys and physicians who are defendants in professional liability actions. This relationship is governed by mandatory statutes, rules of ethics, and rules of procedure, and is not appropriately a subject of these Guidelines. However, these Guidelines seek to clarify duties arising in those situations where the physician is not a party-defendant but the legal action is based on a claim of professional negligence made by a person treated or evaluated by the physician.[6] The Guidelines address some of the recurring concerns in this difficult area.

Treating Versus Non-Treating Witnesses

In earlier editions, the Guidelines did not always distinguish between physicians who were retained expert medical opinion witnesses and those medical witnesses who were fact witnesses by virtue of treating the attorney's client as a patient. The relationship between a physician who is a retained expert and an attorney is voluntary and reciprocal, and fee arrangements between them are business agreements restricted only by prevailing law and their professional guidelines of ethics. By contrast, interactions between treating physicians and patient's attorneys are not chosen, arising instead from their respective connections and duties to their mutual patient/client. The Guidelines, recognizing this distinction, preclude retained experts and attorneys from invoking the assistance of the Joint Committee in fee disputes arising between them.

---

[6] In such situations, the physician or other health care provider may be a potential defendant and/or may be required to provide expert testimony affecting defendant(s) who are co-workers and colleagues.

I. INTRODUCTION

The North Carolina Medico-Legal Guidelines are the product of collaboration between the North Carolina Medical Society and North Carolina Bar Association. The Guidelines are the end-product of decades of cooperation between physicians and lawyers aimed at improving their inter-professional interactions in medical litigation.

The relationship between a physician and an attorney should be based upon mutual respect, courtesy, and understanding. Medical testimony is generally indispensable in legal cases to prove or disprove the nature or extent of injuries or other legally relevant medical conditions. Therefore, when accepting a patient, a physician also accepts the incidental obligation to cooperate in any legal proceedings in which the patient may become involved.[7] When attorneys make inappropriate or inconsiderate demands on physicians, they cause animosity between the professions. Without mutual cooperation by physicians and attorneys, their patients/clients become the unfortunate victim of professional ill will.

To promote inter-professional cooperation and courtesy, the particular responsibilities of physicians and attorneys should be more clearly defined. These Guidelines set out these responsibilities, citing legal and/or medical authority where applicable. These Guidelines are not exclusive, nor do they cover all situations or seek to define the outer limits of professional interrelationships. The Guidelines establish minimum standards for those relationships and encourage civility between the professions.

II. SPECIFIC REGULATIONS

These Guidelines are not intended to supplant any mandatory rules, laws or regulations. Mandatory rules (for example the Rules of Professional Conduct governing attorney behavior, the North Carolina Rules of Civil Procedure governing court procedure, and the North Carolina Rules of Evidence governing the admissibility of evidence in court proceedings), statutes, and regulations take precedence over these Guidelines. Some relevant citation to applicable rules, laws, professional codes and position statements, and/or regulations are contained in the text of these Guidelines.

---

[7] See AMA Code of Medical Ethics, § 9.07 "Medical Testimony," (2004-05 ed.) (regarding ethical duty to testify if patient requests "in order to secure the patient's legal rights."). AMA Code of Medical Ethics provisions are aspirational rather than mandatory.

III. DEFINITIONS

The following definitions apply throughout these Guidelines:

A. "Physician" Defined: A physician is a person licensed to practice medicine by the North Carolina Medical Board as that term has historically been understood, i.e., medical and osteopathic physicians.[8] The Guidelines also cover a physician assistant licensed by the North Carolina Medical Board.

B. "Medical Record" Defined: The medical record is a collection of protected health information for a particular individual, that: is created or received by a physician or other health care provider; relates to the past, present, or future physical or mental health or condition of the individual; and includes information about the provision of health care to that individual and the past, present, or future payments by or on behalf of that individual for the provision of health care.[9] Medical records are inherently sensitive and personal and contain information that relates to an individual's physical or mental condition, medical history, medical diagnosis, or medical treatment,[10] as well as demographic and other information that identifies or has the potential to identify the individual (e.g., patient name, address, social security number, unique identifier, etc.).[11]

C. "Medical Report" Defined: A medical report is a report generated by a physician at the request of an attorney in order to assist the attorney in preparing for litigation which involves a patient's medical condition, treatment, or prognosis. A medical report may be a narrative summary of the medical record, or it may be a response to requests for expert opinions regarding the patient's condition, treatment, or prognosis not contained in the medical record. The preparation of a medical report may, in some instances, require the physician to obtain a current evaluation of the patient.[12]

---

[8] N.C. Gen. Stat. Ch. 90, Art. 1 (2005) governs the licensure of medical and osteopathic physicians in North Carolina. N.C. Gen. Stat. § 90-18.1 (2005) governs the licensure of physician assistants in North Carolina. Like physicians, other health care providers also are encouraged to follow the Guidelines but are not required to do so unless otherwise instructed by their regulatory Board. Attorneys should follow the provisions of the Guidelines in dealings with all health care professionals.

[9] Relevant HIPAA citations include: 45 C.F.R. § 160.013 (2005) for the definitions of "health information" and "individually identifiable health information" and § 164.501 (2005) for the definitions of "designated record set" and "protected health information." See Appendix A-1, Relevant HIPAA Definitions.

[10] Medical Records are defined by the following North Carolina statutory and regulatory provisions: N.C. Gen. Stat. §§ 8-44.1 (2005), 90-410(2) (2005), 58-39-15(18) (2005), 130A-372 (2005), 10A N.C.A.C. 13B.3900 et seq. (2005). Other provisions of North Carolina and federal law refer to information about patients' medical services using terms other than "Medical Records." See N.C. Gen. Stat. § 122C-3(9) (2005) and 42 C.F.R. §§ 2.11 and 2.13 (2004). See these Guidelines, Part IV(A)(4) (regarding records of patients receiving services for drug or alcohol abuse), and Appendix A-2, Pertinent N.C. Statutes and Regulations regarding Medical Records.

[11] See AMA Code of Medical Ethics Sec. 5.07, "Confidentiality: Computers" and Sec. 5.075 Confidentiality: Disclosure of Records to Data Collection Companies" (2004-05 ed.) (regarding confidentiality and computerized data bases).

D. **"Independent Medical Examination" Defined**: An independent medical examination is a medical examination in which a person is required or agrees to submit to a medical examination by a physician selected or approved by a court, administrative agency or other adjudicatory body or by the mutual agreement of the parties.[13]

E. **"Medical Witness" Defined**: A medical witness is a physician who provides testimony concerning one or more medical issues involved in a lawsuit or claim.[14] Three types of medical witnesses are recognized by the N.C. Medico-Legal Guidelines.[15] They are:

1. **"Retained Expert Witness" Defined**: A retained expert witness is a physician who has been retained by one of the parties to litigation to provide expert opinion testimony or evidence concerning one or more medical issues involved in the lawsuit or claim.

2. **"Fact Expert Witness" Defined:** A fact expert witness is a physician who is called upon to testify or provide evidence because they have treated a patient who is a party or witness in a lawsuit or claim.

3. **"Independent Expert Witness" Defined:** An independent expert witness is a physician who has been selected or approved by a court, administrative agency or other adjudicatory body or by the mutual agreement of the parties to perform an independent medical examination.

---

[12] See N.C. Gen. Stat. 90-411 (2005) (regarding reasonable fees for the preparation of medical reports). See also N.C. Rule of Civil Procedure 35.

[13] Independent medical examinations occur in a number of contexts. For civil actions in North Carolina's state courts, see N.C. Rule of Civil Procedure 35. In workers' compensation cases, independent medical examinations can occur upon agreement of the parties, order of the Industrial Commission, or pursuant to N.C. Gen. Stat. § 97-27 (2005). Reference should be made to any Rules adopted by the Industrial Commission for guidance regarding communications with independent medical witnesses in workers' compensation cases. With regard to social security disability claims, see 20 C.F.R. §§ 404.1517 and 416.917 (2004), which discuss when the Social Security Administration will purchase a consultative examination of a disability claimant. The reports generated from these examinations are kept in the claimant's file and are available for review by the claimant and/or the claimant's representative by going to the office that has the file. The reports are not automatically sent to the claimant or the claimant's representative. The claimant may direct the Social Security Administration to release the report to his or her own doctor. See also 20 C.F.R. §§ 404.1519 to 404.1519t, 416.919 to 404.1519t, 409.1512, and 416.927 (2004) (regarding Social Security Administration Medical Advisors).

[14] "Medical experts should have recent and substantive experience in the area in which they testify and should limit testimony to their sphere of expertise." AMA Code of Medical Ethics, Sec. 9.07, "Medical Testimony" (2004-05 ed.).

[15] The obligations of medical witnesses under the Guidelines may differ, depending upon which type of medical witness they are.

IV. SPECIFIC SITUATIONS

A. Medical Records

1. Ownership of Medical Records

Usually, records made or collected by or at the direction of a physician in connection with the treatment and evaluation of a patient are maintained and retained by the physician, hospital or other individual or institutional care giver. The original record is deemed to be the property of the physician, hospital, or other individual or institutional care giver. The patient has a qualified right to say who may receive information contained in the record.[16]

2. Inspection and Copying of Medical Records

a. Required Authorization

An original medical record should not be removed from the possession of a physician, hospital, or other individual or institutional care giver except upon court order, but the original should be available for inspection or copying with proper written authorization.[17] Proper written authorization is to be provided by the patient, an individual empowered by law to act in the patient's behalf regarding disclosure of medical records, or by order of a court or administrative agency having jurisdiction and authority to mandate such disclosure.[18]

---

[16] See AMA Code of Medical Ethics, "Fundamental Elements of the Patient-Physician Relationship" (2004-05 ed.) ("The patient has the right to receive information from physicians. . . and [patients] are also entitled to obtain copies or summaries of their medical records [and] to have their questions answered."); See also N.C. Medical Board, "Access to Physician Records" (Position Statement adopted 11/93, amended 5/96, 5/97, 3/02, and 8/03) ("Each physician has a duty on the request of a patient or the patient's representative to release a copy of the record in a timely manner to the patient or the patient's representative, unless the physician believes that such release would endanger the patient's life or cause harm to another person"). Complex rules govern the disclosure of medical information about an individual's substance abuse, diagnosis or treatment, and the disclosure of such information is excluded from the scope of these Guidelines. See Part IV(A)(4), infra, and N.C. Gen. Stat. § 122C-3(9) (2005). HIPAA citation regarding personal representatives can be found at 45 C.F.R. 164.502(g) (2004).

[17] HIPAA mandates that a valid authorization must contain, at a minimum: (1) a description of the information to be used or disclosed; (2) the name(s) of those authorized to make the requested use or disclosure; (3) the name of the person(s) to whom the covered entity may make the requested use or disclosure; (4) the purpose of the use or disclosure; (5) an expiration date or event (e.g., end of research study); and (6) the signature of the individual and date (if the authorization is signed by a personal representative of the individual, a description of such representative's authority). 45 C.F.R. § 164.508(c) (1)(i-iv) (2004). Also, § 164.508(c)(2) requires that the authorization contain statements adequate to place the individual on notice that the individual has the right to revoke the authorization, the ability or inability to condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization, and the potential for information to be disclosed pursuant to the authorization to be subject to redisclosure.

[18] In workers' compensation cases, "an employer paying medical compensation to a provider rendering treatment. .may obtain records of the treatment without the express authorization of the employee." N.C. Gen. Stat. § 97-25.6 (2005). Reference should be made to the Rules of the Industrial Commission or contact made with the Industrial Commission regarding the right of the employer or others acting on its behalf to obtain medical records without the express authorization of the employee. HIPAA permits such disclosure under an exemption that reads: "A covered entity may disclose protected health information as authorized by and to the extent necessary to

b. Permissible Charges for Copying Medical Records

In personal injury liability and social security disability cases, permissible charges for copies of medical records are governed by N.C. Gen. Stat. 90-411. Further, in personal injury liability cases, a physician may not charge for copies of medical records requested by a patient's attorney if they wish to preserve a lien for their medical services against the patient's recovery of monetary damages for personal injury from a third party.[19] In workers' compensation cases, permissible charges for copies of medical records are governed by N.C. Gen. Stat. § 97-26.1 (2005)[20]. In social security disability cases, see 20 C.F.R. §§ 404.1514 and 416.914 (2005), and N.C.. Gen Stat. § 90-411 (2005). In other circumstances, a physician may charge a reasonable fee for copies of medical records.[21]

c. Withholding Records where Patient Account for Medical Services Not Paid

A physician may not refuse to provide copies of medical records (including the bill for services provided to the patient) on the ground that the patient has not paid the amount due on his account for medical and other services.[22]

3. Requesting Medical Records or a Medical Report From a Treating Physician

a. Notice

An attorney should give a patient's treating physician reasonable notice of the need for inspection and copying of medical records, or of the need for preparation of a medical report.

---

comply with laws relating to workers' compensation…." 45 C.F.R. § 164.512(l) (2004). See also AMA Code of Medical Ethics, Sec. 5.09 "Physicians in Industry," (2004-05 ed.) (Finding no physician patient relationship where "a physician's services are limited to pre-employment physical examinations or examinations to determine if an employee who has been ill or injured is able to return to work" but finding a physician-patient relationship where "a physician renders treatment to an employee, even though the physician is paid by the employer" and noting that release of such information is governed by workers' compensation laws).

[19] See N.C. Gen. Stat. §§ 44-49 and 44-50 (2005). See also N.C. Rule of Professional Conduct 1.15-1 (1997) and N.C. RPC 69, ("Payment of Client Funds to Medical Provider" (1989)) and N.C. RPC 125 ("Disbursement of Settlement Proceeds" (1992)) (requiring lawyer to obey client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien).

[20] North Carolina Industrial Commission Minutes, January 12, 1995. See Appendix E for additional information.

[21] See N.C. Gen. Stat. § 90-411 (2005) and N.C. Medical Board, "Access to Physician Records" (Position Statement adopted 11/93, amended 5/96, 9/97, 3/02, and 8/03).

[22] See N.C. Medical Board, "Access to Physician Records" (Position Statement, adopted 11/93, amended 5/96, 9/97, 3/02 and 8/03) ("Medical records should not be withheld because an account is overdue or a bill is owed."). An attorney may not pay client bills for treatment, although they may advance medical litigation expenses on behalf of a client. See N.C. Rule of Professional Conduct 1.8(e) (1997), RPC 80, "Lending Money to a Client," (1990), and CPR 157 (attorney may advance cost of medical examination if same is litigation expense).

The notice should clearly specify the information requested. Notice may be provided by written correspondence, or by a subpoena, and should be accompanied by appropriate authorization to release the information requested.

b. Authorization

Proper authorization is necessary before a physician can release medical information. No attorney should request and no physician should furnish any medical information concerning the history, physical or mental examination, condition, diagnosis or prognosis of a patient except with the written consent of the patient, the patient's authorized representative, a judicial or administrative order, or in conformity with other applicable legal authority.[23] The scope of the authorization determines the scope of the inspection, release, copying or report. If the requesting attorney wants information beyond what is authorized to be released, the attorney must obtain additional authorization.

c. Promptness

The physician, with proper authorization from the patient or the patient's authorized representative, should promptly furnish the attorney with a complete medical record or medical report. Delay in providing the medical record or medical information may prejudice the opportunity of the patient to settle their claim or lawsuit, may delay the trial of a case, or may cause additional expense or the loss of important testimony.[24]

4. Special Considerations for Substance Abuse Diagnosis and Treatment Records and for Psychotherapy Notes

Under federal and state law, information about an individual's substance abuse, diagnosis or treatment can be a trap for the unwary litigator seeking this information, as well as for the physician or health care facility holding the information. Disclosure—and subsequent re-disclosure—of records generated at a federally-assisted drug or alcohol abuse facility is strictly prohibited by complex federal rules, with criminal penalties for violation.[25] A subpoena alone is never sufficient to compel disclosure; the party seeking disclosure must provide either highly specific written consent from the patient which meets the requirements of the rules, or a court order framed in precise accord with the rules.[26] Protected information includes any information about an individual, whether or not the information is in writing or recorded in some other form, and includes the patient's identity, address, medical or treatment information, and all communications by the patient to program staff.[27] The facility is prohibited from even acknowledging whether the individual is or ever was a patient at the facility.[28] Because of the complexity of the rules, the process for securing drug and alcohol abuse records and related testimony is excluded from the scope of these Guidelines.

---

[23] See N.C. Gen. Stat. §§ 8-53 and 8-44.1 (2005); N.C. Rule of Civil Procedure 45(c); the Rules of the Industrial Commission. See RPC 162, "Communications with Opposing Party's Physicians" (1994) (prohibiting attorney from communicating with opposing party's non-party treating physicians unless the opposing party consents, in non-workers' compensation setting); RPC 180 "Communications with Opposing Party's Physicians" (1994) (extending that prohibition to passive listening); RPC 224 (1997) (extending prohibition to employer's attorney in workers' compensation setting). See also RPC 184 "Communications with Physicians Performing Autopsy" (1994) (allowing opposing counsel to communicate with pathologist performing autopsy without decedent's personal representative's consent). See also AMA Code of Medical Ethics §§ 5.05 "Confidentiality," ("The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law"); Sec. 5.055 "Confidential Care for Minors," and Sec. 5.06 "Confidentiality: Physician-Attorney Relation" (2004-05 ed.).

[24] N.C. Medical Board "Medical Record Documentation" (Position Statement, adopted 5/94, amended 5/96) (medical record "provides a legal document to verify the delivery of care").

[25] See 42 U.S.C. 290dd-3; 42 C.F.R. § 2.1 et seq. (2004) Examples of federal assistance triggering coverage of the rules include tax exemption and participation in Medicare or Medicaid. 42 C.F.R. § 2.12(B) (2004). Also, see N.C. Gen. Stat. §§ 122C-51 et seq. (2005).

In addition, HIPAA provides extra protections for psychotherapy notes.[29] Specific authorization must be obtained for any use or disclosure of psychotherapy notes. For more information see 45 C.F.R. § 164.508(a)(2) (2004).

B. Consultation and Testimony

1. Consultations

It is professional courtesy for physicians and lawyers to cooperate with one another and to abide by applicable statutes and rules so that the medical questions involved in controversies are fairly and adequately explored and presented. Where appropriate, a frank discussion between the patient's physician and the patient's attorney is helpful to give each a complete understanding of the medical and legal issues involved. When such a discussion occurs, their mutual patient/client benefits: time is saved, confusion is minimized (making settlement more likely), and inter-professional understanding is enhanced. To that end, the patient's physician(s) and attorney(s) should attempt, when appropriate, to discuss the medical questions prior to mediation, deposition, or trial.

However, patients' physicians may not communicate with an attorney or any other person about a patient's treatment, evaluation, or condition without the written authorization of the patient or the patient's authorized representative, or a court order, or other lawful authority.[30]

A physician has an obligation to consult with a patient's attorney if the patient has given them written consent to do so.[31] However, this obligation to consult may be limited if the patient has, or may have, a potential malpractice claim against the physician. If a physician is unclear whether the obligation to consult with a patient's attorney may be limited, the physician is encouraged to consult with legal counsel for the North Carolina Medical Society, their own attorney, or ask the advice of their professional liability insurer.

---

[26] See 42 C.F.R. §§ 2.31, 2.33 (2004) (written consent); 42 C.F.R. § 2.61 et seq. (2004) (court orders).

[27] 42 C.F.R. § 2.11 (2004).

[28] 42 C.F.R. § 2.13 (2004).

[29] See Appendix A-1 for definition of *psychotherapy notes*.

[30] In workers' compensation cases, there may be circumstances under which the employer or its representative may communicate with physicians. Contact the N.C. Industrial Commission to ascertain the current status of the law on this issue.

[31] See AMA Code of Medical Ethics §§ 9.07, "Medical Testimony," ("If a patient who has a legal

An attorney investigating a potential professional liability claim should avoid misleading the physician regarding the physician's potential malpractice liability. Where the patient's attorney is investigating a specific physician's potential professional liability or reasonably foresees that the physician's actions may be the basis of a claim, the attorney has an obligation to so advise that physician.[32]

2. Physician Deposition Testimony

Deposition testimony of a physician is sometimes necessary and is preferably arranged at a scheduled time in the physician's office.[33] Depositions are necessary for one or more reasons: for discovery;[34] to perpetuate testimony;[35] or for later use instead of the physician's appearance at trial.[36] Physicians' appearance in court is usually the most effective way to present testimony. However, physicians cannot always be present in court, and sometimes their personal testimony may be of secondary value. Physicians should agree to videotaped depositions when requested. North Carolina Rules of Evidence and of Civil Procedure sometimes prohibit an attorney from using a deposition in state civil court. In those instances, the physician must appear in court to testify.[37]

---

claim requests a physician's assistance, the physician should furnish medical evidence, with the patient's consent, in order to secure the patient's legal rights. The attorney for the party who calls the physician as a witness should be informed of all favorable and unfavorable information developed by the physician's evaluation of the case.") and 8.12, "Patient Information" (2004-05 ed.) (requiring physicians to be honest and open in their dealings with patients even in situations where "a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment. In these situations, the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred. Concern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with a patient.").

[32] See Rule 4.3 of the North Carolina Revised Rules of Professional Conduct (1997).

[33] In criminal cases in North Carolina state courts, medical witnesses usually testify at the trial because medical testimony is rarely taken by deposition.

[34] A deposition is a discovery tool which allows one side of a lawsuit to discover the information known to witnesses for the other side. Typically, the attorney opposing the patient's claim is prohibited from communicating with the patient's physician prior to trial except at a deposition. The opposing attorney is frequently in need of the physician's deposition testimony in order to defend against the patient's claim. The deposition is usually that attorney's only opportunity to discern the physician's opinion regarding the patient's medical condition.

[35] This occurs when the witness may be legally unavailable at the time of a subsequent trial.

[36] This occurs to accommodate the physician's schedule notwithstanding that live medical testimony is considered to be more effective than deposition medical testimony.

[37] For example, absent the consent of the opposing party, witness depositions may not be used in lieu of live testimony unless the court finds certain apply. N.C. R.Civ. P. 32(a)(4).

V. TRIAL SITUATIONS

A. Subpoenas

1. Witness Subpoenas

a. North Carolina State Courts

Under North Carolina law, physicians, acting as medical witnesses[38] are required to be subpoenaed before the Court may award them an expert witness fee after they have testified at a deposition or trial.[39] Physicians should not attempt to avoid service of subpoenas.[40]

In issuing trial subpoenas to physicians, attorneys must be aware of the physician's patient scheduling needs. For that reason, the attorney should notify the physician by letter of the intent to subpoena the physician to trial. The trial subpoena itself should be issued as soon as practical, but in no event should a subpoena be issued later than seven days before trial. Only a rare emergency calls for later issuance of the subpoena.[41] Where appropriate, the subpoena for attendance at the trial as a witness should reflect the actual time for the physician to appear and/or "will call when needed" or "on standby," if the actual time is uncertain. If the actual time is uncertain, the attorney or someone in the attorney's office should keep the physician informed on a daily basis as to the status of the trial. An attorney has little or no control over scheduling a case.[42] Accordingly, physicians should not necessarily alter the office schedule but should bear in mind the possibility of being called to court. At the same time, the attorney or someone in the attorney's office should keep the physician informed on a daily basis as to the status of the calendar. When a case is postponed or not reached during a court session, the attorney should immediately notify the physician. Physicians have continuing and often unpredictable responsibilities to their patients and, insofar as they are able, attorneys should make arrangements with a minimum of inconvenience or delay.

---

[38] See Section III(E) above defining the types of medical witnesses recognized under the Guidelines. Where the Guidelines refer to a physician as a 'medical witness' the statement refers to all types of medical witnesses defined therein.

[39] N.C. Gen. Stat. § 7A-314(d) (2005) allows the Court in its discretion to authorize payment of expert witness fees and allowances, but only when the witness has testified (either at trial or deposition) after having been served with a subpoena. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Town of Chapel Hill v. Fox, 120 N.C. App. 630, 463 S.E.2d 421 (1995). N.C. Gen. Stat. § 7A-314 (2005) does not compel parties to seek a judicial determination of expert witness fees or who is to pay them. N.C. Gen. Stat. § 7A-454 (2005) addresses under what circumstances a court may order payment of expert witnesses who testify on behalf of indigent criminal defendants. N.C. Rule of Evidence 706 governs who shall pay, and what amount, shall be paid to expert witnesses appointed by the Court in civil and criminal actions. N.C. Gen. Stat. § 15-7 (2005) governs the payment of physicians appointed to conduct post-mortem examinations of homicide victims. In cases before the Industrial Commission, expert witness fees are set by the Commissioner or Deputy Commissioner hearing the case. See N.C. Gen. Stat. §§ 97-90(c) and 97-26.1 (2005).

[40] See AMA Code of Medical Ethics, Section 9.07, "Medical Testimony" (2004-05 ed.) (" As a citizen and as a professional with special training and experience, the physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim requests a physician's assistance, the physician should furnish medical evidence, with the patient's consent, in order to secure the patient's legal rights. . . Medical witnesses should be adequately prepared and should testify honestly and truthfully to the best of their medical knowledge."). See also N.C. Medical Board Position Statement "The Physician-Patient Relationship (adopted 7/95, amended 7/98, 1/00, 2/02, and 8/03): ("[I]t is the position of the North Carolina Medical Board that any act by a physician that violates or may violate the trust a patient places in the physician places the relationship between physician and patient relationship."). Finally, N.C. Gen. Stat. § 90-14 (2005) (regulating physician and physician assistant conduct finds impermissibly unprofessional conduct "contrary to honesty, justice, or morals").

[41] A specific example of a "rare emergency" arises pursuant to the statutory provisions of N.C. Gen. Stat. § 50B-2 (2005), which permits a party alleging acts of domestic violence to seek a hearing on an ex parte or expedited basis.

Court calendaring systems vary between judicial district[43] in North Carolina. Under court calendaring rules in some judicial districts, a case will automatically reappear on a trial calendar if it has previously been postponed or not reached. The new trial session, and the case's position on the trial calendar, if known, should be relayed to the physician by letter as soon as possible. If for some reason the new trial week is inconvenient for the physician, they should notify the attorney immediately and in no event later than one week after notice of the new trial date.[44]

b. Workers' Compensation Cases[45]

In workers' compensation cases, medical witnesses typically testify by deposition scheduled after lay testimony has been received. A party to a workers' compensation case must obtain permission from the Industrial Commission before a medical witness can offer live testimony. In those rare instances when physicians are subpoenaed, they will be on telephone standby until notified.

2. Subpoenas for Medical Records

Often parties to a lawsuit will subpoena medical records to a trial without requesting the presence of the physician who made them. As in the case of trial subpoenas to physicians (see Section V.A.1. above), subpoenas for medical records should be issued as soon as possible, but in no event should a subpoena be issued later than seven days before trial. Only a rare emergency calls for later issuance of the subpoena.[46] A physician's options in responding to a subpoena for medical records depends in part on who is subpoenaing the records, and on what authorization that person has to view the records. Subpoenas for medical records containing substance abuse and psychiatric information are outside the scope of these Guidelines and require special attention. See IV A. 4. above.

---

[42] Each time a case is scheduled for trial, an attorney must prepare the case fully and subpoena all the witnesses. Most cases are scheduled for trial several times before they are actually called for trial by the Court.

[43] Judicial Districts in North Carolina typically include one or more counties, depending upon whether the district is primarily urban or rural.

[44] This is because attorneys do not have power to postpone scheduled trials and must apply to a Judge for a continuance. The later the application for a continuance, the less likely it is that the Court will grant the requested postponement.

[45] In workers' compensation hearings, physicians may testify in hearings before the Industrial Commission regarding facts communicated or learned by physicians while attending or examining the employee patient without the specific consent of the employee.

a. Records Subpoenaed With Authorization and/or Pursuant to Court Order or Other Authority

If the party subpoenaing the medical record has the written consent of the patient or the patient's personal representative to inspect the records, or if the subpoena is accompanied by a judicial or administrative order, or is issued in conformity with other applicable legal authority the subpoena may be complied with in one of several ways. The custodian of the records may bring them to court and testify to their authenticity and completeness, or the records may be mailed to the presiding judge or their designee accompanied by an affidavit authenticating them signed by the medical record custodian.[47] Only those medical records expressly authorized by the order should be released in accordance with the order.[48]

b. Records Subpoenaed Without Authorization and Without Court Order or Other Authority

Medical records are often subpoenaed to North Carolina state courts by parties without authorization to inspect the records and without a court order requiring their disclosure.[49] This happens often in personal injury cases, where defense attorneys routinely subpoena plaintiffs' medical records for a variety of legitimate reasons.[50] The method of subpoenaing such records varies widely across the state. A party may properly subpoena medical records they lack authorization to inspect by stating in writing on the subpoena that the records are being subpoenaed by one without legal authority to inspect them, and who will not inspect them absent the written consent of the patient or the patient's personal representative or judicial or administrative order, or in conformity with other applicable legal authority.[51]

---

[46] As noted in Section V.A.1.a., a "rare emergency" may arise pursuant to the statutory provisions of N.C. Gen. Stat. § 50B-2 (2005), which permits a party alleging acts of domestic violence to seek a hearing on an ex parte or expedited basis.

[47] See N.C. Rule of Civil Procedure 45(c). Although Rule 45(c) specifically authorizes the "custodian of hospital medical records" to respond to a subpoena for "hospital medical records as defined in N.C. Gen. Stat. § 8-44.1" by certified mailing of the records, it has become common practice in North Carolina state courts for all types of medical records to be sent by certified mail unless an issue arises as to the authorization of the subpoenaing party to inspect the records. N.C. Gen. Stat. § 8-44.1 (2005) broadly defines "hospital medical records."

[48] 45 C.F.R. § 164.512(e) (2004).

[49] N.C. Gen. Stat. § 8-53 (2005) authorizes a resident or presiding judge, in the trial division where the case is pending, or the Industrial Commission pursuant to law, to order the disclosure of the records without authorization at or before trial where to do so is necessary to a proper administration of justice.

[50] Defense counsel may subpoena to a court proceeding the records of current and/or prior treating physicians they have no authority to inspect. In this situation, the attorneys involved expect that, if the patient's attorney objects to disclosure of the records to the defense counsel, the presiding judge at the trial of the action will examine the records in camera (privately) to determine whether the records should be ordered released for the inspection of the subpoenaing party. See N.C. Rule of Professional Conduct 1.2(c) and RPC 236 "Misuse of Subpoena Process" (1997) (prohibiting abuse of the subpoena process by subpoenaing medical records to a lawyer's office where no legal proceeding is occurring).

Prior to the release of medical records subpoenaed without authorization and without court order or other authority, it is imperative to make sure that the release of such information is permitted under HIPAA. HIPAA will not allow health care providers to release health information pursuant to a subpoena that is not accompanied by an order of court or administrative tribunal, unless the health care provider receives "satisfactory assurance" from the requesting party that reasonable efforts have been made to (1) provide notice to the person whose records are being requested or (2) secure a qualified protective order for the records. Each of these alternatives must meet the requirements enumerated in the HIPAA rules. In the absence of such "satisfactory assurances" from outside sources, the health care provider must make a reasonable effort to provide the notice or seek a qualified protective order sufficient to meet the requirements of the rule.

Also, before releasing medical records subpoenaed without authorization and without court order or other authority, a physician should receive one of the following:

1. The patient's written authorization to release the information requested;
2. A court order to release the requested information;
3. A qualified protective order meeting the requirements of Section 164.512 (e);
4. Evidence demonstrating that reasonable efforts have been made to provide written notice to the individual whose records are being requested, in accordance with the requirements of Section 164.512 (e)(1)(iii); or
5. Evidence demonstrating that reasonable efforts have been made to secure a qualified protective order for the requested records, in accordance with the requirements of Section 164.512 (e)(1)(iv).

Absent one of the above, a written objection to the subpoena may be made on the grounds that compliance would be in violation of HIPAA Section 164.512(e). The objection must be (1) in writing, (2) delivered to the party or attorney designated in the subpoena and (3) made within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service.[52]

In the event of an objection or a question about compliance, records-subpoenaed without authority may be placed in a sealed envelope addressed to the Judge presiding at the session of court to which the records have been subpoenaed, and marked: "To remain sealed until otherwise ordered by the presiding Judge."[53]

---

[51] See Appendix B, Sample Subpoena for Medical Records without Authorization and without Court Order or Other Authority to Inspect.

[52] See 45 C.F.R. . § 164.512(e) (2004) for detailed information regarding subpoenas.

B. Notice for Trial

1. Initial Trial Settings

It is imperative both from the standpoint of the efficient administration of justice and the physician's scheduling needs that fact expert witnesses receive as much notice as possible in the setting of a particular case for trial. Under present calendaring procedures in North Carolina state court civil actions, only the week for trial can be designated specifically. There can be no assurances as to when or if the case will be reached that particular week.

2. Fact Expert Witness Availability

Once an attorney has first received notification that a trial is to be scheduled, they should contact their fact expert witnesses regarding availability for trial. At that time, the fact expert witness should inform the attorney of those weeks when they will not be available to testify. Once the case has received a definite trial setting, the attorney should immediately confirm the fact expert witness' availability for that particular week by letter.

3. Final Trial Calendar

When a case appears on the final trial calendar for a particular week, the attorney should notify the fact expert witness regarding the calendaring of the case, its status on the calendar, and an estimate as to the day when the case will be reached. This should be confirmed in writing to the witness. If the fact expert witness has not already been subpoenaed, that should be done at this time.

4. Court Appearance

The business of the courts cannot be governed by the convenience of witnesses, whoever they may be. However, court appearances interrupt medical witness' professional schedule and attorneys should make every reasonable effort to minimize that interruption. The attorney should not require medical witnesses to come in court and sit for long periods of time waiting to be put on the witness stand. The attorney should give the medical witness as much advance notice as is reasonably possible, so that their patient schedule may be rearranged with a minimum of disruption. The medical witness should be alerted by telephone a reasonable time before he or she is actually needed in court.

Medical witnesses are obligated to be in court at the time requested, and should notify the attorney of their arrival. Timing is important not only for the orderly presentation of the case, but also for the convenience of everyone involved in the proceedings. Physicians have ongoing and often unpredictable responsibilities to patients. In such instances, courtroom procedure should permit medical witnesses to testify out of order or at another time. When a medical emergency arises, attorneys should be notified immediately in order to make alternative arrangements and, if appropriate, to seek the court's release of the medical witness or postponement of the medical witness' appearance until the emergency has passed.

---

[53] See Appendix C, Sample Letter to Accompany Records sent to Court in Response to Sample Subpoena for Medical Records without Authorization and without Court Order or Other Authority to Inspect.

C. Medical Witnesses

1. Generally

a. Expert Status

As a medical witness, the physician's role is to provide information, not to advocate a position. The attorneys serve as the advocates. The medical witnesses, the court, and the attorneys should show mutual respect and consideration to each other.

In general, there are two types of witnesses—fact and expert. Expert witnesses, because they possess knowledge not generally known to the jury, are allowed to express opinions. In order to be an expert, it is necessary to know more than the jury knows and to have an opinion about the subject under inquiry. Evolving but unsettled law may require a more stringent standard. The presiding judge at trial may make an initial inquiry into the qualifications of a witness to testify and either permit or limit the testimony.

Because medical witnesses virtually always testify as experts, even when they may also be fact witnesses, the Guidelines treat all medical witnesses as expert witnesses, and differentiate between the types of expert medical witnesses.[54] In order to be accepted as an expert in a trial in North Carolina state courts, the presiding judge must find that the witness has expertise.[55]

---

[54] See II (E) above for definition of the three types of medical expert witnesses.

[55] If a medical witness is not tendered to and accepted by the presiding judge as an expert, they may not express expert medical opinions and the judge will not have authority to award them an expert witness fee.

Treating physicians typically testify as hybrid fact-expert witnesses, because of their training and knowledge and by virtue of their treatment of a patient whose medical condition is at issue. They may testify about medical observations,[56] or to observations of facts unrelated to their medical expertise. They may also testify about their expert opinions within the scope of their medical expertise. These witnesses are referred to as fact expert witnesses in the Guidelines.

It is not necessary that a medical witness have treated or examined a patient in order to testify as an expert. Expert medical testimony may be based upon a review of the medical chart or a hypothetical set of facts. Witnesses who testify in this fashion typically have been retained by one of the parties for the purpose of providing expert opinion testimony, and do not have a physician-patient relationship with the party whose medical condition is at issue. These witnesses are referred to as retained expert witnesses in the Guidelines.

b. Preparation

Proper preparation for conferences, depositions, and trial testimony includes a review of the relevant medical records. The physician's office staff should cooperate in scheduling preparatory conferences and depositions at a mutually convenient time, when they are least likely to be interrupted by patient problems, other appointments or operating times.

c. Independent Medical Examinations

Attorneys should provide independent medical witnesses with the ground rules of the independent medical examination submitted to them in writing, including who is to get a report, where copies should be sent, who is to pay for the examination, and the purpose and extent of the examination. Where the examination has been ordered selected or approved by a court, administrative agency or other adjudicatory body, attorneys should also provide the independent medical witness with a copy of the order approving or selecting them.

2. Fees

a. General Considerations

Medical witness charges for assisting attorneys in legal matters should be reasonable, reflecting the physician's experience, the level of specialization, the environment in which the physician practices, and the demand for his or her services.

---

[56] Medical observations will often be based on medical expertise and therefore be based on expert opinion. For example, when testifying to their medical diagnosis of a patient, the fact witness is expressing an expert medical opinion.

The recommended fee for a medical witness' court appearance should be measured from the time the medical witness leaves their office to go to court until they return to their office from court, and should also include compensation for time spent preparing to testify. Under certain circumstances, the presiding judge will set a fee for the physician.[57]

b. Fees in Workers' Compensation Cases

In workers' compensation cases, all expert witness fees, and attorney fees, must be approved by the Industrial Commission. See N.C. Gen. Stat. § 97-90 (2005). Receipt of a fee without the approval of the Industrial Commission is a Class 1 misdemeanor prohibited by N.C. Gen. Stat. § 97-90 (2005).

c. Prohibition Against Contingent Fees

Attorneys are prohibited from offering and physicians are prohibited from accepting fees wholly or partially contingent upon the outcome of the matter in which medical testimony is offered.[58] A fee shall not be deemed contingent for the reason that the patient's financial condition may render collection difficult in the event that the patient does not prevail in a legal action.

d. Fees for Fact Expert Witnesses

In civil cases in North Carolina state courts, fact expert witnesses are entitled to reasonable compensation for time spent in conferences, preparation of medical reports, depositions, time spent out of the office for court or other appearances, and for travel costs.

An attorney is ethically prohibited from having an economic interest in a client's claim. Therefore, while an attorney may advance fees which are incurred in pursuing claims,[59] all such fees are ultimately the responsibility of the patient/client.[60]

---

[57] This only occurs on motion of the party prevailing in a matter, if they have called the medical witness, the witness has testified pursuant to subpoena, and has been received by the court as an expert witness. In this instance, the prevailing party seeks to have the fee set and taxed against the losing party as a court cost. See N.C. Gen. Stat. § 7A-314 (2005). This fee may not necessarily represent the entire fee owed a retained or fact medical witness by virtue of their contractual relationship with the attorney and/or their patient or client. Nothing compels a party to move for expert witness fees to be taxed as costs. See also N.C. Gen. Stat. §§ 6-20 and 7A-305 (2005).

[58] See AMA Code of Medical Ethics §§ 6.01 "Contingent Physician Fees" (prohibiting the same) and 8.10 "Lien Laws" (2004-05 ed.) (allowing liens only where "the fee is fixed in amount and not contingent on the amount of settlement of the patient's claim against a third party). Cf. N.C. Gen. Stat. §§ 44-49 through 44-51 (2005) (N.C. lien laws allocating fees based on pro rata share of percentage of recovery).

[59] Such fees are called 'litigation expenses' and are to be distinguished from charges for treatment, which may not be ethically advanced by attorneys. See footnote 24.

[60] Where the attorney incurring the fee does not represent the patient, the fee is nonetheless a litigation expense to be borne by his or her client. This typically happens when the defense attorney takes the deposition of a treating expert witness, and is responsible for their fees for testifying.

An attorney should not place an undue burden on fact medical witnesses for services rendered at an attorney's request on behalf of a patient/client. No attorney should request a fact medical witness to consult with them or prepare a medical report for them where the client is unable to pay for the same, unless they are willing to advance the cost of such litigation expenses or they have informed the medical witness that the client is unable to pay for their services. If the client is unwilling to ultimately pay for the same, the attorney should not request such services.

The fact expert witness may require payment for depositions, conferences, and consultations at the time of the service. For some patients and clients, prepayment is not feasible and alternative methods of payment must be considered. The fact expert witness, attorney, and the patient may agree to any lawful method of payment.

e. Fees for Retained Expert Witnesses

All services and fees of retained expert witnesses are subject to negotiation between the physician and the contracting party. Also, unless agreed to between the parties, any such service rendered does not create a physician/patient relationship.

Retained expert witnesses are permitted to charge a reasonable fee if their court appearance is canceled without sufficient time for the physician to reschedule patients, surgery, and consultations. However, retained expert witnesses should make a reasonable effort to profitably reschedule their time in order to minimize expense or loss.

f. Fees for Independent Medical Witnesses

Independent medical witness fees may either be established by the court, administrative agency or other adjudicatory body selecting or approving them, or by the party seeking their appointment, or by the parties by agreement. Independent medical witnesses should determine how they will be paid, and by whom, prior to conducting the independent medical examination.

g. Pro Bono/Criminal Cases

When an attorney stipulates in writing that they are handling a client's case without charge or expectation of payment from any recovery, then a treating physician should consider providing medical reports and testimony free of charge. Should an attorney be awarded payment unexpectedly, the physician should be notified promptly by the attorney so that a charge may be made by the physician if appropriate.

If the patient is a victim in a criminal prosecution case, then the physician should provide a medical report to the investigating law enforcement agency free of charge.

VI. JOINT COMMITTEE OF N.C. MEDICAL SOCIETY AND N.C. BAR ASSOCIATION

The Joint Committee of the N.C. Medical Society and the N.C. Bar Association shall be comprised of the Chair of the N.C. Bar Association Medico-Legal Liaison Committee and one or more N.C. Bar Association members designated by the Chair, and the Legal Counsel for the N.C. Medical Society and one or more N.C. Medical Society members designated by the Executive Director of the N.C. Medical Society. The purpose of the Joint Committee is to create a better understanding, a closer relationship, and unity between the medical and legal professions, so that each may better serve the other and the public. In order to fulfill that purpose, the Joint Committee shall meet at least annually to:

- Promulgate revisions to these Guidelines as necessary to keep them legally current and effective.

- Report annually to the N.C. Medical Society and N.C. Bar Association about the work of the Committee and make any appropriate recommendations.

- Accept and mediate reported complaints of attorneys and physicians who experience problems related to a failure to comply with these Guidelines[61] and, where appropriate, forward such reports to the proper disciplinary authorities.

---

[61] However, the Joint Committee will not mediate fee disputes between retained expert witnesses and attorneys, or between independent medical witnesses and attorneys.

APPENDIX A-1

RELEVANT HIPAA DEFINITIONS

45 C.F.R. 160.103 Definitions.

Health information means any information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
2. Related to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

1. Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
2. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
    - (i) That identifies the individual; or
    - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. 164.501 Definitions.

Designated record set means:

1. A group of records maintained by or for a covered entity that is:
    - (i) The medical records and billing records about individuals maintained by or for a covered health care provider;
    - (ii) The enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or
    - (iii) Used, in whole or in part, by or for the covered entity to make decision about individuals.
2. For purposes of the paragraph, the term records means any item, collection, or grouping of information that includes protected health information and is maintained, collected, used, or disseminated by or for a covered entity.

Protected health information means individually identifiable health information:

1. Except as provided in paragraph (2) of this definition, that is:
    - (i) Transmitted by electronic media;
    - (ii) Maintained in any medium described in the definition of electronic media at §162.103 of this subchapter; or
    - (iii) Transmitted or maintained in any other form or medium.
2. *Protected health information* excludes individually identifiable health information in:
    - (i) Education records covered by the Family Educational Right and Privacy Act, as amended, 20 U.S.C. 1232g;
    - (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
    - (iii) Employment records held by a covered entity in its role as employer.

Psychotherapy notes means notes records (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record.

Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

APPENDIX A-2

PERTINENT NORTH CAROLINA STATUTES AND REGULATIONS REGARDING MEDICAL RECORDS

"Medical records" are defined by the following North Carolina statutory or regulatory provisions:

- N.C. Gen. Stat. § 8-44.1 (2005)[1]
- N.C. Gen. Stat. § 90-410(2) (2005)[2]
- N.C. Gen. Stat. § 58-39-15(18) (2005)[3]
- N.C. Gen. Stat. § 130A-372 (2005)[4]
- 10A N.C. Admin. Code § 14J.0101 (2005)[5]
- 10A N.C. Admin. Code § 14J.1701 (2005[6]

---

[1] "Hospital medical records" are defined as "records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by N. C. Gen. Stat. § 122-8.1, N. C. Gen. Stat. § 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes." (Please note that N.C. Gen. Stat. § 122-8.1 and N.C. Gen. Stat. § 90-109.1 have been repealed).

[2] Medical records are defined as "personal information that relates to an individual's physical or mental condition, medical history, or medical treatment, excluding X-rays and fetal monitor records."

[3] Information about patients is subject to three definitions under N.C. Gen. Stat. § 58-39-15 of the North Carolina insurance statutes:

(18) "Medical-record information" means personal information that:
  a. Relates to an individual's physical or mental condition, medical history, or medical treatment; and
  b. Is obtained from a medical professional or medical-care institution, from the individual, or from the individual's spouse, parent, or legal guardian.

(19) "Personal information" means any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics. "Personal information" includes an individual's name and address and medical-record information, but does not include privileged information.

(22) Privileged information" means any individually identifiable information that (i) relates to a claim for insurance benefits or a civil or criminal proceeding involving an individual, and (ii) is collected in connection with or in reasonable anticipation of a claim for insurance benefits or civil or criminal proceeding involving an individual: Provided, however, information otherwise meeting the requirements of this subsection shall nevertheless be considered personal information under this Article if it is disclosed in violation of N.C. Gen. Stat. § 58-39-75 (2005).

[4] Medical records are defined as "health data relating to the diagnosis or treatment of physical or mental ailments of individuals."

[5] The medical record of an inmate of a local confinement facility is defined as "a record of medical problems, examinations, diagnoses and treatments."

[6] The definition in footnote 4 also applies to inmates in municipal lock-up facilities.

Other provisions of North Carolina law refer to information about patients' medical services using terms other than "medical record":

- Individuals receiving services for mental health, substance abuse, or mental retardation are referred to as "clients," and information about their treatment is called "confidential information," defined in N.C. Gen. Stat. § 122C-3(9) (2005).[7] Compilations of such information are sometimes called the "client record."[8] Note that substance abuse information also is likely to be subject to the strict provisions of the federal drug and alcohol abuse facility law.

- Both §130A-45.8 (2005),[9] concerning patient information held by public health authorities, and §131E-97 (2005),[10] addressing patient information held by

---

[7] "Confidential information" is defined in § 122C-3(9) as:

> ...any information, whether recorded or not, relating to an individual served by a facility that was received in connection with the performance of any function of the facility. 'Confidential information' does not include statistical information from reports and records or information regarding treatment or services which is shared for training, treatment, habilitation, or monitoring purposes that does not identify clients either directly or by reference to publicly known or available information.

10A N.C. Admin. Code 26B.0103(b)(3) (2005) further provides that confidential information as defined in Section 122C-3 "includes but is not limited to photographs, videotapes, audiotapes, client records, reimbursement records, verbal information relative to clients served, client information stored in automated files, and clinical staff member client files."

[8] The Administrative Code has several slightly differing definitions for this information. 10A N.C. Admin. Code 26B.0103(b)(1) (2005) defines "client record" as "any documentation made of confidential information." 10A N.C. Admin. Code 26D.0103(8) (2005) defines "client record" as "a written account of all mental health and mental retardation services provided to an inmate the time of acceptance of the inmate as the client until termination of services. This information is documented on standard forms which are filed in a standard order in an identifiable folder." 10A N.C. Admin. Code 27G.0103(b)(12) (2005) defines "client record" as "a documented account of all services provided to a client." 10A N.C. Admin. Code 21A.0201(22) (2005) contains this definition: "'client information' or 'client record' means any information, including information stored in computer data banks or computer files relating to a client that was received in connection with the performance of any function of the agency." 10A N.C. Admin. Code 28A.0102(b)(6) (2005) defines "client record" as "any record made of confidential information."

[9] N.C.G.S. §130A-45.8 (2004) provides:

> (a) Medical records compiled and maintained by public health authorities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.
>
> (b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by public health authorities in connection with the admission, treatment and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

[10] Section 131E-97 (2005) provides:

> (a) Medical records compiled and maintained by health care facilities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.
>
> (b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by health care facilities in connection with the admission, treatment, and

"health care facilities," draw a distinction between the patient's medical records and financial records.

- N.C. Gen. Stat. § 131E-214.1 (2005) defines both "patient data" and "patient identifying information."[11]

- Medical information governed by the Division of Aging and the Division of Social Services is considered "client information."[12]

- 10A N.C. Admin. Code 47B.0102(6) (2005) defines "identifying information" with respect to cancer patients.[13]

---

discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

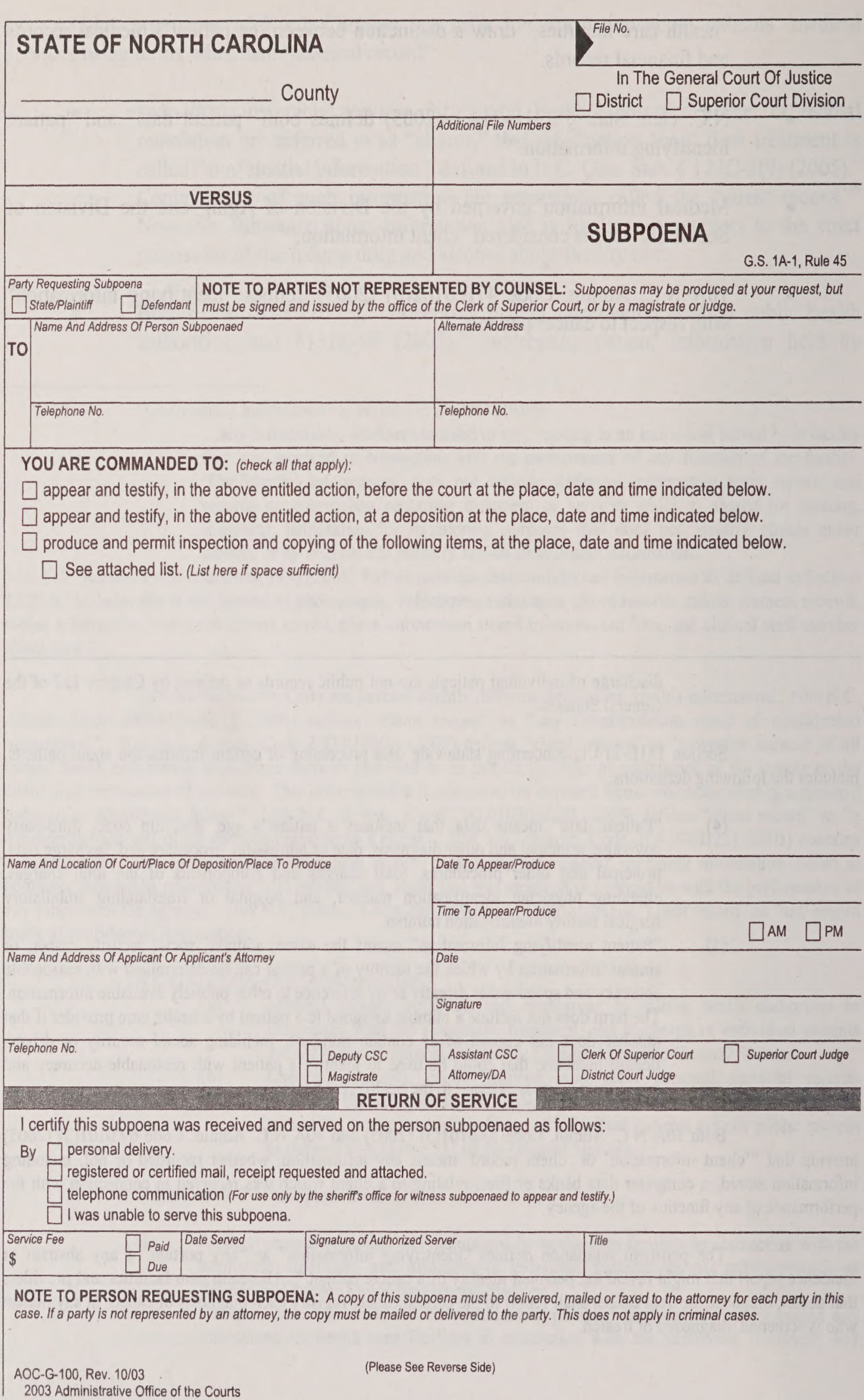
[11] Section 131E-214.1, concerning statewide data processing of certain information about patients, includes the following definitions:

(4) "Patient data" means data that includes a patient's age, sex, zip code, third-party coverage, principal and other diagnosis, date of admission, procedure and discharge date, principal and other procedures, total charges and components of the total charges, attending physician identification number, and hospital or freestanding ambulatory surgical facility identification number.

(5) "Patient identifying information" means the name, address, social security umber, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a health care provider if that number does not consist of or contain numbers, including social security or drivers license numbers, that could be used to identify a patient with reasonable accuracy and speed from sources external to the health care provider.

[12] Both 10A N.C. Admin. Code 5J.0101(3) (2005) and 10A N.C. Admin. Code 69.0101(3) (2005) provide that "'client information' or 'client record' means any information, whether recorded or not, including information stored in computer data banks or files, relating to a client which was received in connection with the performance of any function of the agency."

[13] The pertinent regulation defines "identifying information" as "any portion of any abstract or incidence report that might reveal the personal identity of a cancer patient." All health care facilities and providers that detect, diagnose, or treat cancer shall report to the central cancer registry each diagnosis of cancer in any person who is screened, diagnosed or treated.



STATE OF NORTH CAROLINA

File No.

__________________ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

Additional File Numbers

VERSUS

SUBPOENA

G.S. 1A-1, Rule 45

Party Requesting Subpoena
☐ State/Plaintiff ☐ Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: *Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.*

TO

Name And Address Of Person Subpoenaed

Alternate Address

Telephone No.

Telephone No.

YOU ARE COMMANDED TO: *(check all that apply):*

- ☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
- ☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
- ☐ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
  - ☐ See attached list. *(List here if space sufficient)*

Name And Location Of Court/Place Of Deposition/Place To Produce

Date To Appear/Produce

Time To Appear/Produce
☐ AM ☐ PM

Name And Address Of Applicant Or Applicant's Attorney

Date

Signature

Telephone No.

☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* ☐ *Superior Court Judge*
☐ *Magistrate* ☐ *Attorney/DA* ☐ *District Court Judge*

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

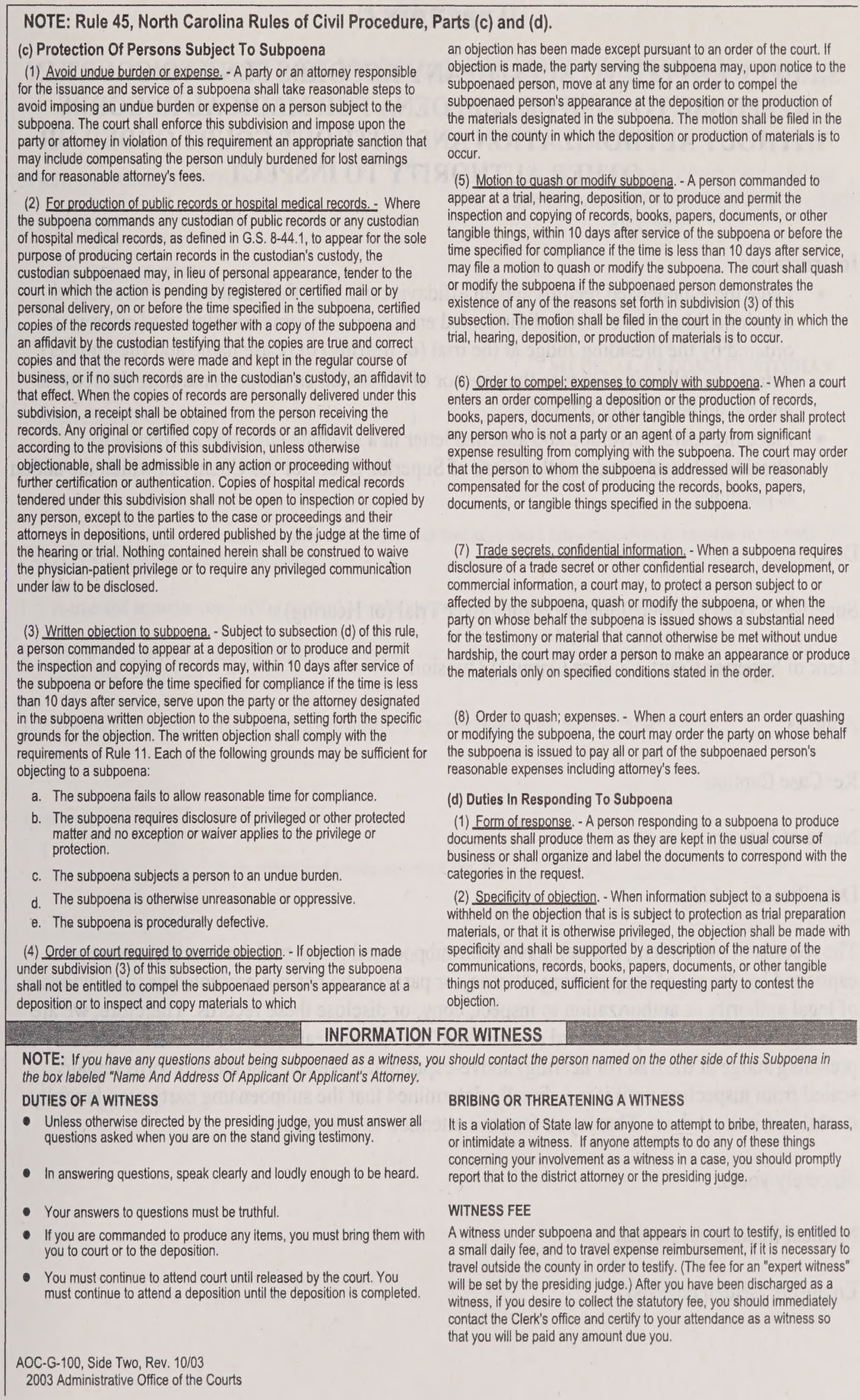
By ☐ personal delivery.
☐ registered or certified mail, receipt requested and attached.
☐ telephone communication *(For use only by the sheriff's office for witness subpoenaed to appear and testify.)*
☐ I was unable to serve this subpoena.

Service Fee $ ☐ *Paid* ☐ *Due*	*Date Served*	*Signature of Authorized Server*	*Title*

NOTE TO PERSON REQUESTING SUBPOENA: *A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.*

AOC-G-100, Rev. 10/03
2003 Administrative Office of the Courts

(Please See Reverse Side)



NOTE: Rule 45, North Carolina Rules of Civil Procedure, Parts (c) and (d).

(c) Protection Of Persons Subject To Subpoena

(1) Avoid undue burden or expense. - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoena. - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.
b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
c. The subpoena subjects a person to an undue burden.
d. The subpoena is otherwise unreasonable or oppressive.
e. The subpoena is procedurally defective.

(4) Order of court required to override objection. - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. - When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets, confidential information. - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties In Responding To Subpoena

(1) Form of response. - A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. - When information subject to a subpoena is withheld on the objection that is is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

NOTE: *If you have any questions about being subpoenaed as a witness, you should contact the person named on the other side of this Subpoena in the box labeled "Name And Address Of Applicant Or Applicant's Attorney.*

DUTIES OF A WITNESS

- Unless otherwise directed by the presiding judge, you must answer all questions asked when you are on the stand giving testimony.
- In answering questions, speak clearly and loudly enough to be heard.
- Your answers to questions must be truthful.
- If you are commanded to produce any items, you must bring them with you to court or to the deposition.
- You must continue to attend court until released by the court. You must continue to attend a deposition until the deposition is completed.

BRIBING OR THREATENING A WITNESS

It is a violation of State law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the district attorney or the presiding judge.

WITNESS FEE

A witness under subpoena and that appears in court to testify, is entitled to a small daily fee, and to travel expense reimbursement, if it is necessary to travel outside the county in order to testify. (The fee for an "expert witness" will be set by the presiding judge.) After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the Clerk's office and certify to your attendance as a witness so that you will be paid any amount due you.

AOC-G-100, Side Two, Rev. 10/03
2003 Administrative Office of the Courts

APPENDIX C

SAMPLE LETTER TO ACCOMPANY RECORDS SENT TO COURT IN RESPONSE TO SAMPLE SUBPOENA FOR MEDICAL RECORDS WITHOUT AUTHORIZATION AND WITHOUT COURT ORDER OR OTHER AUTHORITY TO INSPECT

Instructions:

- Place the subpoenaed records and an affidavit certifying their authenticity in a sealed envelope. Mark the outside of the sealed envelope: "To remain sealed until otherwise ordered by the presiding Judge at the trial (or hearing) of [Case name and file number]".
- Attach the following letter to the exterior of the sealed envelope containing the records and the authenticating affidavit.
- Place the sealed envelope and attached letter in a separate envelope addressed to 'Presiding Judge' in care of the Clerk of Superior Court for the County in which the action is pending.

Date

Superior or District Court Judge Presiding over Trial (or Hearing)

Clerk of Superior Court, Civil or Criminal Division

Address

Re: Case Caption

Name of Patient:

Dear Presiding Judge:

The records of our patient, (name), have been subpoenaed to the trial (or hearing) above-captioned by, (name of subpoenaing, attorney or party), who has not presented us with evidence of legal authority or authorization to inspect, copy, or disclose these records. Therefore, we are sending these records to you sealed and marked "To remain sealed until otherwise ordered by the presiding Judge at the trial (or hearing) above-captioned." We ask that these records remain sealed from inspection until it is judicially determined that the subpoenaing party may lawfully unseal and inspect them. Thank you for your attention to this request.

Sincerely yours,

Medical Records Custodian

Enclosure (sealed records)

APPENDIX D

AFFIDAVIT OF MEDICAL RECORD CUSTODIAN

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE [SUPERIOR or DISTRICT] COURT DIVISION
COUNTY OF __________	FILE NO.: ____________

(NAME OF PLAINTIFF))
)
Plaintiff;)
)
vs.) **AFFIDAVIT OF**
) **MEDICAL RECORD CUSTODIAN**
(NAME OF DEFENDANT))
)
Defendant.)

__________________, being first duly sworn, deposes and says that I am a custodian of records for NAME OF FACILITY and the attached records are:

1. A true and accurate copy of the medical records incurred for the medical treatment of NAME OF PATIENT;
2. These records were made and kept in the regular course of business at or near the time of the acts, conditions, or events recorded; and
3. They were made by persons having knowledge of the information set forth in those records.

____
AFFIANT

Subscribed and sworn to before me, this____day of____________, 20________

____
NOTARY PUBLIC

My commission expires:______________

NOTARY SEAL

APPENDIX E

SAMPLE LETTER REQUESTING MEDICAL RECORDS

Date

Health Care Provider or Facility Name and Address
Attn: Medical Records Custodian

RE: Names: <<John Patient>>
DOB:
SS#:

Dear Medical Records Custodian:

Please be advised that this law firm has been authorized to obtain the medical records of <<John Patient>>. Enclosed is an authorization for the release of medical records.[1]

[Optional] If the case involves a personal injury liability claim, the letter must so indicate and should reference the statutory charges at the time:

These records are sought with regard to a personal injury liability claim. **N.C. Gen. Stat § 90-411 (2005) sets the maximum charges permissible for medical records requested in personal injury liability claims as follows:** "The maximum fee for each request shall be seventy-five (75) cents per page for the first 25 pages, fifty (50) cents per page for pages 26 through 100, and twenty-five (25) cents for each page in excess of 100 pages, provided that the health care provider may impose a minimum fee of up to ten dollars ($10.00), inclusive of copying costs."

Please forward to the office of the undersigned counsel the following items:

1. A complete copy of all medical records, as defined in the *2005 Medico-Legal Guidelines*[2], including laboratory reports, interpretations of all diagnostic images and studies, and all other information in your possession regarding <<John Patient>>;
2. All billing information, including ledger cards, insurance claim forms, etc., whether stored on paper or in electronic format, as the same pertains

---

[1] See N.C. Gen. Stat. § 8-53 to determine who should execute authorizations regarding decedents.

[2] **"Medical Record" Defined**: The medical record is a collection of protected health information for a particular individual, that: is created or received by a physician or other health care provider; relates to the past, present, or future physical or mental health or condition of the individual; and includes information about the provision of health care to that individual and the past, present, or future payments by or on behalf of that individual for the provision of health care. Medical records are inherently sensitive and personal and contain information that relates to an individual's physical or mental condition, medical history, medical diagnosis, or medical treatment as well as demographic and other information that identifies or has the potential to identify the individual (e.g., patient name, address, social security number, unique identifier, etc.).

to medical services rendered to <<John Patient>>. (For additional information, see Appendix A-1); and

3. All correspondence, whether stored on paper or in electronic format, to and from any other person or entity concerning <<John Patient>>.

[Optional] Our firm's check will be forwarded to you upon receipt of your bill for any copying costs consistent with fees set out in North Carolina General Statute § 90-411, a copy of which is attached for your information.

[Optional] Please note that, in the event that you wish to preserve a provider's lien created by N.C.G.S. §§ 44-49 and 44-50, you must provide, without charge, a copy of the records and billing information requested above.

Thank you for your assistance.

Law & Jones, PLLC
1 Lawyers Drive
Anytown, North Carolina

PLEASE NOTE FOR WORKERS' COMPENSATION CASES SPECIAL RULES APPLY: This form is suggested for personal injury cases pending in the Courts. Special rules apply to Workers' Compensation cases. When a health care provider bills an employer's compensation insurance carrier or third-party administrator (adjusting agency), one free copy of medical records associated with the services must be provided, unless arrangements have been made to provide the free copy to a rehabilitation nurse. Fees for additional copies to these or other parties are set by the N.C. Industrial Commission (as an exception to N.C. Gen. Stat. § 90-411, codified at § 97-26.1) at a maximum of $.50 per page for the first 40 pages, and $.20 per page for additional pages, with an allowable minimum fee of $10.00 (inclusive of per page charges). (See January 12, 1995, *Minutes* of the N.C. Industrial Commission.) Industrial Commission Rule 607 provides that, if requested, parties must provide each other with copies of medical and rehabilitation records in their possession within 30 days, and with copies of additional records they obtain thereafter within 15 days after they come into the party's possession.

APPENDIX F

SELECTED STATEMENTS OF THE NORTH CAROLINA MEDICAL BOARD

- The Physician-Patient Relationship
- Medical Record Documentation
- Access to Medical Records
- Retention of Medical Records

THE PHYSICIAN-PATIENT RELATIONSHIP

The North Carolina Medical Board recognizes the movement toward restructuring the delivery of health care and the significant needs that motivate that movement. The resulting changes are providing a wider range and variety of health care delivery options to the public. Notwithstanding these developments in health care delivery, the duty of the physician remains the same: to provide competent, compassionate, and economically prudent care to all his or her patients. Whatever the health care setting, the Board holds that the physician's fundamental relationship is always with the patient, just as the Board's relationship is always with the individual physician. Having assumed care of a patient, the physician may not neglect that patient nor fail for any reason to prescribe the full care that patient requires in accord with the standards of acceptable medical practice. Further, it is the Board's position that it is unethical for a physician to allow financial incentives or contractual ties of any kind to adversely affect his or her medical judgment or patient care.

Therefore, it is the position of the North Carolina Medical Board that any act by a physician that violates or may violate the trust a patient places in the physician places the relationship between physician and patient at risk. This is true whether such an act is entirely self-determined or the result of the physician's contractual relationship with a health care entity. The Board believes the interests and health of the people of North Carolina are best served when the physician-patient relationship remains inviolate. The physician who puts the physician-patient relationship at risk also puts his or her relationship with the Board in jeopardy.

Elements of the Physician-Patient Relationship

The North Carolina Medical Board licenses physicians as a part of regulating the practice of medicine in this state. Receiving a license to practice medicine grants the physician privileges and imposes great responsibilities. The people of North Carolina expect a licensed physician to be competent and worthy of their trust. As patients, they come to the physician in a vulnerable condition, believing the physician has knowledge and skill that will be used for their benefit.

Patient trust is fundamental to the relationship thus established. It requires that:

- there be adequate communication between the physician and the patient;
- the physician report all significant findings to the patient or the patient's legally designated surrogate/guardian/personal representative;
- there be no conflict of interest between the patient and the physician or third parties;
- personal details of the patient's life shared with the physician be held in confidence;
- the physician maintain professional knowledge and skills;
- there be respect for the patient's autonomy;
- the physician be compassionate;
- the physician respect the patient's right to request further restrictions on medical information disclosure and to request alternative communications;
- the physician be an advocate for needed medical care, even at the expense of the physician's personal interests; and
- the physician provide neither more nor less than the medical problem requires.

The Board believes the interests and health of the people of North Carolina are best served when the physician-patient relationship, founded on patient trust, is considered sacred, and when the elements crucial to that relationship and to that trust—communication, patient primacy, confidentiality, competence, patient autonomy, compassion, selflessness, appropriate care—are foremost in the hearts, minds, and actions of the physicians licensed by the Board.

This same fundamental physician-patient relationship also applies to mid-level health care providers such as physician assistants and nurse practitioners in all practice settings.

Termination of the Physician-Patient Relationship

The Board recognizes the physician's right to choose patients and to terminate the professional relationship with them when he or she believes it is best to do so. That being understood, the Board maintains that termination of the physician-patient relationship must be done in compliance with the physician's obligation to support continuity of care for the patient.

The decision to terminate the relationship must be made by the physician personally. Further, termination must be accompanied by appropriate written notice given by the physician to the patient or the patient's representative sufficiently far in advance (at least 30 days) to allow other medical care to be secured. Should the physician be a member of a group, the notice of termination must state clearly whether the termination involves only the individual physician or includes other members of the group. In the latter case, those members of the group joining in the termination must be designated. It is advisable that the notice of termination also include instructions for transfer of or access to the patient's medical records.

(Adopted July 1995)
(Amended July 1998, January 2000; March 2002, August 2003)

MEDICAL RECORD DOCUMENTATION

North Carolina Medical Board takes the position that physicians and physician extenders should maintain accurate patient care records of history, physical findings, assessments of findings, and the plan for treatment. The Board recommends the Problem Oriented Medical Record method known as SOAP (developed by Lawrence Weed).

SOAP charting is a schematic recording of facts and information. The S refers to "subjective information" (patient history and testimony about feelings). The O refers to objective material and measurable data (height, weight, respiration rate, temperature, and all examination findings). The A is the assessment of the subjective and objective material that can be the diagnosis but is always the total impression formed by the care provided after review of all materials gathered. And finally, the P is the treatment plan presented in sufficient detail to allow another care provider to follow the plan to completion. The plan should include a follow-up schedule.

Such a chronological document

- records pertinent facts about an individual's health and wellness;
- enables the treating care provider to plan and evaluate treatments or interventions;
- enhances communication between professionals, assuring the patient optimum continuity of care;
- assists both patient and physician to communicate to third party participants;
- allows the physician to develop an ongoing quality assurance program;
- provides a legal document to verify the delivery of care; and
- is available as a source of clinical data for research and education.

Certain items should appear in the medical record as a matter of course:

- the purpose of the patient encounter;
- the assessment of patient condition;
- the services delivered--in full detail;
- the rationale for the requirement of any support services;
- the results of therapies or treatments;
- the plan for continued care;
- whether or not informed consent was obtained; and, finally,
- that the delivered services were appropriate for the condition of the patient.

The record should be legible. When the care giver will not write legibly, notes should be dictated, transcribed, reviewed, and signed within reasonable time. Signature, date, and time should also be legible. All therapies should be documented as to indications, method of delivery, and response of the patient. Special instructions given to other care givers or the patient should be documented: Who received the instructions and did they appear to understand them?

All drug therapies should be named, with dosage instructions and indication of refill limits. All medications a patient receives from all sources should be inventoried and listed to include the method by which the patient understands they are to be taken. Any refill prescription by phone should be recorded in full detail.

The physician needs and the patient deserves clear and complete documentation.

(Adopted 5/94)
(Amended 5/96)

ACCESS TO MEDICAL RECORDS

A physician's policies and practices relating to medical records under their control should be designed to benefit the health and welfare of patients, whether current or past, and should facilitate the transfer of clear and reliable information about a patient's care. Such policies and practices should conform to applicable federal and state laws governing health information.

It is the position of the North Carolina Medical Board that notes made by a physician in the course of diagnosing and treating patients are primarily for the physician's use and to promote continuity of care. Patients, however, have a substantial right of access to their medical records and a qualified right to amend their records pursuant to the HIPAA privacy regulations.

Medical records are confidential documents and should only be released when permitted by law or with proper written authorization of the patient. Physicians are responsible for safeguarding and protecting the medical record and for providing adequate security measures.

Each physician has a duty on the request of a patient or the patient’s representative to release a copy of the record in a timely manner to the patient or the patient’s representative, unless the physician believes that such release would endanger the patient’s life or cause harm to another person. This includes medical records received from other physician offices or health care facilities. A summary may be provided in lieu of providing access to or copies of medical records only if the patient agrees in advance to such a summary and to any fees imposed for its production.

Physicians may charge a reasonable fee for the preparation and/or the photocopying of medical and other records. To assist in avoiding misunderstandings, and for a reasonable fee, the physician should be willing to review the medical records with the patient at the patient's request. Medical records should not be withheld because an account is overdue or a bill is owed (including charges for copies or summaries of medical records).

Should it be the physician's policy to complete insurance or other forms for established patients, it is the position of the Board that the physician should complete those forms in a timely manner. If a form is simple, the physician should perform this task for no fee. If a form is complex, the physician may charge a reasonable fee.

To prevent misunderstandings, the physician's policies about providing copies or summaries of medical records and about completing forms should be made available in writing to patients when the physician-patient relationship begins.

Physicians should not relinquish control over their patients' medical records to third parties unless there is an enforceable agreement that includes adequate provisions to protect patient confidentiality and to ensure access to those records.[1]

When responding to subpoenas for medical records, unless there is a court or administrative order, physicians should follow the applicable federal regulations.

---

[1] See also Position Statement on Departures from or Closings of Medical Practices.

(Adopted November 1993)
(Amended May 1996, September 1997, March 2002, August 2003)

RETENTION OF MEDICAL RECORDS

The North Carolina Medical Board supports and adopts the following language of Section 7.05 of the American Medical Association's current *Code of Medical Ethics* regarding the retention of medical records by physicians.

7.05: Retention of Medical Records
Physicians have an obligation to retain patient records which may reasonably be of value to a patient. The following guidelines are offered to assist physicians in meeting their ethical and legal obligations:

1. Medical considerations are the primary basis for deciding how long to retain medical records, For example, operative notes and chemotherapy records should always be part of the patient's chart. In deciding whether to keep certain parts of the record, an appropriate criterion is whether a physician would want the information if he or she were seeing the patient for the first time.

2. If a particular record no longer needs to be kept for medical reasons, the physician should check state laws to see if there is a requirement that records be kept for a

minimum length of time. Most states will not have such a provision. If they do, it will be part of the statutory code or state licensing board.

3. In all cases, medical records should be kept for at least as long as the length of time of the statute of limitations for medical malpractice claims. The statute of limitations may be three or more years, depending on the state law. State medical associations and insurance carriers are the best resources for this information.

4. Whatever the statue of limitations, a physician should measure time from the last professional contact with the patient.

5. If a patient is a minor, the statute of limitations for medical malpractice claims may not apply until the patient reaches the age of majority.

6. Immunization records always must be kept.

7. The record of any patient covered by Medicare or Medicaid must be kept at least five years.

8. In order to preserve confidentiality when discarding old records, all documents should be destroyed.

9. Before discarding old records, patients should be given an opportunity to claim the records or have them sent to another physician, if it is feasible to give them the opportunity.

Please Note:
(a.) North Carolina has no statute relating specifically to the retention of medical records.
(b.) Several North Carolina statutes relate to time limitations for the filing of malpractice actions. Legal advice should be sought regarding such limitations.

(Adopted 5/98)

APPENDIX G-1
Sample Authorization Form to Use and Disclose Health Information

Individual's name: ______________________ **Date of Birth:**__________

Individual's address: ______________________ **Individual's ID#:**__________

____

____

I hereby voluntarily authorize the use and disclosure of my protected health information as described below:

1. Specific Description of the Information to be Used or Disclosed:

____

____

____

The above information will be called "Authorized Information" throughout the rest of this form.

2. Person (or class of persons) Authorized to Make the Use or Disclosure of Authorized Information:

____

____

____

3. Person (or class of persons) to Whom the Use or Disclosure of Authorized Information May Be Made:

____

____

____

4. Authorized information will be used and/or disclosed for the following purpose(s):

____

____

____

5. This authorization expires: ______________________

6. Furthermore, by signing below, I understand that:

- my personal information will be released to the person or class of persons listed above;
- this information may include information regarding mental health, drugs & alcohol, HIV/AIDS and other communicable diseases, and/or genetic testing (unless specifically excluded above);
- I may revoke this authorization by a written notification of my desire to revoke it to the medical provider named in number 2 above;
- any action already taken in reliance on this authorization cannot be reversed, and my revocation will not affect those actions;
- the medical provider named in number 2 above may not condition its treatment of me on whether or not I sign this authorization; and
- information released may no longer be protected by federal privacy regulations.

Individual's Signature ______________________ **Date:**__________

APPENDIX G-2

Authorization Form to Use and Disclose Protected Health Information

(By Authorized Personal Representative)

Patient's name:______________________________ **Date of Birth:**______________________

Representative's name and address: _______________ **Relationship:**______________________

____

____ **Patient's ID #:**______________________

____

On behalf of ________________________, I hereby voluntarily authorize the use and disclosure of his/her protected health information:

1. **Specific Description of the Information to be Used or Disclosed:**

____

____

____

The above information will be called "Authorized Information" throughout the rest of this form.

2. **Person (or class of persons) Authorized to Make the Use or Disclosure of Authorized Information:**

____

____

____

3. **Person (or class of persons) to Whom the Use or Disclosure of Authorized Information May Be Made:**

____

____

____

4. **Authorized information will be used and/or disclosed for the following purpose(s):**

____

____

____

5. **This authorization expires:** ____

6. **Furthermore, by signing below, I understand that:**
   - the personal information will be released to the person or persons listed in number 3 above;
   - this information may include information regarding mental health, drugs & alcohol, HIV/AIDS and other communicable diseases, and/or genetic testing (unless specifically excluded above);
   - I may revoke this authorization by a written notification of my desire to revoke it to the medical provider named in number 2 above;
   - any action already taken in reliance on this authorization cannot be reversed, and my revocation will not affect those actions;
   - the medical provider named in number 2 above may not condition treatment of ____________________ on whether or not I sign this authorization; and
   - information released may no longer be protected by federal privacy regulations.

Personal Representative's signature________________________________ **Date:**________________

Index to Medico-Legal Guidelines

A

APPEARANCE IN COURT.
Medical witness, MLG V(B).

ATTORNEYS' FEES.
Workers' compensation cases, MLG V(C).

AUTHORIZATION.
Disclosure or release of medical information, MLG IV(A).
  Samples of authorizations, MLG Appx G.
Physician communication with attorney, MLG IV(B).

C

CALENDAR.
Trial calendar, MLG V(B).

CHARGES FOR COPYING MEDICAL RECORDS, MLG IV(A).

CONSENT OF PATIENT.
Authorization of disclosure or release of medical information, MLG IV(A).
  Samples of authorizations, MLG Appx G.
Physician communication with attorney, MLG IV(B).

CONSULTATION WITH PATIENT'S ATTORNEY.
Duty of physician, MLG IV(B).

CONTINGENT FEES.
Offering physician, prohibition, MLG V(C).

COPYING MEDICAL RECORDS, MLG IV(A).

CRIMINAL PROSECUTIONS.
Medical reports provided law enforcement.
  Without charge, MLG V(C).

D

DEFINITIONS, MLG III.
Relevant HIPAA definitions, MLG Appx A-1.

DEPOSITION TESTIMONY.
Physicians, MLG IV(B).

DISCLOSURE OF MEDICAL RECORDS.
Inspection and copying, MLG IV(A).
Release authorizations, MLG Appx G.

E

EXPERT WITNESSES.
Definitions, MLG III(E).
Fact expert witness.
  Contacting for availability at trial, MLG V(B).
Fees, MLG V(C).
Medical witness, MLG V(C).

F

FACT EXPERT WITNESS.
Contacting for availability at trial, MLG V(B).
Defined, MLG III(E).
Fees, MLG V(C).

FEES FOR MEDICAL WITNESSES, MLG V(C).

FREE OF CHARGE.
Medical reports and medical testimony.
  Pro bono handling by attorney, criminal prosecutions, MLG V(C).

H

HIPAA DEFINITIONS, MLG Appx A-1.

I

INDEPENDENT EXPERT WITNESS.
Defined, MLG III(E).
Fees, MLG V(C).

INDEPENDENT MEDICAL EXAMINATION, MLG V(C).
Defined, MLG III(D).

INSPECTION OF MEDICAL RECORDS, MLG IV(A).

INTER-PROFESSIONAL COOPERATION AND COURTESY.
Promoting, MLG I.

INTRODUCTION, MLG I.

J

JOINT COMMITTEE OF NC MEDICAL SOCIETY AND NC BAR, MLG VI.

M

MANDATORY RULES.
Precedence over guidelines, MLG II.

MEDICAL BOARD POSITION STATEMENTS, MLG Appx F.

MEDICAL EXAMINATION.
Independent medical examination, MLG V(C).
  Defined, MLG III(D).

MEDICAL RECORDS AND REPORTS, MLG IV.
Affidavit of custodian, MLG Appx D.
Charges for copying.
  Permissible charges, MLG IV(A).
Defined, MLG III(B), MLG III(C).
Inspection and coping, MLG IV(A).
Ownership, MLG IV(A).

MEDICAL RECORDS AND REPORTS —Cont'd
Position statements of NC medical board, MLG Appx F.
Release authorizations, MLG Appx G.
Requesting, MLG IV(A).
  Letter requesting, MLG Appx E.
Statutes and regulations regarding, MLG Appx A-2.
Subpoenas, MLG V(A).
  Form, MLG Appx B.
  Letter sent to court in response, MLG Appx C.
Substance abuse diagnosis and treatment records, MLG IV(A).
Withholding.
  Patient account not paid, MLG IV(A).

MEDICAL WITNESS, MLG V(C).
Appearance in court, MLG V(B).
Defined, MLG III(E).

N

NOTICE.
Need for inspection and copying medical record, MLG IV(A).
Trial, MLG V(B).

O

OWNERSHIP OF MEDICAL RECORDS, MLG IV(A).

P

PERSONAL INJURY LIABILITY CASE.
Charges for copying medical records, MLG IV(A).

PHYSICIAN DEFINED, MLG III(A).

PHYSICIAN DEPOSITION TESTIMONY, MLG IV(B).

PRECEDENCE OVER GUIDELINES, MLG II.

PRO BONO.
Attorney and physician handling without charge, MLG V(C).

PROMPTNESS.
Furnishing medical record or report, MLG IV(A).

R

RECORDS AND REPORTS.
Medical records and reports, MLG IV.
  Affidavit of custodian, MLG Appx D.
  Charges for copying.
    Permissible charges, MLG IV(A).
  Defined, MLG III(B), MLG III(C).
  Inspection and coping, MLG IV(A).
  Ownership, MLG IV(A).
  Position statements of NC medical board, MLG Appx F.
  Release authorizations, MLG Appx G.
  Requesting, MLG IV(A).
    Letter requesting, MLG Appx E.
  Statutes and regulations regarding, MLG Appx A-2.

RECORDS AND REPORTS —Cont'd
Medical records and reports —Cont'd
  Subpoenas, MLG V(A).
    Form, MLG Appx B.
    Letter sent to court in response, MLG Appx C.
  Substance abuse diagnosis and treatment records, MLG IV(A).
  Withholding.
    Patient account not paid, MLG IV(A).

REGULATIONS.
Precedence over guidelines, MLG II.

RELEASE OF MEDICAL RECORDS.
Inspection and copying, MLG IV(A).
Release authorizations, MLG Appx G.

REQUESTING MEDICAL RECORD, MLG IV(A).
Letter requesting, MLG Appx E.

RETAINED EXPERT WITNESS.
Defined, MLG III(E).
Fees, MLG V(C).

S

SOCIAL SECURITY DISABILITY CASES.
Charges for copying medical records, MLG IV(A).

STATUTES.
Precedence over guidelines, MLG II.

SUBPOENAS, MLG V(A).
Form, MLG Appx B.
Letter sent to court in response, MLG Appx C.

SUBSTANCE ABUSE DIAGNOSIS AND TREATMENT RECORDS.
Disclosure, special considerations, MLG IV(A)

SUPPLEMENTAL TO REGULATIONS AND LAWS, MLG II.

T

TRIAL CALENDAR, MLG V(B).

TRIAL SITUATIONS, MLG V.

V

VICTIMS IN CRIMINAL PROSECUTIONS.
Medical reports provided law enforcement.
  Without charge, MLG V(C).

VIDEOTAPED DEPOSITIONS.
Physician's duty to agree when requested, MLG IV(B).

W

WITNESSES.
Expert witnesses.
  Definitions, MLG III(E).
  Fact expert witness.
    Contacting for availability at trial, MLG V(B)
  Fees, MLG V(C).
  Medical witness, MLG V(C).
Fees.
  Medical witnesses, MLG V(C).

WITNESSES —Cont'd
Medical witness, MLG V(C).
  Appearance in court, MLG V(B).
  Defined, MLG III(E).
Physician deposition testimony, MLG IV(B).
Subpoenas, MLG V(A).

WORKERS' COMPENSATION CASES.
Charges for copying medical records, MLG IV(A).
Fees, experts and attorneys, MLG V(C).
Medical witnesses.
  Deposition, live testimony, subpoena, MLG V(A).

NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR UTILIZATION OF REHABILITATION PROFESSIONALS IN WORKERS' COMPENSATION CLAIMS

Effective June 1, 2000.

Rule
I. Application of the rules.
II. Purpose of the rules.
III. Definitions; Description of rehabilitation services.
IV. Qualifications required.
V. Professional responsibility of the rehabilitation professional in workers' compensation claims.

Rule
VI. Communication.
VII. Interaction with physicians.
VIII. Return to work.
IX. Motion for change of RP; Sanctions.

Index follows Rules.

Rule I. Application of the rules.

A. These rules apply to:

1. All cases in which the employer is obligated to provide or is providing and the injured worker is obligated to accept medical compensation under the Act, or in which such compensation is provided by agreement, and during any period when the employer is paying temporary total disability benefits "without prejudice," and

2. Any Rehabilitation Professional (hereinafter RP) assigned under the Workers' Compensation Act and approved by the Commission pursuant to Section VI. E.

B. Any RP who is not assigned under the Act and approved by the Commission must disclose his or her role to (1) the medical provider at the time of the initial contact and (2) any other person from whom the non-approved RP seeks information about the case.

CASE NOTES

Quoted in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

Rule II. Purpose of the rules.

A. The purpose of these rules is to foster professionalism in the provision of rehabilitation services in Industrial Commission cases, such that in all cases the primary concern and commitment of the RP is to the medical and vocational rehabilitation of the injured worker rather than to the personal or pecuniary interests of the parties.

B. To this end, these rules are to be interpreted to promote frank and open cooperation among parties in the rehabilitation process, and to discourage the pursuit of plans or purposes which impede or conflict with the parties' progress toward that goal.

Rule III. Definitions; Description of rehabilitation services.

A. RPs are case managers and coordinators of medical rehabilitation services and/or vocational rehabilitation services, including but not limited to, state, private, or carrier based, whether on site, telephonic, or in or out of state. RPs do not include direct care providers, e.g., physical therapists, occupational therapists, or speech therapists.

B. The "parties" are the worker, the worker's attorney, the employer, the workers' compensation carrier (including claims administrator, third party administrator), and the employer or carrier's attorney(s).

C. "Physician" means medical doctor, chiropractor, other physician, and, where the context requires, other health care providers.

D. "Medical rehabilitation" refers to the planning and coordination of health care services. The goal of medical rehabilitation is to assist in the restoration of injured workers as nearly as possible to the workers' pre-injury level of physical function. Medical case management may include but is not limited to case assessment, including a personal interview with the injured worker; development, implementation and coordination of a care plan with health care providers and with the worker and family; evaluation of treatment results; planning for community re-entry; return to work with the employer of injury and/or referral for further vocational rehabilitation services.

E. "Vocational Rehabilitation" refers to the delivery and coordination of services under an individualized plan, with the goal of assisting injured workers to return to suitable employment.

(1) Specific vocational rehabilitation services may include, but are not limited to: vocational assessment, vocational exploration, counseling, job analysis, job modification, job development and placement, labor market survey, vocational or psychometric testing, analysis of transferable skills, work adjustment counseling, job-seeking skills training, on-the-job training and retraining, and follow-up after re-employment.

(2) The vocational assessment is based on the RP's evaluation of the worker's social, medical, and vocational standing, along with other information significant to employment potential and on a face-to-face interview between the worker and the RP, to determine whether the worker can benefit from vocational rehabilitation services, and, if so, to identify the specific type and sequence of appropriate services. It should include an evaluation of the worker's expectations in the rehabilitation process, an evaluation of any specific requests by the worker for medical treatment or vocational training, and a statement of the RP's conclusion regarding the worker's need for rehabilitation services, benefits expected from services, and a description of the proposed rehabilitation plan.

(3) Job placement activities may be commenced after completion of a vocational assessment and formulation of an individualized plan for vocational services which specifies its goals and the priority for return-to-work options in each case. Placement shall only be directed toward prospective employers offering the opportunity for suitable employment, as defined herein.

F. "Return to work" means placement of the injured worker into suitable employment, as defined herein. Return-to-work options generally should be considered in the following priority:

(1) Current job, current employer
(2) New job, current employer
(3) On-the-job training, current employer
(4) New job, new employer
(5) On-the-job training, new employer
(6) Formal vocational training to prepare worker for job with current or new employer.
(7) Due to the high risk of small business failure, self-employment should be considered only when its feasibility is documented with reference to worker's aptitudes and training, adequate capitalization, and market conditions.

G. "Suitable employment" means employment in the local labor market or self-employment which is reasonably attainable and which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment.

Rule IV. Qualifications required.

A. RPs in cases subject to these rules shall follow the Code of Ethics specific to their certification (i.e. CRC, CDMS, CVE, CRRN, COHN, ONC, and CCM) as well as any status specific to their occupation.

B. RPs who are Registered Nurses must have a North Carolina license to practice and are subject to the requirements of the North Carolina Nursing Practice Act.

C. RPs who are Licensed Professional Counselors are subject to the requirements of the North Carolina Licensed Professional Counselor's Act.

D. RPs rendering services in cases subject to these rules shall meet the following criteria, and shall upon request provide a resume of their qualifications and credentials during initial meetings with parties and health care providers.

(1) Requirements for Qualified Rehabilitation Professionals (QRPs):

a. Two years of full-time work experience, or its equivalent in workers' compensation case management, where a minimum of (30) percent of the time was spent in managing medical and/or vocational rehabilitation services to persons with disabling conditions or diseases. This experience should have been within the past 15 years; AND one of the following credentials, or a similar credential determined by the Industrial Commission as a substantial equivalent thereto:

Certified Rehabilitation Counselor (CRC)
Certified Registered Rehabilitation Nurse (CRRN)
Certified Disability Management Specialist (CDMS)
Certified Vocational Evaluator (CVE)
Certified Occupational Health Nurse (COHN)
Orthopedic Nurse Certified (ONC)
Certified Case Manager (CCM); OR

b. Employed within the North Carolina Department of Human Resources as a Vocational Rehabilitation Provider;

c. The Commission may, through its Minutes, modify the list of credentials contained in subsection (a) above to add or delete appropriate credentials.

(2) Requirements for Conditional Rehabilitation Professionals (CRPs):

a. A CRP is defined as a person who does not meet the requirements for QRP and who wishes to work as an RP in cases subject to this rule, including the following:

i. CRC, CRRN, CDMS, CVE, COHN, ONC, or CCM without the workers' compensation case management experience required;

ii. A post-baccalaureate degree in a health-related field from an accredited institution, plus one year of experience in the provision of rehabilitation services to persons with disabling conditions or diseases,

iii. A baccalaureate degree in a health-related field from an accredited institution, plus two years experience in the provision of rehabilitation services to individuals with disabling conditions or diseases, or

iv. Current North Carolina licensure as a registered nurse and three years experience in clinical nursing providing care for adults with disabling conditions and diseases.

b. In order to work as an RP, a CRP will work under the direct supervision of a QRP until qualifications for a QRP are fulfilled. The supervisor must meet the requirements for providing workers' compensation case management services in North Carolina. Supervision shall include regular case staffing between the CRP and the QRP supervisor, detailed review by the QRP supervisor of all reports, and periodic meetings no less frequently than quarterly. The name, address and telephone number of the supervisor shall be on all documents identifying the CRP. The QRP is responsible to assure that the work of the CRP shall meet all requirements including those of this rule.

c. Once an RP meets certification eligibility requirements, an RP may maintain CRP status for a period of two years only.

CASE NOTES

Stated in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999)

Rule V. Professional responsibility of the rehabilitation professional in workers' compensation claims.

A. The RP shall exercise independent professional judgment in making and documenting recommendations for medical and vocational rehabilitation for the injured worker, including any alternatives for medical treatment and cost-effective return-to-work options including retraining or retirement. The RP shall realize that the attending physician directs the medical care of an injured worker.

B. The RP shall inform the parties of his or her assignment and proposed role in the case. At the outset of the case, the RP shall disclose to health care providers and the parties any possible conflict of interest, including any compensation carrier's or employer's ownership of or affiliation with the RP.

C. Subject to the provisions for medical care and treatment set forth in the Workers' Compensation Act, the medical RP may explain the medical information to the worker, and shall discuss with the worker all treatment options appropriate to the worker's conditions, but shall not advocate any one specific source for treatment or change in treatment.

D. As case consultants or expert witnesses, RPs have an obligation to provide unbiased, objective opinions. The limits of their relationships shall be clearly defined through written or oral means in accordance with CRCC Code of Professional Ethics, Canon 2, Rule 2.4, or through similar provisions in the applicable code of ethics, if any.

E. There may be parts of the rehabilitation process for which an RP may not be qualified. The RP has the responsibility to refrain from those activities which do not fall within his or her qualifications. RPs shall practice only within the boundaries of their competence, based on their education, training, appropriate professional experience, and other professional credentials.

F. Prohibited Conduct:

(1) RPs shall not conduct or assist any party in claims negotiation, investigative activities, or perform any other non-rehabilitation activity;

(2) RPs shall not advise the worker as to any legal matter including claims settlement options or procedures, monetary evaluation of claims, or the applicability to the worker of benefits of any kind under the Workers' Compensation Act. RPs shall advise the nonrepresented worker to direct such questions to the Industrial Commission, and the represented worker to direct questions to his or her attorney.

(3) RPs shall not accept any compensation or reward from any source as a result of settlement.

CASE NOTES

Quoted in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

Rule VI. Communication.

A. At their first meeting, RPs shall provide the injured worker with a copy of these rules or a summary of the rules approved by the Commission.

B. RPs shall timely inform injured workers that the RP will share relevant and material information with the employer and insurance carrier and that the RP may be compelled to testify regarding any information obtained.

C. In cases where the employer is paying medical compensation to a provider rendering treatment under the Workers' Compensation Act, the injured worker, if requested by an RP, shall sign a Form 25C Consent authorizing the RP to obtain records of such current treatment. Refusal to sign the consent may be deemed by the Commission to be noncompliance with rehabilitation and may result in the suspension of benefits.

D. In preparing written and oral reports, the RP shall present only information relevant and material to the worker's medical and/or vocational rehabilitation and shall make every effort to avoid undue invasion of privacy.

E. The carrier shall promptly notify the Industrial Commission and all parties on a Form 25N when an RP is assigned to a case and identify the purpose of the rehabilitation involvement.

F. The RP shall provide copies of all correspondence simultaneously to all parties to the extent possible, making every effort to effect prompt service.

G. The RP shall make periodic written reports documenting accurately and completely the substance of all significant activity in the case, including the rehabilitation activity defined above, which reports shall be provided to all parties at the same time. A worker not represented by counsel shall be furnished with a copy of each periodic report, or, in the alternative, the RP shall advise orally or in writing (at least as often as reports are produced) as to the plan for and progress of the case, and shall advise the worker that he or she has the right to request a copy of the reports under Industrial Commission Rule 607.

H. Frequency and timing of periodic reports will be determined at the time of referral and will depend upon the type of service provided. However, prompt communication of significant activity to all parties by telephone, telecopier, electronic media, or letter should occur when information pertinent to the rehabilitation process is obtained, when changes or revisions are recommended or occur in medical or vocational treatment plans, or on any other occasion when the worker's understanding and cooperation is important to the implementation of the rehabilitation plan.

I. Communication with worker's attorney.

(1) The first meeting of the worker and RP shall, if requested, take place at the office of the worker's attorney. If this location is requested, it shall not delay the meeting more than (20) calendar days.

(2) To promote cooperation among the parties, the RP shall coordinate activities with the injured worker's attorney, and, at the employer or carrier's discretion, with the defense attorney. If the RP believes that the worker is not cooperating with the provision of rehabilitation services, the RP shall advise all parties and shall describe what cooperative action on the part of the worker is sought.

CASE NOTES

Communications Between Physician and Rehabilitation Professional. — The fact that a treating physician and a rehabilitation professional have communicated outside the plaintiff's presence without the plaintiff's consent, without more, does not violate the Industrial Commission's rules. Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

Rule VII. Interaction with physicians.

A. At the initial visit with a physician the RP shall provide professional identification and shall explain the RP's role in the case.

B. In all cases, the RP shall advise the worker that he or she has the right to a private examination by the medical provider outside of the presence of the RP. If the worker prefers, he or she may request that the RP accompany him or her during the examination. However, if the worker or the worker's attorney notifies the RP in writing that the worker desires a private examination, no subsequent waiver of that right shall be effective unless the waiver is revoked in writing by the worker or, if represented, by the worker's attorney.

C. If the RP wishes to have a personal conference with the physician following an examination, the RP should reserve with the physician sufficient appointment time for a conference. The worker must be offered the opportunity to attend this conference with the physician. If the worker or the physician does not consent to a joint conference, or if in the physician's opinion it is medically contraindicated for the worker to participate in the conference, the RP will note this in his or her report and may in such case communicate directly with the physician and shall report the substance of the communication.

D. When the RP determines that it is necessary to communicate with a physician other than at a joint meeting, the RP shall first notify the injured worker, or his/her attorney if represented, of the RP's intent to communicate and the reasons therefor. The RP need not obtain the injured worker's or attorney's prior consent for the following types of communication:

1. The communication is limited to scheduling issues or requests for time-sensitive medical records;
2. A medical emergency is involved;
3. The injured worker's health or medical treatment would either be adversely affected by a delay or benefited by immediate action;
4. The communication is limited to advising the physician of the employer or carrier approval for recommended testing or treatment;
5. The injured worker or attorney has consented to such communications through a valid, current authorization;
6. The communication is initiated by the physician; or
7. The injured worker failed to show up for a scheduled appointment or arrived at a time other than the scheduled appointment time.

Whenever an RP communicates with a physician without the prior consent or presence of the injured worker, the RP must promptly document the reasons for and the substance of the communication and promptly report such to the injured worker or attorney, if represented, pursuant to Rule VI.

E. The RP may assist in scheduling second opinions requested by the treating physician, as well as supporting treatment. In such case, the worker shall receive at least 10 calendar days notice of an appointment for a second opinion unless otherwise agreed by the parties or required by statute.

F. The RP may assist in obtaining from the treating physician an opinion as to the degree of permanent partial impairment retained by the worker at maximum medical improvement. The decision to obtain a second physician's opinion on the degree of impairment is not within the practice of rehabilitation. However, if requested by the party who desires a second opinion, the RP may assemble information, schedule, coordinate, and, with the worker's consent, attend the appointment with that physician.

G. If a party requests a second opinion or an independent medical examination, the RP's involvement is limited to assembling and forwarding medical records and information, and scheduling, coordinating, and, with the worker's consent, attending the appointment with that physician.

H. The RP shall simultaneously send copies to the parties of all written communications to medical care providers, and shall accurately and completely record and report all oral communications.

Rule VIII. Return to work.

A. The RP shall obtain from the medical provider work restrictions which fairly address the demands of any proposed employment. If ordered by a physician, the RP should obtain a Functional Capacity Evaluation (FCE) or Physical Capacity Evaluation (PCE). Any FCE or PCE obtained should measure the worker's capacities and impairments.

B. The RP shall refer the worker only to opportunities for suitable employment, as defined herein.

C. If the RP intends to utilize written or videotaped job descriptions in the return-to-work process, the RP shall provide a copy of the description to all parties for review before the job description is provided to the doctor. The worker or the worker's attorney shall have seven business days from mailing of the description, to notify the RP, all parties, and the physician of any objections or amendments to the job description. The job description and the objections or amendments, if any, shall be submitted to the physician simultaneously. This process may be expedited on occasions when job availability is critical. This waiting period does not apply if the worker or the worker's attorney has pre-approved the job description.

D. In preparing written job descriptions, the RP shall utilize recognized standards which may include but not be limited to the Dictionary of Occupational Titles and/or the Handbook for Analyzing Jobs published by the U.S. Department of Labor, which are recognized as national standard references for use in vocational rehabilitation.

E. In identifying proposed employment for the injured worker, the RP should consider the worker's transportation requirements.

F. Follow-up after placement may be carried out to verify the appropriateness of the job placement.

G. The RP shall not initiate or continue placement activities which do not appear reasonably likely to result in placement of the injured worker in suitable employment. The RP shall report to the parties when efforts to place the worker in suitable employment do not appear reasonably likely to result in placement of the injured worker in suitable employment.

Rule IX. Motion for change of RP; Sanctions.

A. An RP may be removed from a case upon motion by either party for good cause shown or by the Industrial Commission in its own discretion. The motion shall be filed with the Executive Secretary's Office and served upon all parties and the RP. Any party or the RP may file a response to the motion within (10) days. The Industrial Commission shall then determine whether to remove the RP from the case. The parties are referred to Industrial Commission Rule 609.

B. If the employer/carrier chooses to do so and the worker consents, the employer/carrier may replace the RP, in which case the moving party shall notify the Industrial Commission that the motion does not need to be decided.

C. For good cause, including ineffective delivery of rehabilitation services, failure to comply with applicable laws, rules or regulations, or failure to timely respond to lawful orders of the Commission or other regulatory authorities, the Commission may prohibit or restrict an RP, or group of RPs, further participation by particular workers, employers, or health care providers, groups or classes of them, or all of them. As provided in Industrial Commission Rule 802, the Commission may impose appropriate sanctions for violation of these Rules.

D. A party may request reconsideration of a ruling or appeal from an order as provided in Rule 703 or pursuant to N.C. Gen. Stat. §§ 97-83; 97-84.

Index to Rules of Utilization of Rehabilitation Professionals

A

APPLICATION OF RULES, ICRehabProf Rule I.

ATTORNEY OF WORKER, COMMUNICATION WITH, ICRehabProf Rule VI.

B

BOUNDARIES OF COMPETENCE, PRACTICE WITHIN, ICRehabProf Rule V.

C

CASE CONSULTANTS OR EXPERT WITNESSES.
Obligation of rehabilitation professional when serving as, ICRehabProf Rule V.

CODE OF ETHICS, PROFESSIONAL TO FOLLOW, ICRehabProf Rule IV.

COMMUNICATIONS WITH PHYSICIANS, ICRehabProf Rule VII.

CONDITIONAL REHABILITATION PROFESSIONALS, REQUIREMENTS, ICRehabProf Rule IV.

COPY OR SUMMARY OF RULES.
Professional to provide employee, ICRehabProf Rule VI.

D

DEFINITIONS, ICRehabProf Rule III.

DISCLOSURE OF ROLE BY NON-APPROVED REHABILITATION PROFESSIONAL, ICRehabProf Rule I.

F

FORM 25C CONSENT.
Authorizing professional to obtain records of treatment, ICRehabProf Rule VI.

FUNCTIONAL CAPACITY EVALUATION.
Rehabilitative professional obtaining, ICRehabProf Rule VIII.

G

GOOD CAUSE, RESTRICTING FURTHER PARTICIPATION, ICRehabProf Rule IX.

I

INTERACTION WITH PHYSICIANS BY REHABILITATION PROFESSIONALS, ICRehabProf Rule VII.

J

JOB DESCRIPTIONS, ICRehabProf Rule VIII.

JOB PLACEMENT ACTIVITIES, WHEN COMMENCED, ICRehabProf Rule III.

M

MEDICAL CASE MANAGEMENT, ICRehabProf Rule III.

MEDICAL REHABILITATION DEFINED, ICRehabProf Rule III.

MOTION FOR CHANGE OF REHABILITATION PROFESSIONAL, ICRehabProf Rule IX.

N

NOTICE THAT PROFESSIONAL ASSIGNED TO CASE.
Carrier to notify commission and parties, ICRehabProf Rule VI.

O

OBJECTIONS OR AMENDMENTS TO JOB DESCRIPTION, FILING, ICRehabProf Rule VIII.

P

PARTIES DEFINED, ICRehabProf Rule III.

PHYSICAL CAPACITY EVALUATION.
Rehabilitative professional obtaining, ICRehabProf Rule VIII.

PRIVATE EXAMINATION BY MEDICAL PROVIDER, ICRehabProf Rule VII.

PROFESSIONAL RESPONSIBILITY OF REHABILITATION PROFESSIONALS, ICRehabProf Rule V.

PROHIBITED CONDUCT ON PART OF REHABILITATION PROFESSIONAL, ICRehabProf Rule V.

PURPOSE OF RULES, ICRehabProf Rule II.

Q

QUALIFICATIONS FOR REHABILITATION PROFESSIONALS, ICRehabProf Rule IV.

QUALIFIED REHABILITATION PROFESSIONS, REQUIREMENTS, ICRehabProf Rule IV.

R

REMOVAL OF REHABILITATION PROFESSIONAL.
Motion for change, ICRehabProf Rule IX.

REPORTS BY REHABILITATION PROFESSIONALS, ICRehabProf Rule VI.

RETURN TO WORK DEFINED, ICRehabProf Rule III.

RETURN TO WORK PROCESS, ICRehabProf Rule VIII.

S

SECOND OPINION OR INDEPENDENT MEDICAL EXAM.
Rehabilitative professional's role, ICRehabProf Rule VII.

SERVICES PROVIDED BY REHABILITATION PROFESSIONS, ICRehabProf Rule III.

SHARING INFORMATION WITH EMPLOYER AND INSURANCE CARRIER.
Professional to inform employee, ICRehabProf Rule VI.

SUITABLE EMPLOYMENT DEFINED, ICRehabProf Rule III.

SUITABLE EMPLOYMENT, REFERRAL OF WORKER TO, ICRehabProf Rule VIII.

V

VOCATIONAL ASSESSMENT, ICRehabProf Rule III.

VOCATIONAL REHABILITATION DEFINED, ICRehabProf Rule III.

W

WORK RESTRICTIONS, OBTAINING FROM MEDICAL PROVIDER, ICRehabProf Rule VIII.

TORT CLAIMS RULES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

Effective May 1, 2000.

Article I. Administration

Rule
T101. Location of offices and hours of business.
T102. Transaction of business by the Commission.
T103. Official forms.
T104. Filing by telefacsimile transmission.

Article II. Claims Procedures

T201. Rules of Civil Procedure.
T202. Filing fees.
T203. Enlargement of time.
T204. Infants and incompetents.
T205. Motions.
T206. Hearings.
T207. Hearing costs.

Article III. Appeals to Full Commission

T301. Notice of appeal to the Full Commission.
T302. Transcripts.
Rule
T303. Assignments of error.
T304. Dismissal of appeal.
T305. Briefs.
T306. Motion for new hearing.
T307. Motions Before Full Commission.
T308. Stays.
T309. New evidence.
T310. Waiver of oral argument.

Article IV. Appeals to the Court of Appeals

T401. Rules of Appellate Procedure.
T402. Appeal bond.
T403. Appeals to the Court of Appeals.
T404. Settling record on appeal.

Article V. Rules

T501. Waiver of rules.
T502. Rulemaking.

Index follows Rules.

ARTICLE I. ADMINISTRATION

Rule T101. Location of offices and hours of business.

The offices of the North Carolina Industrial Commission (hereinafter "Industrial Commission") are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The General Mailing Address is North Carolina Industrial Commission, 4319 Mail Service Center, Raleigh, NC 27699-4319. The same office hours will be observed by the Industrial Commission as are, or may be, observed by other State offices in Raleigh. The offices are open between the hours of 8:00 a.m. and 5:00 p.m. to accept documents for filing.

Rule T102. Transaction of business by the Commission.

The Industrial Commission shall remain in continuous session subject to the call of the Chair to meet as a body for the purpose of transacting such business as may come before it.

Rule T103. Official forms.

(1) The Industrial Commission will supply, on request, forms identified by number and title as follows:

(a) Form T-1, Claim for Damages Under Tort Claims Act, N.C.G.S. § 143-297.

(b) Form T-3, Release of Tort Claim Under N.C.G.S. § 143-297, *et seq.*

(c) Such other forms relating to Tort Claims which, from time to time, may be promulgated by the Industrial Commission.

(2) The use of any printed forms other than those approved and adopted by the Industrial Commission is prohibited. However, a claim for damages under the Tort Claims Act, and an answer or other responsive pleading by a defendant, may be filed by way of an original typed claim or answer and other responsive pleading which is similar in format to a civil pleading in the General Courts of Justice, and which is verified.

Rule T104. Filing by telefacsimile transmission.

Filing by telefacsimile transmission shall be allowed when specific permission is granted by the Dockets Director or by the person designated by the Chair to determine matters related to the Tort Claims Act or by the Chair. If a filing fee is required, it must be received by the Industrial Commission contemporaneously with the telefacsimile either by electronic transfer of funds or other procedure accepted by the Commission. The Industrial Commission may adopt procedures for filing by telefacsimile transmission in other instances.

ARTICLE II. CLAIMS PROCEDURES

Rule T201. Rules of Civil Procedure.

(1) The Rules of Civil Procedure as provided in N.C.G.S. § 1A-1 shall apply in tort claims before the Industrial Commission, to the extent that such Rules are not inconsistent with the Tort Claims Act. In the event of such inconsistency, the Tort Claims Act and these Rules shall control.

(2) In medical malpractice cases filed by or on behalf of prison inmates where the plaintiff is alleging that a health care provider as defined in N.C. Gen. Stat. § 90-21.11 failed to comply with the applicable standard of care under N.C. Gen. Stat. § 90-21.12 and the defendant has filed a Motion to Dismiss the claim, all discovery is stayed until the following occurs:

(a) An informal recorded telephonic hearing is held before a Deputy Commissioner for the purpose of determining

(1) whether a claim for medical malpractice has been stated;

(2) whether expert testimony is necessary for the plaintiff to prevail; and

(3) if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.

(b) Upon receipt of a Motion to Dismiss and Request for Telephonic Hearing from the defendant, the Industrial Commission shall issue an order setting the motion on a hearing docket and the case will be assigned to a Deputy Commissioner. Thereafter, the parties shall have 30 days to submit medical records applicable to the claim to the Dockets Director or to the Deputy Commissioner before whom the case is set.

(c) If the defendant's Motion to Dismiss is granted, an appeal lies to the Full Commission. If defendant's Motion to Dismiss is denied, the case will proceed as any other Tort Claims case.

Rule T202. Filing fees.

(1) No claim shall be accepted for filing with the Industrial Commission which is not accompanied by an attorney's check, certified check, money order, or electronic transfer of funds in payment of a filing fee in an amount equal to the filing fee required for the filing of a civil action in the Superior Court division of the General Court of Justice.

(2) The provisions of paragraph (1) above notwithstanding, a claim which is accompanied by a Petition to Sue as an Indigent shall be accepted for filing upon the date of its receipt.

(3) A Petition to Sue as an Indigent shall consist of the following:

(a) An affidavit sufficient to satisfy the provisions of N.C. Gen. Stat. § 1-110, stating that plaintiff is unable to comply with subsection (1) of this Rule.

(b) If the plaintiff is an inmate in the North Carolina Department of Correction, a report by the Department of Correction stating the balance of plaintiff's prison trust account, together with an accounting of all credits to and withdrawals from that trust account during the prior six months.

(4) The granting or denial of permission to sue as an indigent shall be in the sole discretion of the Industrial Commission.

(5) If, in the discretion of the Industrial Commission, it is determined that plaintiff is able to pay all or any part of the fees assessed under this Rule, an Order shall be issued directing payment of all or any part of that fee, and the plaintiff shall, within thirty (30) days from his receipt of the Order, forward to the Industrial Commission an attorney's check, certified check, money order, or electronic fund transfer for the full

amount which is required to be paid. Failure to submit the required amount of the filing fee within this time shall result in the claim being dismissed without prejudice.

(6) Upon consideration of an inmate's petition to sue as an indigent, the Industrial Commission may determine that the inmate's tort claim is frivolous and dismiss the claim pursuant to N.C. Gen. Stat. § 1-110. Appeals from the dismissal of a claim pursuant to the statute shall proceed directly to the Full Commission and shall be decided without oral argument. The Commission shall forward a copy of the file to the Attorney General's Office without cost upon plaintiff's notice of appeal to the Full Commission.

Rule T203. Enlargement of time.

A Commissioner or Deputy Commissioner may upon the motion of a party or upon his own motion, enlarge the time within which an action must be taken or a document filed pursuant to this Article. If the claim has not been calendared, Motions for Enlargement of Time should be directed to the Commissioner or Deputy Commissioner designated by the Chair to determine Tort Claim motions. An enlargement of time may be granted either before or after the relevant time requirement has elapsed.

Rule T204. Infants and incompetents.

In all cases where it is proposed that minors or incompetents shall sue by their guardian *ad litem,*the Industrial Commission shall appoint such guardian ad litem upon the written application of a reputable person closely connected with such minor or incompetent; but if such person will not apply, then, upon the application of some reputable citizen; and the Industrial Commission shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

Rule T205. Motions.

(1) All Motions in cases which are currently calendared before a Commissioner or Deputy Commissioner shall be sent directly to that Commissioner or Deputy Commissioner at the Industrial Commission. Before a case is calendared, or after a case has been continued, or removed, or after a case has been heard and a Decision and Order entered, Motions shall be directed to the Executive Secretary of the Industrial Commission or the person designated by the Chair to determine these matters, if known.

(2) A motion shall state with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party's position, if known. Service shall be made on all other parties.

(3) Motions to continue or remove a case from the hearing docket on which the case is set must be made well in advance of the scheduled hearing and shall be made in writing. In all cases, the moving party must state that the other parties have been advised of the Motion and relate the position of the other parties regarding the Motion. Oral motions shall be permitted in emergency situations for good cause shown.

(4) The responding party to a Motion, with the exception of Motions to continue or remove a case from a hearing docket, shall have ten (10) days after a Motion is served upon him during which to file and serve copies of response in opposition to the Motion. The Industrial Commission may shorten or extend the time for responding to any Motion.

(5) Notwithstanding the provisions of (4) above, the Industrial Commission may act upon a Motion at any time, despite the absence of notice to all parties, and without awaiting a response. A party who has not received actual notice of such a Motion prior to the entry of a ruling by the Industrial Commission or who has not filed a response at the time such ruling is entered and who is adversely affected by the ruling may request reconsideration, vacation, or modification of the ruling. Motions will be determined without argument, unless the Industrial Commission orders otherwise.

(6) In a case in which a Motion to amend pleadings has been filed, the Commissioner or Deputy Commissioner may permit amendment of pleadings at the time of the hearing and then proceed to a determination of the case based on the evidence presented at the hearing without requiring additional pleadings.

(7) Motions to dismiss or for summary judgment for the defendant on the ground that plaintiff has failed to specifically name the individual officer, agent, employee or

involuntary servant whose alleged negligence gave rise to the claim, or failure to properly name the department or agency of the State with whom such person was employed, shall be ruled upon following discovery.

(8) In appropriate cases, motions may be set for hearing before a Commissioner or Deputy Commissioner upon request of either party or upon the Commission's own motion.

Rule T206. Hearings.

(1) The Industrial Commission may, on its own Motion, order a hearing or rehearing of any case in dispute.

(2) The Industrial Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Industrial Commission, and conducive to an early and just resolution of disputed issues.

(3) In cases involving a plaintiff who is an inmate in the North Carolina Department of Correction, the Industrial Commission shall set contested cases for hearing as follows:

(a) In the prison unit where plaintiff is incarcerated or in some other prison facility agreed upon by the Industrial Commission and the Attorney General's office; or

(b) By videoteleconference according to procedures adopted by the Industrial Commission; or

(c) By telephone conference according to procedures adopted by the Industrial Commission.

(4) The Industrial Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum should be sent to the Dockets Department of the Industrial Commission if the case has not been set on a calendar for hearing. If the case has been set for hearing, the request should be sent to the Deputy Commissioner or Commissioner before whom the case is set.

(5) The Industrial Commission will give reasonable notice of a hearing in every case. Postponement or continuance of a duly scheduled hearing will rest entirely in the discretion of a Commissioner or Deputy Commissioner. Where a party has not notified the Industrial Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party shall constitute notice to the party's attorney.

(6) In cases involving minimal property damage, the Commission may, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.

(7) In cases of multiple claim filings by an inmate, the Industrial Commission may consolidate all of the claims for hearing upon the motion of either party or upon the Commission's own motion. Other cases may be consolidated according to Rule 42 of the North Carolina Rules of Civil Procedure.

(8) In the event of inclement weather or natural disaster, hearings shall be cancelled if the proceedings in the General Court of Justice are cancelled in the county in which the Tort Claims hearings are set.

Rule T207. Hearing costs.

Hearing costs shall be assessed in each case set for hearing, including those cases which are settled after being calendared and notices mailed, and shall be payable upon submission of a statement by the Industrial Commission.

ARTICLE III. APPEALS TO FULL COMMISSION

Rule T301. Notice of appeal to the Full Commission.

A letter or other document expressing an intent to appeal, which is filed within 15 days of receipt of the Decision and Order of the Industrial Commission, and which clearly sets forth the Decision and Order from which appeal is taken, shall be considered notice of appeal to the Full Commission within the meaning of N.C. Gen. Stat. § 143-292. Such notice shall include a written statement confirming service of a copy of the notice by mail or in person on the opposing party or parties.

Rule T302. Transcripts.

Upon receipt of notice of appeal, the Industrial Commission, after taxing appropriate costs, will prepare and supply to all parties a transcript of the record of the case and decision from which appeal is being taken to the Full Commission.

Rule T303. Assignments of error.

The appellant shall, within 25 days of receipt of the transcript of the record, or receipt of notice that there will be no transcript of the record, file in triplicate with the Industrial Commission, a written statement of the particular grounds for the appeal. The statement shall certify service of a copy by mail or in person upon the opposing party or parties. Particular grounds for appeal not set forth in the written statement will be deemed to be abandoned and argument thereon will not be heard before the Full Commission. The grounds must be stated in particularity, including the specific errors allegedly committed by the hearing Commissioner or Deputy Commissioner and the pages in the transcript on which the alleged errors are recorded.

Rule T304. Dismissal of appeal.

Failure to file assignments of error may result in the dismissal of the appeal either upon the Motion of the non-appealing party or upon the Full Commission's own Motion.

Rule T305. Briefs.

(1) Appellant's brief shall be filed with the Industrial Commission in triplicate no later than 25 days after receipt of the transcript of the record or receipt of notice that there will be no transcript.

(2) Thereafter, appellee's brief shall be filed with the Industrial Commission in triplicate no later than 25 days after the service of appellant's brief. When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired. If both parties appeal, they shall each file an appellant's and appellee's brief on the schedule set forth herein. The parties may file with the Docket Director a written stipulation to a single extension of time for each party, not to exceed 30 days, if the matter has not been calendared for hearing.

(3) A party who fails to file a brief, will not be allowed oral argument before the Full Commission. Cases should be cited by North Carolina reports, and preferably, to Southeastern reports. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute unworthy acts or motives to opposing counsel.

(4) Each brief filed pursuant to this Rule shall be accompanied by a written certification that the brief has been served by mail or in person upon the opposing party or parties.

Rule T306. Motion for new hearing.

A Motion for a New Hearing must be filed in writing, and supported by Affidavit. Such Motions filed during the pendency of an appeal to the Full Commission shall be argued before the Full Commission at the time of the hearing of the appeal.

Rule T307. Motions Before Full Commission.

During the pendency of an appeal to the Full Commission, any Motion by either party shall be filed in triplicate with the Industrial Commission and directed to the Chair if the case has not been calendared. If the case has been calendared the motion shall be directed to the Full Commission panel before whom the case is set. Every motion shall certify, in writing, that it has been served by mail or in person upon the opposing party or parties.

Motions for Reconsideration of a decision of the Full Commission shall be directed to the Commissioner who authored the Decision and Order.

Rule T308. Stays.

When a case is appealed to the Full Commission or to the Court of Appeals, all decisions and orders of a Deputy Commissioner or the Full Commission are stayed pending appeal.

Rule T309. New evidence.

No new evidence will be presented to, or heard by, the Full Commission unless the Commission in its discretion permits.

Rule T310. Waiver of oral argument.

Either or both parties, with permission of the Full Commission, may waive oral argument before the Full Commission. The Full Commission may in its discretion order that all oral argument in a particular case will be waived. If oral argument is waived by either of these methods, the Full Commission will issue a decision, based on the record, assignments of error, and briefs.

ARTICLE IV. APPEALS TO THE COURT OF APPEALS

Rule T401. Rules of Appellate Procedure.

Except as otherwise provided in N.C. Gen. Stat. § 143-293, in every case appealed to the Court of Appeals, the North Carolina Rules of Appellate Procedure governing appeals in an ordinary civil action shall apply.

Rule T402. Appeal bond.

The amount of the appeal bond shall be set by the Chair of the Industrial Commission or the Chair's designee.

Rule T403. Appeals to the Court of Appeals.

All Motions filed by the parties regarding appeal to the Court of Appeals shall be addressed to and ruled upon by the Chair of the Industrial Commission, or the Chair's designee.

Rule T404. Settling record on appeal.

Upon a proper Motion, the Chair of the Industrial Commission, or the Chair's designee, shall enter an Order settling a record on appeal after conducting a settlement conference, in accordance with the North Carolina Rules of Appellate Procedure. Settlement conferences shall be held at the Industrial Commission offices or by telephone conference.

ARTICLE V. RULES

Rule T501. Waiver of rules.

In the interest of justice, any Tort Claims Rule may be waived by a Commissioner, Deputy Commissioner, or the Full Commission.

Rule T502. Rulemaking.

Prior to adopting, deleting or amending any Tort Claims Rule of the Industrial Commission which affects the substantive rights of parties, the Industrial Commission will give at least 30 days notice of the proposed change in Rules. Such notice will be given by publishing, in a newspaper or newspapers of general circulation in North Carolina, notice of such proposed change. Such notice will include an invitation to any interested party to submit in writing any objection, suggestion or other comment with respect to the proposed Rule change or to appear before the Full Commission at a time and place designated in the notice for the purpose of being heard with respect to the proposed Rule change.

Index to Tort Claims Rules of the North Carolina Industrial Commission

A

ADOPTION OF RULES.
Procedure, ICTortClaim Rule T502.

APPEAL BOND, ICTortClaim Rule T402.

APPEALS.
Arguments.
  Waiver of oral argument, ICTortClaim Rule T310.
Assignments of error, ICTortClaim Rule T303.
  Conditional assignments, ICTortClaim Rule T304.
Briefs, ICTortClaim Rule T305.
Court of appeals.
  Bond, ICTortClaim Rule T402.
  Motions, ICTortClaim Rule T403.
  Record on appeal.
    Settling, ICTortClaim Rule T404.
  Rules of appellate procedure, ICTortClaim Rule T401.
Dismissal, ICTortClaim Rule T304.
  Frivolous claims by inmates, ICTortClaim Rule T202.
Evidence.
  New evidence, ICTortClaim Rule T309.
Frivolous claims by inmates, ICTortClaim Rule T202.
Motions.
  New hearings, ICTortClaim Rule T306.
  Pendency of appeal, ICTortClaim Rule T307.
Notice, ICTortClaim Rule T301.
Oral argument, waiver, ICTortClaim Rule T310.
Stay pending appeal, ICTortClaim Rule T308.
Transcripts, ICTortClaim Rule T302.

ASSIGNMENTS OF ERROR.
Appeals, ICTortClaim Rule T303.
  Conditional assignments, ICTortClaim Rule T304.

B

BRIEFS.
Appeals, ICTortClaim Rule T305.

C

CANCELLATION OF HEARING.
Inclement weather or disaster, ICTortClaim Rule T206.

CLAIMS.
Filing fees, ICTortClaim Rule T202.
Hearings, ICTortClaim Rule T206.
Infants and incompetents, ICTortClaim Rule T204.

CLAIMS —Cont'd
Rules of civil procedure.
  Applicability, ICTortClaim Rule T201.

COMMISSION.
Offices.
  Hours of business, ICTortClaim Rule T101.
  Location, ICTortClaim Rule T101.
Transaction of business, ICTortClaim Rule T102.

CONSOLIDATION OF CLAIMS FOR HEARING, ICTortClaim Rule T206.

CONTINUANCE OF HEARING, ICTortClaim Rule T206.

COSTS.
Hearings, ICTortClaim Rule T207.

COURT OF APPEALS.
Appeals to.
  Bond, ICTortClaim Rule T402.
  Motions, ICTortClaim Rule T403.
  Record on appeal.
    Settling, ICTortClaim Rule T404.
  Rules of appellate procedure, ICTortClaim Rule T401.

D

DISMISSALS.
Appeals, ICTortClaim Rule T304.

E

ENLARGEMENT OF PERIOD OF TIME, ICTortClaim Rule T203.

EVIDENCE.
Appeals.
  New evidence, ICTortClaim Rule T309.

F

FACSIMILE TRANSMISSIONS.
Filing by telefacsimile, ICTortClaim Rule T104.

FAX.
Filing by telefacsimile, ICTortClaim Rule T104.

FEES.
Filing fees, ICTortClaim Rule T202.

FORMS.
Official forms.
  Supplying by commission, ICTortClaim Rule T103.

FRIVOLOUS CLAIMS.
Inmate's petition to sue as indigent.
  Dismissal by commission, ICTortClaim Rule T202.

G

GUARDIAN AD LITEM.
Infants and incompetents, ICTortClaim Rule T204.

H

HABEAS CORPUS AD TESTIFICANDUM.
Issuance of writ, ICTortClaim Rule T206.

HEARINGS.
Claims, ICTortClaim Rule T206.
Costs, ICTortClaim Rule T207.
Motions, ICTortClaim Rule T205.
New hearings.
  Motions, ICTortClaim Rule T306.

HOURS OF BUSINESS, ICTortClaim Rule T101.

I

INCOMPETENTS.
Guardian ad litem, ICTortClaim Rule T204.

INDIGENTS.
Petition to sue as indigent, ICTortClaim Rule T202.

INFANTS.
Guardian ad litem, ICTortClaim Rule T204.

INMATES IN DEPARTMENT OF CORRECTIONS.
Filing medical malpractice claims.
  Defendant filing motion to dismiss, procedure, ICTortClaim Rule T201.
Frivolous claims by inmates, ICTortClaim Rule T202.
Hearings in contested cases, inmate involved, ICTortClaim Rule T206.
Petition to sue as indigent, ICTortClaim Rule T202.

M

MEDICAL MALPRACTICE CASES FILED BY INMATES.
Defendant filing motion to dismiss, procedure, ICTortClaim Rule T201.

MINORS.
Guardian ad litem, ICTortClaim Rule T204.

MOTIONS, ICTortClaim Rule T205.
Appeals.
  Court of appeals, ICTortClaim Rule T403.
  New hearings, ICTortClaim Rule T306.
Enlargement of period of time, ICTortClaim Rule T203.
Pendency of appeal, ICTortClaim Rule T307.
Reconsideration, ICTortClaim Rule T307.

N

NEW HEARING, MOTION, ICTortClaim Rule T306.

NOTICE.
Appeals, ICTortClaim Rule T301.
Hearings, ICTortClaim Rule T206.

O

OFFICES.
Hours of business, ICTortClaim Rule T101.
Location of offices, ICTortClaim Rule T101.
Transaction of business, ICTortClaim Rule T102.

P

PRISONERS.
Filing medical malpractice claims.
  Defendant filing motion to dismiss, procedure, ICTortClaim Rule T201.
Frivolous claims by inmates, ICTortClaim Rule T202.
Hearings in contested cases, inmate involved, ICTortClaim Rule T206.
Petition to sue as indigent, ICTortClaim Rule T202.

R

RECONSIDERATION, MOTION FOR, ICTortClaim Rule T307.

REHEARING.
Motion for new hearing, ICTortClaim Rule T306.
Motion for reconsideration, ICTortClaim Rule T307.

RULES OF CIVIL PROCEDURE.
Applicability, ICTortClaim Rule T201.

S

STAY PENDING APPEAL, ICTortClaim Rule T308.

T

TELEFACSIMILE, FILING BY, ICTortClaim Rule T104.

TELEPHONIC HEARINGS.
Minimal property damage, ICTortClaim Rule T206.

TIME.
Enlargement of period of time, ICTortClaim Rule T203.

TRANSCRIPTS.
Appeals, ICTortClaim Rule T302.

W

WAIVER OF RULES, ICTortClaim Rule T501.

CHILDHOOD VACCINE-RELATED INJURY RULES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

With amendments received through September 10, 1997.

Article I. Administration

Rule
101. Locations of offices and hours of business.
102. Transaction of business by the Commission.
103. Official forms.

Article II. Rules of Commission

201. Rules of Civil Procedure.
Rule
202. Procedure.
203. Attorneys fees.

Index follows Rules.

ARTICLE I. ADMINISTRATION

Rule 101. Locations of offices and hours of business.

The offices of the Industrial Commission are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina 27611. The same office hours will be observed by the Industrial Commission as are or may be observed by other State offices in Raleigh.

Rule 102. Transaction of business by the Commission.

The Commission will remain in continuous session subject to the call of the Chairman to meet as a body for the purpose of transacting such business as may come before it.

Rule 103. Official forms.

The use of any printed forms other than those approved and adopted by this Commission is prohibited. Approved forms may be obtained from the Commission. Insurance carriers and self-insurers may prepare forms for their own use, provided: (1) that the color of the paper upon which the form is printed shall be substantially identical to that used on the approved Commission's form, (2) no statement, question, or information blank contained on the approved Commission's form is omitted from the substituted form, and (3) such substituted form is substantially identical in size and format with the approved Commission's form.

ARTICLE II. RULES OF COMMISSION

Rule 201. Rules of Civil Procedure.

The Rules of Civil Procedure apply in cases involving a purported Childhood Vaccine-Related Injury, so long as such rules are consistent with Article 17 of Chapter 130A of the General Statutes, except as hereinafter specifically provided.

Rule 202. Procedure.

Upon provision of a copy of the claim and supporting documentation, including all available medical records pertaining to the alleged injury, as provided in N.C.G.S. § 130A-425(b), further proceedings shall be suspended for a period of ninety (90) days during which the responsible government agencies shall determine and report their position on the issues listed in N.C.G.S. § 130A-426(a). If the said agencies agree that the claimant is entitled to money compensation meeting or exceeding the maximum amount set forth in § 130A-427(b), the Commission shall so notify the claimant and respondents, and further notify them of the services the Department of Human Resources proposes to provide pursuant to § 130A-427(a)(5). The Commission shall thereafter allow the parties a reasonable period of time to settle the matter before proceeding to hearing.

Rule 203. Attorneys fees.

At the conclusion of the case, counsel for the plaintiff shall submit to the Commission an account of time and services rendered the plaintiff for consideration in setting a fee pursuant to § 130A-427(a)(4).

Index to Childhood Vaccine-Related Injury Rules of the North Carolina Industrial Commission

A

ATTORNEYS' FEES, ChildhoodVaccine Rule 203.

C

CLAIMS.
Procedure, ChildhoodVaccine Rule 202.

COMMISSION.
Forms.
  Official forms.
    Supplying, ChildhoodVaccine Rule 103.
Offices.
  Hours of business, ChildhoodVaccine Rule 101.
  Location, ChildhoodVaccine Rule 101.
Transaction of business, ChildhoodVaccine Rule 102.

F

FEES.
Attorneys' fees, ChildhoodVaccine Rule 203.

FORMS.
Official forms.
  Supplying, ChildhoodVaccine Rule 103.

O

OFFICES.
Hours of business, ChildhoodVaccine Rule 101.
Location, ChildhoodVaccine Rule 101.
Transaction of business, ChildhoodVaccine Rule 102.

R

RULES OF CIVIL PROCEDURE.
Applicability, ChildhoodVaccine Rule 201.

RULES FOR THE DISPUTE RESOLUTION COMMISSION

Amendments through March 1, 2006.

Rule
I. Officers of the Commission.
II. Commission office; Staff.
III. Commission membership.
IV. Meetings of the commission.
V. Commission's budget.
VI. Powers and duties of the commission.
VII. Mediator conduct.
VIII. Investigation and review of matters of ethical conduct, character, and fitness to practice; conduct of hearings; sanctions.
Rule
IX. Investigation and review of applications for certification denied or revoked for reasons other than those pertaining to ethics and conduct.
X. Internal operating procedures.

Index follows Rules.

Rule I. Officers of the Commission.

A. *Officers.* The Commission shall establish the offices of Chair, Vice-Chair, and Secretary/Treasurer.

B. *Appointment; Elections.*

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair and Secretary/Treasurer shall be elected by vote of the full Commission and shall serve two year terms.

C. *Committees.*

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may, appoint ex officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission. Ex-officio members shall serve for a one-year term.

Rule II. Commission office; Staff.

A. *Office.* The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. *Staff.* The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

Rule III. Commission membership.

A. *Vacancies.* Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. *Disqualifications.* If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. *Conflicts of Interest and Recusals.* All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.

2. Recuse himself for herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. *Compensation.* Pursuant to N.C. Gen. Stat. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

Rule IV. Meetings of the commission.

A. *Meeting Schedule.* The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. *Quorum.* A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.

C. *Public meetings.* All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. *Matters requiring immediate action.* If, in the opinion of the Chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be referred to the Executive Committee. The Executive Committee may consider the matter and vote or take other action as appropriate by correspondence, telephone, facsimile, or other practicable method; provided, all formal action taken by the Executive Committee is reported to the Commission and included in the minutes of Commission proceedings.

Rule V. Commission's budget.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

Rule VI. Powers and duties of the commission.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (l) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in the *Rules Implementing Mediated Settlement Conferences (Rules)* and as against such other requirements of the North Carolina Supreme Court Dispute Resolution Commission or the Commission which amplify and clarify those Rules. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile and keep current a list of certified mediators, which specifies the judicial districts in which each mediator wishes to practice. Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences program, and make the list available upon request to any attorney, organization, or member of the public seeking it.

F. Prepare and keep current biographical information on certified mediators who wish to appear in the Mediator Information Directory contemplated in the *Rules*. Periodically disseminate updated biographical information to Senior Resident Superior Court Judges, Chief District Court Judges, Clerks of Superior Court, and Trial Court Administrators in districts in which mediators wish to serve, and

G. Make reasonable efforts on a continuing basis to ensure that the judiciary, clerks of court, court administration personnel, attorneys, and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

Rule VII. Mediator conduct.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal conviction, any complaint filed against or disciplinary action imposed upon the mediator by any other professional organization, or any judicial sanction. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

Rule VIII. Investigation and review of matters of ethical conduct, character, and fitness to practice; conduct of hearings; sanctions.

A. *Establishment of the Standing Committee on Standards, Discipline, and Advisory Opinions.*

1. *Establishment of Committee.* The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. *Matters to Be Considered by Committee.* The Committee shall review and consider the following matters:

a. appeals of staff decisions to deny an application filed by a person seeking certification as a mediator or filed by a person seeking recertification as a mediator based upon the person's conduct, character, or fitness to practice;

b. appeals of staff decisions to deny an application filed by a person or entity seeking certification or recertification as a mediator training program based upon the person's conduct, character, or fitness to practice or that of a trainer or program manager of the mediator training program;

c. complaints which are filed by a member of the Commission, its staff, or any member of the public about a mediator, an applicant for mediator certification or renewal of certification, a mediation trainer, or a mediator training program manager (affected person) based upon the affected person's conduct, character, or fitness to practice: and

d. the drafting of advisory opinions pursuant to the Commissions's Advisory Opinion Policy.

3. *The Investigation of Violations of the Standards of Conduct.*

a. *Information Obtained During the Process of Certification or Renewal.* Commission staff shall review all pending grievances, disciplinary matters, judicial sanctions, and convictions reported by certified mediators, by applicants for mediator certification or certification renewal and by trainers or managers affiliated with mediator training programs applying for certification or certification renewal. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant, mediator, or training program's eligibility for certification or certification renewal. Staff shall forward all such matters of eligibility to the Committee for review except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions* (Guidelines) adopted by the Committee and approved by the Commission.

b. *Complaints of mediator misconduct filed with the Commission.* The staff of the Commission shall forward written complaints about the conduct of an applicant, mediator, trainer, or training program manager filed by any member of the general public, the Commission, or its staff to the committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the Executive Director shall refer the matter to the committee's chair rather than to the committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions.

c. *Investigation by the Standing Committee.* The Committee shall investigate all matters brought before it by staff pursuant to the provisions of subsection a. or b. and may contact the following persons and entities for information concerning such application or complaint: the affected person or applicant, State Bar officials, officials of other professional licensing bodies to whom the affected person is subject, parties or other individuals who brought complaints against the mediator or applicant, court officials, and any other person or entity who may have additional information about the matters reported or facts alleged. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. All information in Commission files pertaining to the initial certification of a mediator or mediation training program or renewals of such certifications, to requests for informal or formal guidance from the Commission pursuant to the Advisory Opinion Policy, and to pending complaints shall be confidential.

d. *Probable Cause Determination.* The Committee on Standards, Discipline, and Advisory Opinions shall deliberate to determine whether probable cause exists to believe that the conduct of the affected person or applicant:

i) is inconsistent with good moral character (MSC Rule 8.E. FFS Rule 8.F. and Rule VII above);

ii) is a violation of the Supreme Court's Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, applicant, trainer or manager is subject (Rule VII above);

iii) is a violation of the rules for the Mediated Settlement Conference, Family Financial Settlement, or Pre-litigation Farm Nuisance Mediation Programs;

iv) is a violation of MSC Rule 9 or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules;

v) reflects a lack of fitness to conduct mediations or to serve as a trainer or training program manager and/or (Rule VII above); or

vi) discredits the Commission, the courts, or the mediation process (Rule VII above).

If there is a finding of probable cause, that the affected person or applicant shall be sanctioned pursuant to these rules.

4. *Authority of Committee to Dismiss Complaints or Propose Sanctions.*

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person or applicant without conditions or, if the investigation were initiated by the filing of a written complaint, shall dismiss the complaint and notify the complaining party and the affected person by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. There shall be no right of appeal from the Committee's decision to dismiss a complaint or certify an affected person or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall propose sanctions on the affected person or applicant as set forth in Section B.10. of these rules, except that if the Committee determines that the violation of the Standards or rules is technical or minor in nature, that the complaining party was not significantly harmed and that the Commission, courts or programs were not discredited, the Committee may elect to caution the affected person or applicant rather than imposing sanctions. The Committee's findings, conclusions, and proposed sanctions or any letter of caution shall be in writing and forwarded to the affected person or applicant by U.S. mail, return receipt requested.

c. If sanctions are proposed, the affected person or applicant may appeal the findings and/or proposed sanctions to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings and its proposed sanctions. Notification of appeal must be in writing. If no appeal is filed within thirty (30) days, the affected person or applicant shall be deemed to have accepted the Committee's findings and proposed sanctions and said sanctions shall commence.

5. *Disputes between mediators and complainants.* Commission staff may attempt to resolve any disputes between a complaining party and an affected person in which the conduct of the affected person does not constitute a violation of the grounds set out in Section A.3.d. above.

B. *Appeal to the Commission.*

1. *The commission shall meet to consider appeals.* An appeal of the Committee's determination pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. *Conduct of the hearing.*

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission pursuant to this rule shall be a *de novo* review of the Committee's decision.

c. Complainants, applicants, and affected persons may appear at the hearing with or without counsel.

d. All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or affected person.

e. In the event that the complainant, affected person, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission shall be conducted informally but with decorum.

g. The Commission, through its counsel, and the applicant or affected person may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

h. The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

3. *Date of Hearing.* An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is imposed.

4. *Notice of Hearing.* The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal Communications regarding scheduling matters shall be directed to Commission staff.

6. *Attendance.* All parties, including complaining parties, applicants and parties against whom sanctions are proposed, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. *Witnesses.* The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witnesses who will be called to testify.

8. *Transcript.* The Commission shall retain a court reporter to keep a record of the proceeding. Any Party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. *Commission Decision.* After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. *Sanctions.* The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

a. Private, written admonishment;
b. Public, written admonishment;
c. Completion of additional training;
d. Restriction on types of cases to be mediated in the future;
e. Reimbursement of fees paid to the mediator or training program;
f. Suspension for a specified term;
g. Probation for a specified term;
h. Certification or renewal of certification upon conditions;
i. Denial of certification or certification renewal;
j. Decertification; and/or
k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time.

11. *Publication of Committee / Commission Decisions.*

a. Names of mediators who are reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter and on its web site.

b. Names of mediators who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.

12. *Appeal.* The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

13. *Reinstatement.* A mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g, below. Except as otherwise provided by the Standing Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

i) the name and address of the petitioner;

ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and

iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

c. The petition for reinstatement may also contain a request for a hearing on the matter to consider an additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filling of the petition. The Commission shall conduct the hearing, consistent with Section B above. At the hearing, the petitioner may:

i) appear personally and be heard;

ii) be represented by counsel;

iii) call and examine witnesses;

iv) offer exhibits; and

v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification, or prohibition from serving as a trainer or manager; and

ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference and/or Family Financial Settlement Programs, the Commission, the courts, or the public interest; and

iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

i. The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

Rule IX. Investigation and review of applications for certification denied or revoked for reasons other than those pertaining to ethics and conduct.

A. *Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.*

1. *Establishment of Committee.* The Chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. *Matters to Be Considered by Committee.* The Committee shall review and consider the following matters:

a. Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule 8.

b. Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule 8.

3. *The Investigation of Qualifications.*

a. *Information obtained during the process of certification or renewal.* Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in the MSC Rules 8 and 9 and FFS Rules 8 and 9 and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

b. *Complaints about mediator or mediator training program qualifications filed with the Commission.* The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affiliated with such program (affected person/program that do not pertain to ethics or conduct filed by any member of the general public, the Commission, or its staff to the Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit the Executive Director shall refer the matter to the Committee's chair rather than to the Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal chair's determination to the full Committee on Certification of Mediators and Mediator Training Programs. The appeal shall be in writing and directed to the Commission's office.

c. *Investigation by the Standing Committee.* The Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b. The Chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. The Chair or designee may contact the following persons and entities for information concerning such application or complaint:

i) all references, employers, colleges, and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject.

ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program.

iii) all parties bringing complaints about a mediator or a mediator training program's qualifications for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

d. *Probable Cause Determination.* The Committee on Certification of Mediators and Mediator Training Programs shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

i) does not meet the qualifications for mediator certification set out in MSC Rule 8 and/or FFS Rule 8 or guidelines and other policies adopted by the Commission that amplify those rules; or

ii) does not meet the qualifications for mediator training program certification as set out in MSC rule 9 and/or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found that the application for certification or recertification should be denied or the affected person/program's certification should be revoked.

4. *Authority of Committee to Deny Certification or Certification Renewal or to Revoke Certification.*

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3,d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Committee shall dismiss the complaint and notify the complaining party and the affected person/program or applicant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall deny certification or recertification or revoke certification. The Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by U.S. mail, return receipt requested.

c. If the Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings, conclusions, and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty (30) days, the affected person/program or applicant shall be deemed to have accepted the committee's findings and denial or revocation.

B. *Appeal of the denial to the Commission.*

1. *The Commission Shall Meet.* An appeal of a denial or revocation by the Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. *Conduct of the Hearing.*

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties: special counsel to the Commission, if appointed: and members of e Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews an or character recommendations.

b. Hearings conducted by the Commission will be a *de novo* review of the Committee's decision.

c. The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Special counsel supplied either by the Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

e. The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

f. All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

g. In the event that the complainant, affected person/program, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

h. Proceedings before the Commission shall be conducted informally but with decorum.

3. *Date of Hearing.* An appeal of any denial by the Committee shall be heard by the Commission within ninety (90) days of the date of the letter transmitting the Committee's findings, conclusions, and denial or revocation.

4. *Notice of Hearing.* The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte Communications.* No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. *Attendance.* All parties including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. *Witnesses.* The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witness who will testify for them.

8. *Transcript.* The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. *Commission Decision.* After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions, and denial in writing and serve it on the parties within sixty (60) days of the date of the hearing.

10. *Publication of Committee / Commission Decisions.*

a. Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

b. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

11. *Appeals.* The General Court of Justice Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an application or revoking a certification. An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

12. *Reinstatement of Certification.* A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

i) the name and address of the petitioner;

ii) the qualification upon which the denial or revocation was based; and

iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

c. The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

i) appear personally and be heard;

ii) be represented by counsel;

iii) call and examine witnesses;

iv) offer exhibits; and

v) cross-examine witnesses.

f. At the hearing the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and

ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

i. If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

j. The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with the Superior Court in Wake County within thirty (30) days of the date of the Commission's decision.

Rule X. Internal operating procedures.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

Index to Rules for the Dispute Resolution Commission

A

APPEAL TO COMMISSION.
Denial or revocation of certification.
Other than reasons of ethics or conduct violations, DisputeResComm Rule IX.
Violations of standards of conduct, DisputeResComm Rule VIII.

B

BUDGET OF COMMISSION, DisputeResComm Rule V.

C

CHAIR.
Appointment, term, DisputeResComm Rule I.
COMMITTEES, DisputeResComm Rule I.
COMPENSATION AND EXPENSES FOR MEMBERS, DisputeResComm Rule III.
COMPLAINTS AGAINST MEDIATOR.
Investigation of violations of standards of conduct, DisputeResComm Rule VIII.
Notice to commission by mediator, DisputeResComm Rule VII.
CONFLICTS OF INTEREST, DisputeResComm Rule III.
CRIMINAL CONVICTION.
Mediators, notice to commission, DisputeResComm Rule VII.

D

DENIAL OF CERTIFICATION.
Investigation.
Reasons other than ethics or conduct violations, DisputeResComm Rule IX.
DISCIPLINARY ACTION AGAINST MEDIATOR, DisputeResComm Rules IX, VIII.
Investigation of violations of standards of conduct, DisputeResComm Rule VIII.
Notice to commission by mediator, DisputeResComm Rule VII.
DISQUALIFICATION OF COMMISSION MEMBER, DisputeResComm Rule III.
DUTIES OF COMMISSION, DisputeResComm Rule VI.

E

ETHICAL CONDUCT.
Investigation and review, DisputeResComm Rule VIII.

I

IMMEDIATE ACTION.
Matters requiring, DisputeResComm Rule IV.
INTERNAL OPERATING PROCEDURES, DisputeResComm Rule X.
INVESTIGATION.
Application for certification denied or revoked.
Reasons other than ethics or conduct violations, DisputeResComm Rule IX.
Violations of standards of conduct, DisputeResComm Rule VIII.

M

MATTERS REQUIRING IMMEDIATE ACTION, DisputeResComm Rule IV.
MEETINGS, DisputeResComm Rule IV.

O

OFFICE OF COMMISSION, DisputeResComm Rule II.
OFFICERS OF COMMISSION, DisputeResComm Rule I.

P

POWERS OF COMMISSION, DisputeResComm Rule VI.
PROFESSIONAL CONDUCT, STANDARDS FOR.
Mediators, trainers and managers of training programs, DisputeResComm Rule VII.
PUBLIC MEETINGS, DisputeResComm Rule IV.

Q

QUORUM, DisputeResComm Rule IV.

R

RECUSAL.
Conflict of interest, DisputeResComm Rule III.
REVOCATION OF CERTIFICATION.
Investigation.
Reasons other than ethics or conduct violations, DisputeResComm Rule IX.

S

SECRETARY/TREASURER.
Election by commission, term, DisputeResComm Rule I.

STAFF, DisputeResComm Rule II.

STANDARDS OF PROFESSIONAL CONDUCT.

Investigation of violations, DisputeResComm Rule VIII.

Mediators, trainers and managers of training programs, DisputeResComm Rule VII.

STANDING COMMITTEE ON CERTIFICATION OF MEDIATORS AND MEDIATOR TRAINING PROGRAMS, DisputeResComm Rule IX.

STANDING COMMITTEE ON STANDARDS, DISCIPLINE AND ADVISORY OPINIONS, DisputeResComm Rule VIII.

V

VACANCIES ON COMMISSION, DisputeResComm Rule III.

VICE-CHAIR.

Election by commission, term, DisputeResComm Rule I.

LOCAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Revised effective October, 1992,
with amendments through August 11, 2008.

Organization of the Court.

Rule
3(a). Filing and docket fees.
3(b). Docketing statement.
5. Interlocutory orders.
5.1. Appeals by permission (Deleted December 1, 1998).
8. Stay or injunction pending appeal.
9(a). Release prior to judgment of conviction.
9(b). Release after conviction and notice of appeal.
9(c). Recalcitrant witnesses.
10(a). Retention of the record on appeal in the district court.
10(b). Records on appeal.
10(c). Transcripts.
10(d). Renumbered.
10(e). Supplemental records, modification or correction.
11(a). Transcript acknowledgements.
11(b). Time limits for filing transcripts.
11(c). Exhibits.
11(d). Access of counsel to original record.
12(a). Appeals by aggrieved non-parties in the lower court.
12(b). Joint appeals/cross-appeals and consolidations.
12(c). Expedition of appeals.
12(d). Abeyance.
12(e). Intervention.
15(a). Docketing fee.
15(b). Petitions for Review.
18. Procedures.
21(a). Case captions for extraordinary writs.
21(b). Petitions for mandamus or prohibition.
21(c). Fees and Costs for Prisoner Petitions for Mandamus, Prohibition, or other Extraordinary Relief.
21(d). Petitions for Writ of Mandamus Pursuant to 18 U.S.C. § 3771, Crime Victims' Rights.
22(a). Certificates of appealability.
22(b). Death penalty cases and motions for stay of execution.
22(c). Petitions for rehearing in death penalty cases.
22(d). Motions for authorization.
24. Prisoner appeals.
25(a). Electronic Case Filing System.
25(b). Filing documents, use of facsimile equipment, service, certificate of service.
25(c). Confidential and Sealed Materials.
26. State holidays and inclement weather.
26.1. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.
27(a). Content of motions, notification and consent.
27(b). Procedural orders acted on by clerk; reconsideration thereof.

Rule
27(c). Form of Motions.
27(d). Responses; replies.
27(e). Panel assignments and emergency motions.
27(f). Motions for summary disposition.
28(a). Consolidated cases and briefs.
28(b). Addenda and attachments to briefs.
28(c). Responsibilities of counsel listed on a brief.
28(d). Joint appeals and consolidations.
28(e). Citation of additional authorities.
28(f). Statement of facts.
29. Motion for leave to file brief as amicus curiae (Deleted December 1, 1998).
30(a). Attorney sanctions for unnecessary appendix designations.
30(b). Appendix contents; Number of copies.
30(c). Responsibility of parties.
30(d). Dispensing with appendix.
31(a). Shortened time for service and filing of briefs in criminal cases.
31(b). Briefing orders.
31(c). Filing and service.
31(d). Number of copies.
32(a). Reproduction of briefs and appendices.
32(b). Length of briefs.
32(c). Correction of briefs and appendices.
32.1. Citation of unpublished dispositions.
33. Circuit mediation conferences.
34(a). Oral argument; Pre-argument review and summary disposition of appeals; Statement regarding the need for oral argument.
34(b). Informal briefs.
34(c). Court sessions and notification to counsel.
34(d). Argument time.
34(e). Motion to submit on briefs.
35. En banc proceedings.
36(a). Publication of decisions.
36(b). Unpublished dispositions; Distribution of Opinions.
36(c). Renumbered.
39(a). Printing costs.
39(b). Bill of costs.
39(c). Recovery of costs in the district court.
40(a). Filing of petition.
40(b). Statement of purpose.
40(c). Time limits for filing petitions.
40(d). Papers filed after denial of a petition for rehearing.
41. Motion for stay of the mandate.
42. Voluntary dismissals.
45. Dismissals for failure to prosecute.
46(a). Legal assistance to indigents by law students.
46(b). Admission to practice.
46(c). Appearance of counsel; withdrawal; substitutions.
46(d). Appointment of counsel.

Rule
46(e). Attorney's fees and expenses.
46(f). Proceeding pro se.
46(g). Rules of disciplinary enforcement.
47(a). Procedures for adoption of local rules and internal operating procedures.
47(b). Advisory committee on rules and procedures.

Appendix of Forms

Form
1. Notice of appeal to a court of appeals from a judgment or order of a district court.
2. Notice of appeal to a court of appeals from a decision of the tax court.
3. Petition for review of order of an agency, board, commission or officer.
4. Motion and affidavit for permission to appeal in forma pauperis.
5. Notice of appeal to a court of appeals from a judgment or order of a district court or a bankruptcy appellate panel.
6. Certificate of compliance with Rule 32(a).

Fourth Circuit Forms

Rule
A. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.
B. Appearance of counsel.
C. Certificate of death penalty case — Fourth Circuit Local Rule 22(b).
D. Application for admission to the bar.
E. Docketing Statement — Tax Court.
F. Docketing Statement — Agency.
G. Docketing Statement — Civil and Criminal Court.

Index follows Rules.

Editor's note. — Each local rule has been given the same number as the rule in the Federal Rules of Appellate Procedure to which it pertains, and the court has attempted not to repeat any information that can be found in the body of any rule. Whenever possible, information concerning practices and procedures of this court is set forth in the published internal operating procedures of the court rather than in the local rules. The court has adopted a local rule only in those circumstances where the rule establishes specific affirmative obligations on the parties proceeding before the court, delegates additional authority to the clerk or creates certain options which the Federal Rules of Appellate Procedure indicate can only be exercised by creation of a local rule.

For website, see **www.ca4.uscourts.gov/.**

ORGANIZATION OF THE COURT

A. *Judges of the United States Court of Appeals for the Fourth Circuit*

Chief Judge:

KAREN J. WILLIAMS

Circuit Judges:

J. HARVIE WILKINSON III
PAUL V. NIEMEYER
M. BLANE MICHAEL
DIANA GRIBBON MOTZ
WILLIAM B. TRAXLER, JR.
ROBERT B. KING
ROBERT L. GREGORY
DENNIS W. SHEDD
ALLYSON K. DUNCAN
G. STEVEN AGEE

Senior Circuit Judges:

J. DICKSON PHILLIPS, JR.
ROBERT F. CHAPMAN
CLYDE H. HAMILTON

B. *Office of the Circuit Executive*

Circuit Executive: Samuel W. Phillips
(804) 916-2184

C. *Office of the Clerk of Court*

Clerk: Patricia S. Connor
Office: (804) 916-2700

D. *Office of Staff Counsel*

Senior Staff Counsel:	Robert W. Jaspen (804) 916-2900

E. *Library*

Librarian:	Alyene McClure (804) 916-2319

F. *Office of the Circuit Mediator*

Chief Circuit Mediator:	William T. Howell (843) 521-4022

G. *Fourth Circuit Advisory Committee on Rules and Procedure*

Norman B. Smith, Esquire, Chairman
Carrie Goodwin Fenwick, Esquire
Russell V. Palmore, Jr., Esquire
Ralph C. McCulloch, II, Esquire
Albert D. Brault, Esquire

Rule 3(a). Filing and docket fees.

Upon filing a notice of appeal, appellant shall pay the clerk of the district court a fee of $455, which includes a $5 filing fee for the notice of appeal and a $450 fee for docketing the appeal in this Court. (Amended effective December 1, 1995; amended effective November 1, 2003; amended effective April 27, 2006.)

Rule 3(b). Docketing statement.

To assist counsel in giving prompt attention to the substance of an appeal, to help reduce the ordering of unnecessary transcripts, to provide the Clerk of the Court of Appeals at the commencement of an appeal with the information needed for effective case management, and to provide necessary information for any mediation conference conducted under Local Rule 33, counsel filing a notice of appeal for any direct or cross-appeal must complete and file a docketing statement, using the form provided by the clerk of the district court. The Clerk of the Court of Appeals will provide a similar form for petitions for review, applications for enforcement, and Tax Court appeals.

The original docketing statement and any attachments must be received and filed in the Court of Appeals within 14 days of filing the notice of appeal, with a copy served on the opposing party or parties. Docketing statements for petitions for review, applications for enforcement, and Tax Court appeals must be received and filed with the Clerk of the Court of Appeals within 14 days of docketing of the petition, application, or tax appeal. A copy of the docketing statement must be served on the opposing party or parties.

The docketing statement shall have attached to it any transcript order.

Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. Failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissing a case under Local Rule 45.

If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, the Clerk's Office should be informed in writing of any errors and any proposed additions or corrections within 7 days of service of the docketing statement, with copies to all other parties. (Amended effective June 8, 1994; amended effective September 28, 1994; amended effective December 1, 1995; amended effective March 4, 1998; amended effective April 1, 2008.)

Rule 5. Interlocutory orders.

The Court of Appeals will initially enter a petition for permission to appeal upon the miscellaneous docket; a docket fee shall not be required unless the petition is granted.

A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must be filed with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A. Upon granting the petition, the Court of Appeals will notify the district court by copy of the order and transfer the case to the regular docket. (Amended effective December 1, 1995.)

Rule 5.1. Appeals by permission (Deleted December 1, 1998).

Rule 8. Stay or injunction pending appeal.

Filing a notice of appeal does not automatically stay the operation of the judgment, order or decision for which review is sought. If an application to the district court for temporary relief pending appeal is not practicable, counsel must make a specific showing of the reasons the application was not made to the district court in the first instance. Any motion to the Court of Appeals should include copies of all previous applications for relief and their outcome. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion and any response unless the parties have previously filed disclosure statements with the Court in the case. See FRAP 26.1, Local Rule 26.1, and Form A. If any party deems that parts of the record or other materials are essential to a fair presentation of the issues regarding a motion, copies of these papers must be attached to each copy of the motion. Filing and assignment of emergency motions for stay or injunction pending appeal are governed by Local Rule 27(e). An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court and may be conditioned upon the filing of a supersedeas bond in the district court. (Amended effective December 1, 1995; amended effective February 1, 2001.)

Rule 9(a). Release prior to judgment of conviction.

A criminal defendant may be released in accordance with the conditions set by the district court prior to judgment of conviction. If the district court refuses to release the prisoner, or sets conditions for release that cannot be met, the order is appealable as a matter of right and will be given prompt consideration by the Court of Appeals. Counsel should submit memoranda in support of their position on appeal and, in cases involving corporate defendants, Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements required by FRAP 26.1, Local Rule 26.1 and Form A. The appeal is usually decided without oral argument upon the materials presented by the parties. A motion for release pending determination of the appeal may be filed and will be assigned as provided in Local Rule 27(e). (Amended effective December 1, 1995; amended effective February 1, 2001.)

Rule 9(b). Release after conviction and notice of appeal.

After the district court has ruled on a motion for bail or reduction of bail pending appeal, the appellant may renew the motion for release, or for a modification of the conditions of release, before the Court of Appeals without noting an additional appeal. A copy of the district court statement of reasons should accompany the motion. The motion will be submitted to a three-judge panel for decision. (Amended effective December 1, 1995.)

Rule 9(c). Recalcitrant witnesses.

When an appeal arises from the incarceration of a witness who refuses to testify or produce evidence in any court or grand jury proceeding, the Court of Appeals is required by statute, 28 U.S.C. § 1826, to decide the appeal within 30 days of the filing of the notice of appeal. Therefore, counsel should immediately contact the Clerk's office regarding all such witness contempt matters so that the appeal may be expedited for resolution within the statutory guidelines. (Amended effective December 1, 1995.)

Rule 10(a). Retention of the record on appeal in the district court.

In cases in which all parties are represented by counsel on appeal, the district court clerk will transmit with the notice of appeal sent to the Court of Appeals a certificate that the record of docket entries is available upon request. The district court clerk will notify the Court of Appeals of the subsequent filing of any transcript in the case. The district court will then retain the record on appeal until and unless a judge of this Court asks the Clerk of this Court to obtain it. Upon receipt of a request from the Clerk of the Court of Appeals, the clerk of the district court will assemble and transmit the record on appeal within 48 hours. (Amended effective December 1, 1995; amended effective April 1, 2008.)

Rule 10(b). Records on appeal.

The preparation and transmittal of the record on appeal is the obligation of the clerk of the lower court, board or agency, and any questions concerning form or content should be addressed to the trial forum in the first instance. A record on appeal consists of a specific number of volumes of pleadings, transcripts, and exhibits. Parties should check with the clerk of the lower court, board or agency to determine whether everything relevant to the issues on appeal will be included initially in the record on appeal in order to obviate motions to supplement the record. The record is transmitted to the appellate court as soon as it is complete, except as provided in Local Rule 10(a). Local Rule 10(a) does not apply to records in cases in which one or more parties are proceeding without counsel on appeal. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 10(c). Transcripts.

(1) *Responsibilities and designation.* The appellant has the duty of ordering transcript of all parts of the proceedings material to the issues to be raised on appeal whether favorable or unfavorable to appellant's position. Transcript Order forms are provided to appellant by the clerk of the district court at the time the notice of appeal is filed. Appellant should complete the form and distribute the appropriate parts of the form to the clerk of the Court of Appeals, the court reporter, the clerk of the district court, and the appellee.

Before the transcript order is mailed, appellant must make appropriate financial arrangements with the court reporter for either immediate payment in full or in other form acceptable to the court reporter, payment pursuant to the Criminal Justice Act, or at government expense pursuant to 28 U.S.C. § 753(f).

In cross-appeals each party must order those parts of the transcript pertinent to the issues of such appeals. The parties are encouraged to agree upon those parts of the transcript jointly needed and to apportion the cost, with additional portions being ordered and paid for by the party considering them essential to that party's appeal.

If the entire transcript of proceedings is not to be prepared, the appellant's docketing statement filed pursuant to Local Rule 3(b) may constitute the statement of issues required by FRAP 10(b)(3)(A).

(2) *Monitoring and receipt by clerk.* Failure to order timely a transcript, failure to make satisfactory financial arrangements with the court reporter, or failure to specify in adequate detail those proceedings to be transcribed will subject the appeal to dismissal by the clerk for want of prosecution pursuant to Local Rule 45. The Clerk's Office is charged with monitoring the status of transcripts pending with court reporters.

(3) *Statement in lieu of transcript.* The parties may prepare and sign a statement of the case in lieu of the transcript or the entire record on appeal. The use of a statement in lieu of a transcript of a hearing substantially accelerates the appellate process. The statement should contain a description of the essential facts averred and proved or sought to be proved and a summary of pertinent testimony.

(4) *Guidelines for preparation of appellate transcripts in the fourth circuit.* An appendix to these rules contains the guidelines adopted by the Fourth Circuit Judicial Council to define the obligations of appellants, appellees, clerks of the district court, court reporters and the Clerk of the Court of Appeals in the ordering, preparation, and filing of transcripts completed pursuant to these rules. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 10(d). Renumbered.

Local Rule 10(d) has been renumbered as Rule 25(c), effective April 16, 2007.

Rule 10(e). Supplemental records, modification or correction.

Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the Court of Appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the Court of Appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process. (Amended effective December 1, 1995.)

Rule 11(a). Transcript acknowledgements.

Upon receipt of an order for a transcript, the clerk of the Court of Appeals will prepare for the reporter a transcript order acknowledgement which will set forth the date the transcript order was received in the Clerk's Office and the transcript due date, computed from the order receipt date in accordance with the time limits set forth in the applicable district court reporter management plan. If the transcript order is correct in all respects, except for an order date error in the reporter's favor, no response will be required from the reporter. If the reporter believes that there is a problem with the transcript order, he or she must complete a copy of the acknowledgement form noting the problem and return it to the Court of Appeals within 7 days of receipt of the form by the reporter, or within such further time as the Court of Appeals allows. The time for completion of the transcript will automatically cease to run until the problem has been remedied. The clerk of the Court of Appeals will send a new transcript order acknowledgement setting forth new transcript order and filing dates taking into account the delay caused by resolving the problem with the original transcript order. (Amended effective December 1, 1995.)

Rule 11(b). Time limits for filing transcripts.

Although FRAP 11(b)(1)(B) requires that transcripts be completed within 30 days from the purchase order date, this court routinely uses instead the time limits set forth in the district court reporter management plans. All of the plans establish a 60-day period for preparation of transcripts, with the following exceptions:

(1) Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants.

(a) transcripts of 1000 pages or less shall be filed within 30 days of transcript order and completion of satisfactory financial arrangements.

(b) transcripts of more than 1000 pages shall be filed within the time ordered by the clerk of the court of appeals.

(2) Special circumstances, such as

(a) bail appeals,

(b) death penalty cases, or

(c) other expedited procedures in which the transcript shall be filed within the time ordered by the Clerk of the Court of Appeals. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 11(c). Exhibits.

Counsel should be aware that certain portions of the record will not be transmitted to the Court of Appeals as part of the record. If bulky documents and physical exhibits are required by a party for oral argument, the party must make advance arrangements with the clerks of both courts for their transportation and receipt. Such arrangements are best made after the completion of the briefing schedule on appeal and receipt of notice of oral argument. (Amended effective December 1, 1995.)

Rule 11(d). Access of counsel to original record.

Counsel desiring to use the record on appeal in preparing their case should make arrangements with the clerk of the district court for access to the record. Under Local Rule 10(a), records in cases in which all parties are represented by counsel are retained by the district court clerk during appeal unless a judge of the Court of Appeals requests that they be obtained. If the record is transmitted to the Court of Appeals, the record may be withdrawn upon proper application and returned to the trial court or the nearest district court clerk's office for counsel's review. Law professors representing indigents by Court appointment may request that the record be sent to the law school for their review. (Amended effective December 1, 1995.)

Rule 12(a). Appeals by aggrieved non-parties in the lower court.

If the appellant was not a party to the lower court proceeding, the appeal shall be styled "In re ____________, Appellant," and the title of the action in the district court shall also be given. (Amended effective December 1, 1995.)

Rule 12(b). Joint appeals/cross-appeals and consolidations.

For the purpose of identifying consolidated appeals and cross-appeals, the earliest docketed appeal will be designated the lead case and identified by an "L" following its docket number. The parties should designate lead counsel for each side and communicate lead counsel's identity in writing to the clerk within 10 days of the consolidation order. Although most consolidations will be on the Court's own motion, a party is not precluded from filing a request. (Amended effective December 1, 1995.)

Rule 12(c). Expedition of appeals.

The Court on its own motion or on motion of the parties may expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 12(d). Abeyance.

In the interest of docket control the Court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an appeal. During the period of time a case is held in abeyance the appeal remains on the docket but nothing is done to advance the case to maturity and resolution. If a case is held in abeyance for cases other than a Fourth Circuit case, the parties will be required to make periodic status reports. (Amended effective December 1, 1995.)

Rule 12(e). Intervention.

A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the Court of Appeals. Any notice of appearance or motion to intervene should indicate the side upon which the movant proposes to intervene. The provisions of FRAP 15(d) govern intervention in appeals from administrative agencies. Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the Court. (Amended effective December 1, 1995.)

Rule 15(a). Docketing fee.

Upon filing a petition for review of an agency order, petitioner shall pay the prescribed docketing fee of $450, payable to the Clerk, U.S. Court of Appeals, or submit a properly executed application for leave to proceed in forma pauperis. (Amended effective December 1, 1995; further amended December 4, 1996; amended effective November 1, 2003; amended effective April 27, 2006.)

Rule 15(b). Petitions for Review.

Whenever filing a petition for review or an application or cross-application for enforcement, the party shall attach to the petition, application or cross-application a copy of the agency order for which review or enforcement is sought. The petition, application or cross-application shall also be accompanied by a list of respondents specifically identifying the respondents' names and the addresses where respondents may be served with the copies of the petition, application or cross-application. (Added December 4, 1996.)

Rule 18. Procedures.

This Court's local rules accompanying FRAP 8 and 27 apply also to applications for stays under FRAP 18. (Added effective December 1, 1995.)

Rule 21(a). Case captions for extraordinary writs.

A petition for a writ of mandamus or writ of prohibition shall not bear the name of the district judge, but shall be entitled simply "In re ____________, Petitioner." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge. (Amended effective December 1, 1995.)

Rule 21(b). Petitions for mandamus or prohibition.

Strict compliance with the requirements of FRAP 21 is required of all petitioners, even pro se litigants. Petitioner must pay the prescribed docket fee of $450, payable to the Clerk, U.S. Court of Appeals; submit the forms required by Local Rule 21(c)(1) for cases subject to that Local Rule; or submit a properly executed application for leave to proceed in forma pauperis. The parties are required to submit Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A.

After docketing, the clerk shall submit the application to a three-judge panel. A motion for emergency relief pending determination of the petition may be filed and will be assigned in accordance with Local Rule 27(e).

If the Court believes the writ should not be granted, it will deny the petition without requesting an answer. Otherwise the Court will direct the clerk to obtain an answer. After an answer has been filed, the Court ordinarily will decide the merits of the petition on the materials submitted without oral argument. Occasionally, however, briefs may be requested and the matter set for oral argument. (Amended effective December 1, 1995; further amended September 25, 1996; amended February 1, 2001; amended effective November 1, 2003; amended effective April 27, 2006.)

Rule 21(c). Fees and Costs for Prisoner Petitions for Mandamus, Prohibition, or other Extraordinary Relief.

(1) *Proceedings arising out of civil matters.* A prisoner filing a petition for writ of mandamus, prohibition, or other extraordinary relief in a matter arising out of a civil case must pay the full $450 docket fee. A prisoner who is unable to prepay this fee may apply to pay the fee in installments by filing with the Court of Appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement for the six-month period immediately preceding the filing of the notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined; and (3) a form consenting to the collection of fees from the prisoner's trust account.

The Court of Appeals will assess an initial partial filing fee of 20% of the greater of:

(a) the average monthly deposits to the prisoner's account for the six-month period immediately preceding the filing of the petition; or

(b) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the petition.

The Court will direct the agency having custody of the prisoner to collect this initial partial fee from the prisoner's trust account, and to collect the remainder of the $450 fee, as well as any other fees, costs, or sanctions imposed by the Court, in monthly installments of 20% of the preceding month's deposits credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the Clerk, U.S. Court of Appeals, each time the amount in the account exceeds $10 until all fees, costs, and sanctions are paid for the petition.

If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45.

(2) *Effect of prior actions and appeals on proceedings arising out of civil matters.* A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted, may not proceed in a matter arising out of a civil case without prepayment of fees unless the prisoner is under imminent danger of serious physical injury.

(3) *Proceedings arising out of criminal matters.* A prisoner who is unable to prepay the full $450 docket fee for a petition for writ of mandamus, prohibition, or other extraordinary relief arising out of a criminal case may apply to proceed without the prepayment of fees by filing an application for leave to proceed in forma pauperis. (Added effective September 25, 1996; amended effective November 1, 2003; amended effective April 27, 2006.)

Rule 21(d). Petitions for Writ of Mandamus Pursuant to 18 U.S.C. § 3771, Crime Victims' Rights.

A petition for writ of mandamus asserting the rights of a crime victim pursuant to 18 U.S.C. § 3771(d)(3) shall bear the caption "PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771, CRIME VICTIMS' RIGHTS." Before filing such a petition, the petitioner must notify the Court of Appeals that such a petition will be filed and must arrange for immediate service of the petition on the relevant parties. Such notification must be by telephone call to the Office of the Clerk during normal office hours (804-916-2700).

A failure to comply with these requirements will adversely affect the Court's ability to decide the petition within 72 hours as required by 18 U.S.C. § 3771(d)(3). (Added effective August 1, 2006.)

Rule 22(a). Certificates of appealability.

(1) The following procedures apply in cases in which the district court has not granted a certificate of appealability ("certificate"):

(A) The appellant may submit a request for a certificate with the Court of Appeals specifying the issues on which the appellant seeks authorization to appeal and giving a statement of the reasons why a certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27 for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a briefing order specifying the issues the Court will review.

NOTE: Subsection (1)(A) allows an appellant to request a certificate before a briefing order is entered. With respect to the form of the request, the Rule largely tracks former Fourth Circuit Rule 22(a).

Because briefing orders are entered promptly after the appeal is docketed, this subsection is likely to affect relatively few appellants. However, when an appellant does file a request before a briefing order is entered, the most efficient course for the Court is to consider that request without waiting for a brief.

(B) If no express request for a certificate has been filed pursuant to Subsection (1)(A) of this Rule, the notice of appeal will be treated as a request for a certificate. *See* Fed. R. App. P. 22(b)(2). To assist the Court in resolving this request, the clerk shall enter a Preliminary Briefing Order directing the appellant to file a brief on the merits and, if required by applicable rules, an appendix. The Preliminary Briefing Order shall neither require nor authorize a brief from the appellee, nor shall it make any statement regarding a reply brief by the appellant, but in all other respects it shall be substantially identical to a standard briefing order entered pursuant to Local Rule 31(b) or Local Rule 34(b), as appropriate. The clerk shall refer the appellant's brief and other relevant materials to a three-judge panel for a determination of whether the appellant has made a substantial showing of the denial of a constitutional right as to any claim presented in the brief. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a Final Briefing Order stating that a certificate has been granted and directing the appellee to file a brief addressing the issue or issues that the Court has accepted for review, and providing for the filing of a reply brief by the appellant.

NOTE: Subsection (1)(B) sets forth the procedures that are likely to be followed in most cases. Under these procedures, the Court, having not received any request for a certificate, will direct the appellant to file a brief on the merits. Although not expressly stated in the Rule, the appellant may also file a separate request for a certificate along with his brief; this ensures that the appellant will not be prevented from making arguments relating to the certificate that are separate from the arguments on the merits. Regardless of whether a separate request is filed, the Court will look at the brief but will not use it to make a final decision; instead, as stated in this section, the Court will only determine whether the appellant has made the showing required by 28 U.S.C. § 2253(c)(2). If a certificate is granted, the Court will enter an order directing the appellee to file a brief addressing the issues the Court has accepted for review.

(2) The following procedures apply in cases in which the district court has granted a certificate of appealability as to at least one issue:

(A) The appellant may submit a request for a certificate as to additional issues, along with a statement of the reasons why the expanded certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27 for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. After the panel has granted or denied such a request, the clerk shall enter a briefing order directing the parties to file briefs addressing the issues the Court will review.

NOTE: Section (2) of this Rule parallels Section (1). Just as Section (1) prescribes separate procedures depending on whether the appellant files a request for a certificate before a briefing order is entered, Section (2) makes different provisions depending on whether a request to expand the certificate is filed before a briefing order is entered.

Subsection (2)(A) addresses the situation in which the request is filed, and provides that the request will be considered before the Court enters its briefing order. In both language and effect, this section is substantially identical to Subsection (1)(A) of the Rule.

(B) If no express request to expand the certificate has been filed pursuant to Subsection (2)(A) of this Rule, the clerk shall enter a briefing order directing the parties to file briefs addressing the issues certified for review by the district court. If the appellant's brief on the merits addresses issues beyond the scope of the certificate granted by the district court, this Court will not review those additional issues unless the appellant files, simultaneously with the brief on the merits, a statement containing the names of the parties, the case number, and a list of the issues that the appellant wishes to add to the certificate. Such statement may also, but need not, present reasons why the certificate should be expanded. Upon receipt of the statement, the clerk shall suspend briefing and refer the brief, the statement, and other relevant materials to a three-judge panel. Once the panel has determined whether to expand the certificate, the clerk shall enter a Final Briefing Order specifying the issue or issues the Court will review.

NOTE: Subsection (2)(A) governs the situation in which the district court grants a certificate as to some issues and the appellant wishes to raise additional issues but does not request expansion of the certificate before a briefing order is entered. Under this subsection, the appellant must brief all the issues he wishes to raise and then file a separate statement identifying the issues he has addressed that were not certified by the district court. If the appellant does not file an appropriate statement, the Court will not review any issues beyond the scope of the certificate granted by the district court. *Cf. Valerio v. Crawford*, 306 F.3d 742, 764-65 (9th Cir. 2002) (en banc) (discussing circuit rule barring expansion of certificate absent express request). When, however, the appellant files a proper statement, the Court will suspend briefing and decide whether to expand the certificate before requiring the appellee to file its brief; this process parallels the process for granting a certificate *ab initio*, as described in Subsection (1)(B).

The purpose of the statement described in Subsection (2)(A) is to trigger the pause in the briefing process during which the Court will consider whether to expand the certificate. This pause will assist the Court in complying with *Miller-El v. Cockrell* , 123 S. Ct. 1029 (2003), by ensuring a separation between the certification inquiry and the final inquiry into the merits.

The statement required by this subsection need not be long or detailed in order to serve its underlying purpose. On the contrary, the Court will accept a simple list of issues addressed in the brief but not certified for review by the district court, although the appellant is also permitted to present a more extended discussion. The clerk may provide appellants with an explanation of the statement requirement along with a warning that failure to file an appropriate statement will result in forfeiture of all issues beyond the scope of the certificate granted by the district court.

(3) A request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection

(2)(B), shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue.

NOTE: Section (3) retains our current practice of referring requests for certification to three-judge panels. While Fed. R. App. P. 22(a) may afford the Court some flexibility in this matter, the use of three-judge panels is consistent with Fed. R. App. 27(c), which provides that a single judge "may not dismiss or otherwise determine an appeal or other proceeding."

The authority for a single judge to issue a certificate derives from § 2253. See 28 U.S.C. § 2253(c)(1) (providing that certain appeals may not proceed "[u]nless a circuit justice or judge issues a certificate of appealability").

(4) In considering a request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), the panel or any judge of the panel may request additional submissions from either party.

NOTE: This section allows the panel to either rule on a certificate based on the materials already received or seek additional information from the parties. Although the Rule does not limit panel discretion, it is likely that panels will seek additional submissions in relatively few cases and will instead issue (or expand) a certificate if the appellant has made a sufficient showing to justify further inquiry.

(5) Notwithstanding any other statement within this Rule, whenever the Court appoints counsel for a pro se appellant, counsel shall have an opportunity to file a brief on the merits addressing all issues as to which the district court or this Court has granted a certificate, unless the Court directs otherwise.

NOTE: This section reflects our current practice of ordering a second round of briefing whenever the Court appoints counsel in a pro se case. This section will prevent any inference that the new Rule has either altered that practice or reduced the discretion of the Court to follow a different procedure in a particular case.

(Amended effective December 1, 1995; further amended effective June 5, 1996; amended effective December 1, 1998; amended effective July 8, 2003.)

Rule 22(b). Death penalty cases and motions for stay of execution.

(1) *Statement certifying existence of sentence of death.* Whenever a petition for writ of habeas corpus or motion to vacate a federal sentence in which a sentence of death is involved is filed in the district court or the Court of Appeals, the petitioner shall file with the petition a statement certifying the existence of a sentence of death and the emergency nature of the proceedings and listing any proposed date of execution, any previous cases filed by petitioner in federal court and any cases filed by petitioner pending in any other court. The clerk of the district court shall immediately forward to the Court of Appeals a copy of any such statement filed, and shall immediately notify by telephone the Court of Appeals upon issuance of a final order in that case. If a notice of appeal is filed, the clerk of the district court shall transmit the available record forthwith. The clerk of the Court of Appeals will maintain a special docket for such cases and these cases shall be presented to the Court of Appeals on an expedited basis.

(2) *Lodging of documents.* In cases in which an execution date has been set, counsel shall lodge with the clerk of the Court of Appeals all district court documents as they are filed and any pertinent state court materials. If an execution date is imminent, counsel may also lodge proposed appellate papers in anticipation of having to seek emergency appellate relief.

(3) *Motion for stay of execution.* Any motion for stay of execution shall be considered initially in conjunction with any pending application for a certificate of appealability. Should a party file a motion to stay execution or a motion to vacate an order granting a stay of execution, the following documents shall accompany such motion:

(a) The habeas petition or motion to vacate filed in the district court;

(b) Each brief or memorandum of authorities filed by either party in the district court;

(c) Any available transcript of proceedings before the district court;

(d) The memorandum opinion giving the reasons advanced by the district court for denying relief;

(e) The district court judgment denying relief;

(f) The application to the district court for stay;

(g) Any certificate of appealability or order denying a certificate of appealability;

(h) The district court order granting or denying a stay and a statement of reasons for its action; and

(i) A copy of the docket entries of the district court. (Amended effective December 1, 1995; further amended June 5, 1996; amended effective July 8, 2003.)

Rule 22(c). Petitions for rehearing in death penalty cases.

Once the Court's mandate has issued in a death penalty case, any petition for panel or en banc rehearing should be accompanied by a motion to recall the mandate and motion to stay the execution.

Generally, the Court will not enter a stay of execution solely to allow for additional time for counsel to prepare, or for the Court to consider, a petition for rehearing. Consequently, counsel should take all possible steps to assure that any such petition is filed sufficiently in advance of the scheduled execution date to allow it to be considered by the Court. Counsel should notify the Clerk's Office promptly of their intention to file a petition for rehearing so that arrangements can be made in advance for the most expeditious consideration of the matter by the Court. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective December 1, 2002; amended effective July 8, 2003.)

Rule 22(d). Motions for authorization.

Any individual seeking to file in the district court a second or successive application for relief pursuant to 28 U.S.C. § 2254 or § 2255 shall first file a motion with the Court of Appeals for authorization as required by 28 U.S.C. § 2244, on the form provided by the clerk for such motions. The motion shall be entitled "In re ____________, Movant." The motion must be accompanied by copies of the § 2254 or § 2255 application which movant seeks authorization to file in the district court, as well as all prior § 2254 or § 2255 applications challenging the same conviction and sentence, all court opinions and orders disposing of those applications, and all magistrate judge's reports and recommendations issued on those applications. The movant shall serve a copy of the motion with attachments on the respondent named in the proposed application and shall file an original and three copies of the motion with attachments in the Court of Appeals. Failure to provide the requisite information and attachments may result in denial of the motion for authorization.

If the Court requires a response to the motion, it will direct that the response be received by the clerk for filing within no more than seven calendar days. The Court will enter an order granting or denying authorization within 30 days of receipt of the motion by the clerk for filing, and the clerk will certify a copy of the order to the district court. If authorization is granted, a copy of the application will be attached to the certified order for filing in the district court. No motion or request for reconsideration, petition for rehearing, or any other paper seeking review of the granting or denial of authorization will be allowed. (Added effective June 5, 1996; amended effective December 1, 2002; amended effective July 8, 2003.)

Rule 24. Prisoner appeals.

(a) *Payment of Fees and Costs Required.* A prisoner appealing a judgment in a civil action must pay in full the $455 fee required for commencement of the appeal. A prisoner who is unable to prepay this fee may apply to pay the fee in installments by filing with the Court of Appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement or institutional equivalent for the six-month period immediately preceding the filing of the notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined; and (3) a form consenting to the collection of fees from the prisoner's trust account.

The Court of Appeals will assess an initial partial filing fee of 20% of the greater of:

(1) the average monthly deposits to the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal; or

(2) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal.

Based upon the prisoner's consent, the Court will direct the agency having custody of the prisoner to collect this initial partial fee from the prisoner's trust account, and to collect the remainder of the $455 filing fee, as well as any other fees costs, or sanctions imposed by the Court of Appeals, in monthly installments of 20% of the preceding month's deposits credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the district court each time the amount in the account exceeds $10 until all fees, costs, and sanctions are paid for the appeal.

If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45.

(b) *Effect of Prior Actions and Appeals.* A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted, may not proceed on appeal without prepayment of fees unless the prisoner is under imminent danger of serious physical injury. (Added effective September 25, 1996; amended effective November 1, 2003; amended effective April 27, 2006.)

Rule 25(a). Electronic Case Filing System.

As authorized by FRAP 25(a)(2)(D) & (c)(2), the Court has established procedures requiring electronic filing of documents, with certain exceptions, and authorizing electronic service of documents using the Court's transmission equipment, as set forth in Administrative Order 08-01. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective April 1, 2008.)

Rule 25(b). Filing documents, use of facsimile equipment, service, certificate of service.

(1) *Filing documents.* Documents except briefs, appendices, and inmate filings are not timely filed unless actually received by the Clerk's Office within the time fixed for filing. Documents are deemed filed upon receipt by the Clerk's Office.

(2) *Use of facsimile equipment,.* Documents may be transmitted for filing by use of facsimile transmission equipment only when an emergency situation exists and advance permission has been obtained to use the Clerk's Office facsimile equipment. Several printing services in Richmond will accept documents by facsimile for filing with the Court. Their telephone numbers may be obtained from the Clerk's Office. When a facsimile copy is filed, the original, signed documents need not be failed.

(3) *Service.* Service on a party represented by counsel must be on all counsel of record.

(4) *Certificate of service.* All documents must be accompanied by a valid certificate of service. The certificate of service of a brief should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual service. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective April 1, 2008.)

NOTE

Local Rule 25(a) has been amended to delete the reference to typeset briefs because FRAP 32(a) no longer provides for typeset briefs.

The first sentence of the last paragraph of Rule 25(b)(1) has been moved to Local Rule 27(d) because it refers to the filing of responses to motions. The final sentence of Local Rule 25(b)(1) has been deleted because it duplicates the information in the first sentence of Local Rule 27(d)(1).

Rule 25(c). Confidential and Sealed Materials.

(1) *Certificates of Confidentiality.* At the time of filing any appendix, brief, motion, or other document containing or otherwise disclosing materials held under seal by another court or agency, counsel or a pro se party shall file a certificate of confidentiality.

(A) Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals.

(B) A certificate of confidentiality must accompany any filing which contains or would otherwise disclose sealed materials. The certificate of confidentiality shall:

(i) identify the sealed material;

(ii) list the dates of the orders sealing the material or, if there is no order, the lower court or agency's general authority to treat the material as sealed;
(iii) specify the terms of the protective order governing the information; and
(iv) identify the appellate document that contains the sealed information.

(2) *Motions to Seal.* Motions to seal all or any part of the record are presented to and resolved by the lower court or agency in accordance with applicable law during the course of trial, hearing, or other proceedings below.

(A) A motion to seal may be filed with the Court of Appeals when:
(i) a change in circumstances occurs during the pendency of an appeal that warrants reconsideration of a sealing issue decided below;
(ii) the need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal; or
(iii) additional material filed for the first time on appeal warrants sealing.

(B) Any motion to seal filed with the Court of Appeals shall:
(i) identify with specificity the documents or portions thereof for which sealing is requested;
(ii) state the reasons why sealing is necessary;
(iii) explain why a less drastic alternative to sealing will not afford adequate protection; and
(B)(iv) state the period of time the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.

(C) A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 calendar days before the Court rules on the motion, but the materials subject to a motion to seal will be held under seal pending the Court's disposition of the motion.

(3) *Filing of Confidential and Sealed Material.*

(A) Appendices: When sealed material is included in the appendix, it must be segregated from other portions of the appendix and filed in a separate, sealed volume of the appendix.

(B) Briefs, Motions, and Other Documents: When sealed material is included in a brief, motion,or any document other than an appendix, two versions of the document must be filed:
(i) a complete version under seal in which the sealed material has been distinctively marked and
(ii) a redacted version of the same document for the public file.

(C) Personal Data Identifying Information: Personal data identifying information, such as an individual's social security number, an individual's tax identification number, a minor's name, a person's birth date, a financial account number, and (in a criminal case) a person's home address, shall be filed in accordance with section 205(c)(3) of the E-Government Act of 2002 and FRAP 25(a)(5).

(D) Marking of Sealed and Ex Parte Material: The first page of any appendix, brief, motion, or other document tendered or filed under seal shall be conspicuously marked SEALED, and all copies shall be placed in an envelope marked SEALED. If filed ex parte, the first page and the envelope shall also be marked EX PARTE.

(E) Method of filing:
(i) *Appendices:* Appendices are filed in paper form only, with sealed material placed in a separate, sealed volume, accompanied by a certificate of confidentiality or motion to seal. A Notice of paper filing and either a certificate of confidentiality or a motion to seal are filed in electronic form.
(ii) *Formal Briefs:* The sealed and public versions of formal briefs are filed in both paper and electronic form. The sealed version is accompanied by a certificate of confidentiality or motion to seal, that is also filed in both paper and electronic form. The electronic sealed version of the brief is filed using the entry SEALED BRIEF FILED, which automatically restricts electronic access to the Court. The electronic public version of the brief is filed using the entry BRIEF FILED.
(iii) *Other Documents:* Any other sealed document is filed electronically using the entry SEALED DOCUMENT FILED, which automatically restricts electronic access to the Court. A certificate of confidentiality or motion to seal is also filed electronically. If filed electronically, paper copies of the sealed document are not required unless requested by the Court.

(F) *Number of Paper Copies Filed and Served:* Sealed documents must be served in paper form because electronic access to sealed documents is restricted to the Court.

(i) *Appendices: Sealed volumes* — File four and serve one on each party separately represented. *Unsealed volumes* — File six (five if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel) and serve one on each party separately represented.

(ii) *Formal Briefs: Sealed version* — File four and serve one on each party separately represented. *Public version* — File eight (six if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel).

(iii) *Other Documents: Sealed version* — File one (none if filed electronically) and serve one paper copy on each party separately represented. *Public version* — File one (none if filed electronically).

(G) Responsibility for Compliance: The responsibility for following the required procedures in filing confidential and sealed materials rests solely with counsel and the parties. The clerk will not review each filing for compliance with this rule.

(H) Public Access: Parties must remember that any personal information not otherwise protected by sealing or redaction may be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the Court. (Amended effective May 18, 2004; Renumbered from Rule 10(a) and Amended effective April 16, 2007; amended effective April 1, 2008.)

Rule 26. State holidays and inclement weather.

Whenever a party in computing a filing or service date relies upon an extension of time due to the inaccessibility of the Clerk's Office because of inclement weather or other conditions, or due to a state holiday, counsel must certify such reliance in the certificate of service or by separate written declaration. (Amended effective December 1, 1995.)

Rule 26.1. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.

(a) *Disclosure Requirements Applicable to Parties, including Intervenors.*

(1) *Who Must File.*

(a) *Civil, Agency, Bankruptcy, and Mandamus Cases.* A party in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel.

(B) *Criminal and Post-Conviction Cases.* A corporate party in a criminal or postconviction case must file a disclosure statement.

(2) *Information to Be Disclosed by Parties, Including Intervenors.*

(A) *Information Required by FRAP 26.1.* A party must identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation.

(B) *Information About Other Financial Interests.* A party must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation.

(C) *Information About Other Publicly Held Legal Entities.* Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded, or state that there are no such entities.

(D) *Information About Trade Association Members.* A party trade association must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

(b) *Disclosure Requirements Applicable to Corporate Amicus Curiae.*

(1) *Who Must File.* If an amicus curiae is a corporation, the amicus curiae brief must include a disclosure statement.

(2) *Information to Be Disclosed by Corporate Amicus Curiae.* A corporate amicus curiae must disclose the same information that sections (a)(2)(A), (B) & (C) require parties to disclose.

(c) *Form.* The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a filer has no disclosures to make.

(d) *Time of Filing.* A party's disclosure statement must be filed within 14 days of docketing of the appeal, unless earlier pleadings are submitted for the Court's consideration, in which case the disclosure statement shall be filed at that time.

(e) *Amendment.* Filers are required to amend their disclosure statements when necessary to maintain their current accuracy. (Amended effective December 1, 1998; amended effective August 11, 2008.)

NOTE

Local Rule 26.1(b)(1) has been changed to conform the disclosure requirements for trade associations to the general amendments in FRAP 26.1.

Rule 27(a). Content of motions, notification and consent.

In cases where all parties are represented by counsel, all motions shall contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion. The statement shall indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition. (Amended effective December 1, 1998.)

NOTE

Former Local Rule 27(a) has been deleted as unnecessary because the provision has been incorporated into FRAP 27(e).

Rule 27(b). Procedural orders acted on by clerk; reconsideration thereof.

Motions and applications for orders if consented to, or if unopposed after due notice to all interested parties has been given or waived, or if the orders sought are procedural or relate to the preparation or printing of the appendix and briefs on appeal, or are such as are ordinarily granted as of course and without notice or hearing, need not be submitted to the Court, or to a judge thereof. Such orders may be entered for the Court by the clerk, who shall forthwith send copies thereof to the parties.

Any party adversely affected by an order entered by the clerk pursuant to this rule shall be entitled to request reconsideration of the clerk's action by the Court, if within 14 days after entry of the order, such party shall file with the clerk and serve upon the parties to the proceedings a request, in writing, for reconsideration, vacation or modification of the order, stating the grounds for such request. The clerk shall thereupon submit to the Court the request for reconsideration, vacation or modification, the motion or application upon which the order was entered, and any responses by other parties which may have been filed in support or opposition to the request. The Court may thereafter take such action as may be proper. (Amended effective December 1, 1998.)

NOTE

Local Rule 27(c) has been redesignated 27(b), and the title has been changed from "Non-Controversial Orders Granted by the Clerk" to "Procedural Orders Acted on by the Clerk." The change better characterizes the clerk's delegation of authority.

Rule 27(c). Form of Motions.

All motions should be filed with the clerk and comply with FRAP 27(d). A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. Counsel should always review carefully the specific rule which authorizes relief to ascertain the requirements and any motion should contain or be accompanied by any supporting documents required by a specific rule. If a motion is supported by attachments, these materials should also be served and filed with the motion. The parties should not make requests for procedural and substantive relief in a single motion, but should make each request in a separate motion. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective April 1, 2008.)

Rule 27(d). Responses; replies.

(1) *Responses.* Although any party may file a response to a motion, a party need not respond to a motion until requested to do so by the Court. The three-day mailing period permitted by FRAP 26(c) does not apply to responses requested by the Court or clerk by letter wherein a response date is set forth in the request. A Disclosure of Corporate Affiliations and Other Financial Entities with a Direct Financial Interest in Litigation statement must accompany any response to a motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. If the Court acts upon a motion without a response, any party adversely affected by such action may by application to the Court request reconsideration, vacation or modification of the Court's action.

(2) *Replies.* The Court will not ordinarily await the filing of a reply before reviewing a motion and response. If movant intends to file a reply and does not want the Court to actively consider the motion and response until a reply is filed, movant shall notify the clerk in writing of the intended filing of the reply and request that this Court not act on the motion until the reply is received. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 27(e) has been redesignated Local Rule 27(d) and the seven-day period for filing a response has been deleted from the local rule because FRAP 27(a)(3)(A) now affords ten days for a response. Reference in the local rule to the absence of a standard time period for filing a reply is deleted because FRAP 27(a)(4) now provides a seven-day reply period. The local rule retains, however, the statement that the court will ordinarily not await the filing of a reply before reviewing the motion or response. Replies are not routinely filed and waiting an additional seven days before actively considering a matter simply delays the disposition of motions by the court. The local rule is amended to provide that when a movant intends to file a reply, the movant shall inform the clerk that a reply is forthcoming and specifically request that the motion not be considered until a reply is received. Subsection 3 of the local rule has been deleted because the statement is now contained in FRAP 27(a)(2)(C)(iii).

Rule 27(e). Panel assignments and emergency motions.

There is a strong presumption that the Court will act, in all but routine procedural matters, through panels or en banc, as prescribed by 28 U.S.C. § 46(c). Ordinarily, counsel shall present all motions to the clerk for presentation to the Court. Application to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time. In such exceptional circumstances, counsel shall attempt to notify the clerk's office that application is being made directly to a single judge, and copies of all papers presented to the judge shall be presented to the clerk as soon as practical for filing.

When a single judge determines to act, the matter will be referred to a panel as early in the process as is practical. As soon as a matter has been assigned to a panel, any action in the matter will be decided by the panel.

The selection of motion panels is similar to the process set forth in I.O.P. 34.1 for hearing panels. In a case where a request for single judge action is made to the clerk and action by a panel is not feasible, the clerk will assign the matter to a judge selected at random. In cases where a single judge, selected *at random*, has found it necessary to act, the clerk will fill out the panel with the at-random selection of two additional judges. In cases in which a single judge, selected *by counsel*, has found it necessary to act, the clerk will assign the matter to a three-judge panel selected at random, which may or may not include the single judge who acted in the case. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective February 1, 2001.)

Rule 27(f). Motions for summary disposition.

Motions for summary affirmance, reversal or dismissal are reserved for extraordinary cases only and should not be filed routinely. Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.

Motions for summary disposition should be made only after briefs are filed. If such motions are submitted before the completion of the briefing schedule, the Court will defer action on the motion until the case is mature for full consideration.

Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed at any time. The court may also sua sponte summarily dispose of any appeal at any time. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 28(a). Consolidated cases and briefs.

Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by Court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the clerk within 10 days of the date of the order of consolidation. In the absence of an agreement by counsel, the clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.

Rule 28(b). Addenda and attachments to briefs.

A party may comply with the requirements of FRAP 28(f) and FRAP 32.1(b) by including material or items designated therein in an addendum at the end of the brief or by supplying them to the Court under separate cover. Should a party wish to supplement the brief with matters other than those designated in FRAP 28(f) or FRAP 32.1(b), the additional material must be presented to the Court under separate cover, accompanied by a motion for leave to file such supplemental material as an attachment to the brief. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective December 1, 2006; amended effective August 20, 2007.)

NOTE

The last sentence of Local Rule 28(b) has been deleted because the clerk's current practice is to hold a non-conforming brief and require its correction rather than return the brief for resubmission in proper form.

Rule 28(c). Responsibilities of counsel listed on a brief.

The Court will interpret the listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable. (Amended effective December 1, 1995.)

Rule 28(d). Joint appeals and consolidations.

Where multiple parties are directed to file a consolidated brief, counsel on the same side of the case should confer and agree upon a means for assuring that the positions of all parties are addressed within the length limits allowed and that each counsel will have an opportunity to review and approve the consolidated brief before it is filed.

Motions to file separate briefs are not favored by the Court and are granted only upon a particularized showing of good cause, such as, but not limited to, cases in which the interest of the parties are adverse. Generally unacceptable grounds for requests to file separate briefs include representations that the issues presented require a brief in excess of the length limitations established by FRAP 32(a)(7) (appropriately addressed by a motion to exceed length limit), that counsel cannot coordinate their efforts due to different geographical locations, or that the participation of separate counsel in the proceedings below entitles each party to separate briefs on appeal.

If a motion to file separate briefs is granted, the length of such briefs may be limited by the Court. The parties shall continue to share the time allowed for oral argument. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Former Local Rule 28(d) has been moved to Local Rule 32(b) and amended to conform to FRAP 32(a)(7).

Rule 28(e). Citation of additional authorities.

Counsel may, without leave of Court, present a letter drawing the Court's attention to supplemental authorities under Rule 28(j) and serve a copy on all counsel of record. The Court may grant leave for or direct the filing of additional memoranda, which may include additional argument before, during or after oral argument. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective December 1, 2002; amended effective April 1, 2008.)

Rule 28(f). Statement of facts.

Every opening brief filed by appellants in this Court shall include a separate section, the title of which is STATEMENT OF FACTS. In this section the attorneys will prepare a narrative statement of all of the facts necessary for the Court to reach the conclusion which the brief desires. The said STATEMENT OF FACTS will include exhibit, record, transcript, or appendix references showing the source of the facts stated. An appellee's brief shall also include a STATEMENT OF FACTS so prepared unless appellee is satisfied with appellant's statement of facts. (Added effective June 5, 1996; amended effective December 4, 1996; amended effective December 1, 1998.)

NOTE

Local Rule 28(g), which has been redesignated 28(f), has been amended to conform to FRAP 28(a)(7) (listing the statement of facts as a separate section) and FRAP 28(b) (providing that appellee is not required to include a statement of facts unless appellee is dissatisfied with appellant's statement).

Rule 29. Motion for leave to file brief as amicus curiae (Deleted December 1, 1998).

NOTE

Local Rule 29 has been deleted because the federal rule now details the filing requirements for amicus curiae briefs.

Rule 30(a). Attorney sanctions for unnecessary appendix designations.

The Court, on its own motion or on motion of any party, may impose sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix. Attorneys shall receive reasonable notice and opportunity to respond before the imposition of any sanction. A party's motion for the imposition of sanctions will be entertained only if filed within 14 days after entry of judgment and only if counsel for the moving party previously objected to the designation of the allegedly unnecessary material in writing to opposing counsel within 10 days of the material's designation. (Amended effective December 1, 1995.)

Rule 30(b). Appendix contents; Number of copies.

In designating or agreeing upon the contents of the appendix, and in assembling the appendix, the parties should avoid unnecessary duplication of materials. The appellee's designation should only include those additional parts of the record to which it wishes to direct the Court's attention that have not already been designated by the appellant.

The use of a selectively abridged record allows the judges to refer easily to relevant parts of the record and saves the parties the considerable expense of reproducing the entire record. Although there is no limit on the length of the appendix except as provided in Local Rule 32(a), it is unnecessary to include everything in the appendix. The appendix should, however, contain the final order or order appealed from, the complaint or petition, as finally amended (civil appeals) or indictment (criminal appeals), as well as all other parts of the record which are vital to the understanding of the basic issues on appeal. Although the entire record is available to the Court should it believe that additional portions are important to a full understanding of the issues, citations to portions of the record not included in the appendix is not favored.

The table of contents to the appendix should be sufficiently detailed to be helpful to the Court. Referring to the transcript of a trial under a single reference to "proceeding" or "trial transcript" is not sufficient. When the testimony of a witness is included in the appendix, the testimony should be clearly identified in the table of contents, beneath the proceeding in which it occurred. The name of the testifying witness and the type of examination (e.g., direct, cross, redirect, or recross) should also be clearly indicated at the top of each page of the appendix where the witness's testimony appears. Exhibits should be listed in the table of contents by number or letter and by name or brief description.

In all criminal appeals seeking review of the application of the sentencing guidelines, appellant shall include the sentencing hearing transcript and presentence report in the appendix. The presentence report must be included in a separate sealed volume, stamped "SEALED" on the volume itself and on the envelope containing it, and be accompanied by a certificate stating that the volume contains sealed material.

Pursuant to the authority granted by FRAP 30(a)(3), the Court requires that only six copies of the appendix must be filed with appellant's opening brief and a copy served on counsel for each party separately represented. Appointed counsel may file five copies and any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies. If the Court allows a deferred appendix, the parties file their page-proof briefs in electronic form only. After the deferred appendix is filed, the parties must file their final briefs in electronic form in addition to filing requisite number of paper copies. The final briefs must contain proper references to the appendix. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective April 16, 2007; amended effective April 1, 2008.)

Rule 30(c). Responsibility of parties.

Notwithstanding that FRAP 30 provides that the appellant shall prepare and file the appendix, the Court considers the coordination of preparing the appendix to be the responsibility of both sides. The failure of a side to designate does not absolve the other side from the responsibility.

Except under the most extraordinary circumstances, supplementary appendices will not be accepted. If the appellant omits from the appendix the portions designated by the appellee, the appellant will be required to file a corrected appendix incorporating such material, and to bear the cost regardless of the outcome of the appeal.

If a party files a motion for leave to file a supplemental appendix, the motion must specifically identify the contents of the supplemental appendix, state that the items are matters of record, and set forth good cause why the original appendix should not be returned for insertion of the additional materials. (Amended effective December 1, 1995.)

Rule 30(d). Dispensing with appendix.

Motions to proceed on the original record pursuant to FRAP 30(f) are carefully reviewed in the Fourth Circuit and are not usually granted unless the appellant is proceeding in forma pauperis, the record is short, or the appeal is expedited. Even if the motion is granted, counsel must include an abbreviated appendix consisting of:

i. pertinent district court docket entries,
ii. indictment or complaint,
iii. judgment or order being appealed,
iv. notice of appeal,
v. any crucial portions of the transcript of proceedings referred to in appellant's brief,
vi. a copy of the order granting leave to proceed on the original record.

The requisite number of copies of the abbreviated appendix as set forth in Local Rule 30(b) must be filed with the brief. (Amended effective December 1, 1995; amended effective April 1, 2008.)

Rule 31(a). Shortened time for service and filing of briefs in criminal cases.

Pursuant to the authority conferred by FRAP 31(a)(2), the time for serving and filing briefs in criminal appeals is shortened as follows: the appellant shall serve and file appellant's brief and appendix within thirty-five days after the date on which the briefing order is filed; the appellee shall serve and file appellee's brief within twenty-one days after service of the brief of the appellant; the appellant may serve and file a reply brief within ten calendar days after service of the brief of the appellee. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective December 1, 2002.)

Rule 31(b). Briefing orders.

A formal briefing schedule shall be sent to the parties upon receipt of the record, notification that the record is complete pursuant to Local Rule 10(a), or when the Clerk determines that no hearing was held for which a transcript is necessary—whichever occurs first. Thus, the time for designating the contents of the joint appendix and the filing of briefs is controlled by the briefing order and not the receipt of the record as provided in FRAP 31(a)(1). (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 31(c). Filing and service.

Briefs and appendices in paper form are deemed filed on the date of mailing if first class mail or other classes of mail at least as expeditious are used. If a courier service is used, the briefs and appendices are deemed timely filed if the briefs and appendices are given to the courier service on or before the due date to be dispatched to the Clerk's Office for delivery within three calendar days. Filing must be within the time allowed by the briefing order. A brief must be accompanied by a valid certificate of service, which should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual service. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required.

Extensions will be granted only when extraordinary circumstances exist. A motion for an extension of time to file a brief must be filed well in advance of the date the brief is due and must set forth the additional time requested and the reasons for the request. The Court discourages these motions and may deny the motion entirely or grant a lesser period of time than the time requested. (Amended effective December 1, 1995; amended effective December 4, 1996; amended effective April 1, 2008.)

Rule 31(d). Number of copies.

Each party must file eight copies of the brief with the clerk and serve two copies on counsel for each party separately represented. Appointed counsel may file six copies and serve one copy on counsel for each party separately represented. Any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies, with service of one copy on counsel for each party separately represented. If an en banc hearing or rehearing en banc is scheduled, additional copies of briefs may be requested. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 32(a). Reproduction of briefs and appendices.

Double-sided copying of appendices is preferred in all cases. If an appendix is prepared by a commercial printer in a court-appointed case, the materials contained in the appendix should be reproduced on both sides of a sheet because reimbursement for copying expenses will be limited to 35 cents per double-sided sheet of the joint appendix. No joint appendix in a court-appointed case should exceed 250 sheets without advance permission from the Court; unless such permission is granted, reimbursement of copy expenses will be limited to 250 sheets. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective December 1, 2002.)

NOTE

Former Local Rule 32(a) has been deleted in its entirety as superseded by FRAP 32(a)(7).

Former Local Rule 32(b) has been redesignated Local Rule 32(a). Consistent with the FRAP amendments, it deletes reference to typeset briefs. It recasts as a preference the court's former requirement that materials in the joint appendix be reproduced on both sides of a sheet in court-appointed cases. FRAP 32(d) requires the court to accept any document in conformity with the requirements of FRAP but permits the court by local rule or order in a particular case to accept documents that do not meet all the FRAP form requirements. FRAP 32(a)(1) and 32(b) provide that briefs and appendices should be copied on only one side of the paper. Several years ago, the Court adopted a double-sided copying requirement and limited the size of the appendix to control excessive reproduction costs in Criminal Justice Act cases. The provision has proved an effective cost reduction mechanism which should be retained if possible. The amended local rule does this by stating that reimbursement will be limited to $.35 per double-sided sheet if the appendix is reproduced by a commercial printer, and that reimbursement will be limited to 250 sheets (500 pages) unless counsel obtained leave to file a longer appendix.

Rule 32(b). Length of briefs.

The Fourth Circuit encourages short, concise briefs. Under no circumstances may a brief exceed the limits set forth in FRAP 32(a)(7) without the Court's advance permission.

A motion for permission to submit a longer brief must be made to the Court of Appeals at least 10 calendar days prior to the due date of the brief and must be supported by a statement of reasons. These motions are not favored and will be granted only for exceptional reasons. (Amended effective December 1, 1998; amended effective December 1, 2002.)

NOTE

Local Rule 32(b) contains some of the information previously found in old Local Rule 28(d), but deletes the second sentence of old Local Rule 28(d), which was superseded by limits set forth in FRAP 32(a)(7). The last sentence of former Local Rule 28(d) has also been deleted from Local Rule 32(b) because footnotes and narrow margins can no longer be used to circumvent the size limitations for briefs established by the new rules.

Rule 32(c). Correction of briefs and appendices.

If briefs, appendices, or other papers are illegible or are not in the form required by the federal rules or by this Court's local rules or standards when filed, counsel will be required to file corrected copies of the document. If the corrected copies are not submitted within the time allowed by the clerk, they must be accompanied by a motion to file out of time. (Added effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Former Local Rule 32(c) has been deleted because FRAP 32(a)(2)(F) requires counsel's phone number.

Rule 32.1. Citation of unpublished dispositions.

Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district court within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If a party believes, nevertheless. that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met. (Amended effective December 1, 1995; amended effective October 1, 2002; amended effective December 1, 2002; amended and renumbered effective December 1, 2006.)

CASE NOTES

Use of Unpublished Dispositions. — Since unpublished opinions are not regarded as binding precedent, such opinions cannot be considered in deciding whether particular conduct violates clearly established law for purposes of adjudging entitlement to qualified immunity. Hogan v. Carter, 85

F.3d 1113 (4th Cir. 1996), cert. denied, 519 U.S. 974, 117 S. Ct. 408, 136 L. Ed. 2d 321 (1996).

Rule 33. Circuit mediation conferences.

All civil and agency cases in which all parties are represented by counsel on appeal will be reviewed by a circuit mediator after the filing of the docketing statements required by Local Rule 3(b). The circuit mediator will determine whether a mediation conference may assist either the Court or the parties. Counsel for a party may also request a conference if counsel believes it will be of assistance to the Court or the parties. Counsel's participation is required at any scheduled conference. Mediation conferences will generally be conducted by telephone but may be conducted in person in the discretion of a circuit mediator. Mediation conferences may be adjourned from time to time by a circuit mediator. Purposes of the mediation conference include:

(a) Jurisdictional review;
(b) Simplification, clarification, and reduction of issues;
(c) Discussion of settlement; and
(d) Consideration of any other matter relating to the efficient management and disposition of the appeal.

Although the time allowed for filing of briefs is not automatically tolled by proceedings under this local rule, if the parties wish to pursue, or are engaged in, settlement discussions, counsel for any party may move to extend the briefing schedule. The mediator, through the Clerk of the Court, may enter orders which control the course of proceedings and, upon agreement of the parties, dispose of the case.

Statements and comments made during all mediation conferences, and papers or electronic information generated during the process, are not included in Court files except to the extent disclosed by orders entered under this local rule. Information disclosed in the mediation process shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the mediation program participants. Confidentiality is required of all participants in the mediation proceedings. All statements, documents, and discussions in such proceedings shall be kept confidential. The mediator, attorneys, and other participants in the mediation shall not disclose such statements, documents, or discussions without prior approval of the Standing Panel on Attorney Discipline. Any alleged violations of this rule shall be referred to the Court's Standing Panel on Attorney Discipline for a determination pursuant to Local Rule 46(g) of whether imposition of discipline is warranted. All proceedings before the Standing Panel on Attorney Discipline involving confidential information under this procedure shall be confidential. (Adopted and effective June 8, 1994; amended effective December 1, 1995; amended effective March 4, 1998; amended effective December 11, 2001.)

Rule 34(a). Oral argument; Pre-argument review and summary disposition of appeals; Statement regarding the need for oral argument.

In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.

In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in FRAP 34(a)(2). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition without oral argument including, but not limited to, affirmance or reversal.

Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. In furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 34(b). Informal briefs.

Whenever the Court determines pursuant to Local Rule 22(a) that briefing is appropriate on an appeal in a non-capital case from the denial of a writ of habeas corpus or of a motion under 28 U.S.C. § 2255, or whenever any pro se appeal is filed from any other type of judgment or order, the clerk shall notify the appellant that appellant shall file, within twenty-one days after receipt of such notice, an informal brief, listing the specific issues and supporting facts and arguments raised on appeal. Appellant's informal brief and any informal brief filed by appellee shall be considered, together with the record and other relevant documents, by the panel to which the proceeding has been referred. The Court will limit its review to the issues raised in the informal brief.

The informal brief may be submitted on a form provided by the clerk and shall provide the specific information required by the form. The parties need not limit their briefs solely to the form. An additional supporting memorandum may be attached if a party deems it necessary in order to address adequately the issues raised, but the informal brief and any supporting memorandum shall not exceed the length limitations established by FRAP 32(a)(7). It is unnecessary to attach record excerpts since the record is before the Court. It is not necessary to cite cases in an informal brief. Unless additional copies are requested by the Court, only the original informal brief must be filed with the Court and copies served on the other parties to the case.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review.

If the panel reviewing an informal brief submitted by an indigent pro se litigant determines that further briefing and possible oral argument would be of assistance, counsel will be appointed and directed to file additional formal briefs. In any appeal that has been informally briefed, the Court may direct that additional briefs be filed prior to oral argument. (Amended effective December 1, 1995; further amended June 5, 1996, September 25, 1996; amended effective December 1, 1998; amended effective October 9, 2003; amended effective April 1, 2008.)

Rule 34(c). Court sessions and notification to counsel.

The court sits in Richmond, Virginia, to hear cases during six to eight separate argument weeks scheduled between September and June. The Court also sits at law schools within the Circuit and at other special argument sessions. The Court's oral argument schedule is available on the Court's Internet site, www.ca4.uscourts.gov.

The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.

Attorneys appearing for oral argument must register with the Clerk's Office on the morning of argument to learn of courtroom assignment, order of appearance, and allocation of oral argument time. Counsel not already a member of the Fourth Circuit bar will be admitted to practice before the Court at that time upon compliance with the provisions of Local Rule 46(b).

The Court convenes at 9:30 a.m., with the exception of Friday, when it convenes at 8:30 a.m.

Preparation for the argument calendar begins in the Clerk's Office at least two months prior to argument. Upon receiving notice that a case has been tentatively assigned to an argument session, counsel must inform the clerk, within the time provided in the notice of any conflict or other matter that would affect scheduling of the case for that session. After a case has been scheduled for argument, any motion that would affect the argument date must show good cause for the requested relief and that the relief could not have been requested within the period set by the Court for notice of conflicts. Continuance of an established oral argument date is not granted because of a prior professional commitment. Although a case will not be removed from the calendar because of a scheduling conflict by counsel after the notification of oral argument has been issued, the Court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present. (Amended effective December 1, 1995; amended effective Arpil 1, 2008.)

Rule 34(d). Argument time.

Briefs for the cases assigned to a hearing panel are distributed by the clerk to the judges on a hearing panel at the time the hearing panel assignments are made. The members of the Court hearing oral argument will have read the briefs before the hearing and therefore will be familiar with the case. In oral argument, counsel should emphasize the dispositive issues.

Since the appellant is allowed to open and close the argument, counsel for appellant should indicate at registration before oral argument how much time counsel wants to reserve for rebuttal. It is recommended that no more than two attorneys argue per side. Each side is normally allowed 20 minutes, even in consolidated cases, but counsel may not need the full time allotted or the Court may shorten the time allotted. In social security disability cases, black lung cases, and labor cases where the primary issue is whether the agency's decision is supported by substantial evidence and in criminal cases where the primary issue involves the application of the sentencing guidelines, each side is limited to 15 minutes. In black lung cases in which the Director, Office of Workers' Compensation Programs, has been granted leave to file a separate brief, the Director will share argument time with whichever side the Director's brief supports.

If counsel believes that more time is needed for oral argument, a written motion setting forth the reasons for additional time and whether the other parties consent must be submitted well in advance of the hearing date. The Court may sua sponte extend the allotted time during the argument or it may terminate the argument whenever in its judgment further argument is unnecessary. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective June 1, 1999.)

NOTE

Local Rule 34(d) was amended to provide that the court may reduce argument time from 30 minutes when extended argument is unnecessary.

Rule 34(e). Motion to submit on briefs.

As soon as possible upon completion of the briefing schedule or within 10 calendar days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument. Such motions are not granted as a matter of course. A motion to submit on briefs should not be used to alleviate a scheduling conflict after the notification of oral argument has been issued. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective December 1, 2002.)

NOTE

Local Rule 34(e) has been amended to conform to the court's practice of requiring that motions to submit on the briefs be filed within ten days of notification to counsel that a case is tentatively calendared. This notification may occur before briefing is completed.

Rule 35. En banc proceedings.

(a) *Petition for rehearing en banc.* A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration shall be stated plainly in the title of the petition. Petitions for rehearing en banc will be distributed to all active and senior judges of the Court, and to any visiting judge who may have heard and decided the appeal.

(b) *Decision to hear or rehear a case en banc.* A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc. A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.

(c) *Decision of cases heard or reheard en banc.* An en banc hearing will be before all eligible, active and participating judges of the Court. An en banc rehearing will be before all eligible and participating active judges, and any senior judge of the Court who sat on the panel that decided the case originally. An active judge who takes senior status after a case is heard or reheard by an en banc Court will be eligible to participate in the en banc decision. A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case. Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel. (The circuit takes the position that the change of wording in 28 U.S.C. § 46(c) referring to participation in en banc decisions does not alter the long-standing rule that the en banc Court reviews the decision from which review is sought in this Court, not the decision of a panel.)

(d) *Additional copies of briefs and appendix for en banc hearing or rehearing.* The Court's order granting hearing or rehearing en banc may require the parties to file additional copies of the briefs and appendix. Each party will bear the initial cost of additional copies of its own briefs. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix. In the event that cross petitions for hearing or rehearing en banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix. (Amended effective March 9, 1994; amended effective December 1, 1995; amended December 4, 1996; amended effective December 1, 1998; amended effective December 1, 2003; amended effective December 1, 2005.)

Rule 36(a). Publication of decisions.

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten calendar days. (Amended effective December 1, 1995; amended effective December 1, 2002.)

Rule 36(b). Unpublished dispositions; Distribution of Opinions.

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. Copies of published and unpublished opinions are available from the Clerk's Office for $2.00 per opinion. Published and unpublished opinions issued since January 1, 1996 are available free of charge at www.ca4.uscourts.gov.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result. (Amended effective December 1, 1995; amended effective December 1, 2002; amended effective October 5, 2004; amended effective January 7, 2005.)

Rule 36(c). Renumbered.

Editor's note. — Rule 36(c) has been amended and renumbered as Rule 32.1, effective December 1, 2006.

Rule 39(a). Printing costs.

The cost of printing or otherwise producing necessary copies of briefs and appendices shall be taxable as costs at a rate equal to actual cost, but not higher than $4.00 per page of photographic reproduction of typed material. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 39(a) has been amended to delete reference to printing costs for typeset briefs.

Rule 39(b). Bill of costs.

The verified bill of costs may be that of a party or counsel, and should be accompanied by the printer's itemized statement of charges. When costs are sought for or against the United States, counsel should cite the statutory authority relied upon. Taxation of costs will not be delayed by the filing of a petition for rehearing or other postjudgment motion. A late affidavit for costs must be accompanied by a motion for leave to file. The clerk rules on all bills of costs and objections in the first instance. (Added effective December 1, 1995.)

Rule 39(c). Recovery of costs in the district court.

The only costs generally taxable in the Court of Appeals are: (1) the docketing fee if the case is reversed; and (2) the cost of printing or reproducing briefs and appendices, including exhibits.

Although some costs are "taxable" in the Court of Appeals, all costs are recoverable in the district court after issuance of the mandate. If the matter of costs has not been settled before issuance of the mandate, the clerk will send a supplemental "Bill of Costs" to the district court for inclusion in the mandate at a later date.

Various costs incidental to an appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; (3) the fee for preparing and transmitting the record; and (4) the premiums paid for any required appeal bond. Application for recovery of these expenses by the successful party on appeal must be made in the district court, and should be made only after issuance of the mandate by the Court of Appeals. These costs, if erroneously applied for in the Court of Appeals, will be disallowed without prejudice to the right to reapply for them in the district court. (Added effective December 1, 1995.)

Rule 40(a). Filing of petition.

Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of privilege. Whenever a request for rehearing en banc is contained in a petition, such fact must be stated plainly on the cover of and in the title of the document. Only the original petition for rehearing or rehearing en banc is required unless additional copies are requested by the Clerk. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective October 5, 2004; amended effective April 1, 2008.)

Rule 40(b). Statement of purpose.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:

i. A material factual or legal matter was overlooked in the decision.

ii. A change in the law occurred after the case was submitted and was overlooked by the panel.

iii. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals and the conflict is not addressed in the opinion.

iv. The proceeding involves one or more questions of exceptional importance.

A petition should only be made to direct the Court's attention to one or more of the above situations. The points to be raised should be succinctly listed in counsel's statement of purpose. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 40(b) has been amended to add a fourth ground for filing a petition for rehearing. The local rule now incorporates the standard contained in FRAP 35(b)(1). Because the statement of purpose section of a petition for rehearing is not a requirement of FRAP, the provision in Local Rule 40(b) regarding rejection of a petition which fails to contain such a statement has been deleted.

Rule 40(c). Time limits for filing petitions.

The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc. The Clerk's Office will deny as untimely any petition received in the Clerk's Office later than 45 days after entry of judgment in any civil case where the United States, or an agency or officer thereof is a party, or 14 days after the entry of judgment in any other case. The only grounds for an extension of time to file a petition, or to accept an untimely petition, are as follows:

i. the death or serious illness of counsel, or of a member of counsel's immediate family (or in the case of a party proceeding without counsel, the death or serious illness of the party or a member of the party's immediate family); or

ii. an extraordinary circumstance wholly beyond the control of counsel or of a party proceeding without counsel.

Petitions for rehearing and petitions for en banc rehearing from incarcerated persons proceeding without the assistance of counsel are deemed filed when they are delivered to prison or jail officials. All other such petitions are deemed filed only when received in the Clerk's Office. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 40(d). Papers filed after denial of a petition for rehearing.

Except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the Court has denied a petition for rehearing or the time for filing a petition for rehearing has expired. (Amended effective December 1, 1995; amended effective December 1, 1998.)

Rule 41. Motion for stay of the mandate.

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must present a substantial question or set forth good or probable cause for a stay. Stay requests are normally acted upon without a request for a response. (Amended effective December 1, 1995.)

Rule 42. Voluntary dismissals.

In civil cases, the stipulation of dismissal or motion for voluntary dismissal may be signed by counsel. In criminal cases, however, the agreement or motion must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant. (Amended effective December 1, 1995.)

Rule 45. Dismissals for failure to prosecute.

When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant or, if appellant is represented by counsel, appellant's counsel that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said 15-day period, the clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue the mandate. In no case shall the appellant be entitled to reinstate the case and remedy the default after the same shall have been dismissed under this rule, unless by order of this Court for good cause shown. The dismissal of an appeal shall not limit the authority of this Court, in an appropriate case, to take disciplinary action against defaulting counsel. (Amended effective December 1, 1995; amended effective December 1, 1998; amended April 1, 2008.)

NOTE

Local Rule 45 eliminates the requirement that the clerk notify appellant personally of counsel's default before dismissing an appeal for failure to prosecute.

Rule 46(a). Legal assistance to indigents by law students.

An eligible law student with the written consent of an indigent and the attorney of record may appear in this Court on behalf of that indigent in any case. An eligible law student with the written consent of the United States Attorney or authorized representative may also appear in this Court on behalf of the United States in any case. An eligible law student with the written consent of the State Attorney General or authorized representative may also appear in this Court on behalf of that state in any case. In each case, the written consent shall be filed with the clerk.

An eligible law student may assist in the preparation of briefs and other documents to be filed in this Court, but such briefs or documents must be signed by the attorney of record. The student may also participate in oral rgument with leave of the Court, but only in the presence of the attorney of record. The attorney of record shall assume personal professional responsibility for the law student's work and for supervising the quality of that work. The attorney should be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.

In order to make an appearance pursuant to this rule, the law student must:

1. Be duly enrolled in a law school approved by the American Bar Association;
2. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis;
3. Be certified by the dean of the student's law school as being of good character and competent legal ability which certification shall be filed with the clerk. This certification may be withdrawn by the dean at any time by mailing notice to the clerk or by termination by this Court without notice of hearing and without any showing of cause;
4. Be introduced to the Court by an attorney admitted to practice before this Court;
5. Neither ask for nor receive any compensation or remuneration of any kind from the person on whose behalf the student renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, a State, or the United States from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require;
6. Certify in writing that he or she has read and is familiar with the Code of Professional Responsibility or Rules of Professional Conduct in force in the state in which the student's law school is located. (Amended effective December 1, 1995.)

Rule 46(b). Admission to practice.

Only attorneys admitted to the bar of this Court may practice before the Court. An attorney may be named on a brief filed in this Court without being admitted to the bar of the Fourth Circuit, provided that at least one lawyer admitted to practice in this Court also appears on the brief. Any other document submitted by an attorney who is not a member of the bar of the Fourth Circuit will be accepted for filing conditioned on his or her qualifying for membership within a reasonable time.

Each applicant for admission to the bar of this Court shall file with the clerk an application on the form approved by the Court and furnished by the clerk. Thereafter, upon written or oral motion of a member of the bar of the Court, the Court will act upon the application. A qualified attorney may be admitted upon personal appearance in open court. It is not necessary that an applicant appear in open court for the purpose of being admitted unless the Court shall otherwise order.

The requisite $170 fee must accompany the application, but attorneys appointed by the Court to represent a party in forma pauperis, counsel for the United States and any agency thereof who has a case pending before this Court, and law clerks to the judges of the Court and to the district judges, magistrate judges, and bankruptcy judges within this Circuit shall be admitted to the bar of this Court without the payment of an admission fee. The clerk shall credit $150 of each $170 fee to the Judiciary's fee account and designate the remaining $20 for deposit to a fund maintained by the Court for the benefit of the bench and bar in the administration of justice.

A certificate indicating that an attorney has been admitted to practice before the Fourth Circuit will be sent to counsel by mail after admission. (Amended effective December 1, 1995; amended effective September 30, 2003; amended effective February 15, 2005.)

Rule 46(c). Appearance of counsel; withdrawal; substitutions.

Each attorney of record must file a written appearance with the clerk within 14 days after the appeal is docketed or after being retained or appointed. At the time of docketing, the clerk will send to each counsel or party in the trial court a "designation of counsel" form. This form should be filled out and returned to the Clerk of the Fourth Circuit within 14 days. Thereafter, the Court will send correspondence, notices of oral argument, and copies of final decisions only to those attorneys who have filed their appearance forms. More than one attorney of the same firm may sign the same form. This form does not affect the credit line listed on printed opinions, as that information is furnished to publishing firms from those names listed on the briefs. Once an appearance in an appeal has been filed, an attorney may not withdraw from representation without notice to the party he or she is representing and consent of the Court. A motion to withdraw should state fully the reason for the request. Substitution of counsel of record can be accomplished by submitting a counsel of record form or written appearance for new counsel along with existing counsel's motion to withdraw or strike appearance. (Amended effective December 1, 1995; amended effective December 1, 2002.)

Rule 46(d). Appointment of counsel.

In any appeal in which appointment of counsel is mandated by section (a)(1) of the Criminal Justice Act, 18 U.S.C. § 3006A(a)(1), counsel is appointed upon the docketing of the appeal without prior notice to the attorney who represented the indigent in the case below. The duty of counsel appointed under the CJA extends through advising an unsuccessful appellant in writing of the right to seek review in the Supreme Court. If the appellant requests in writing that a petition for a writ of certiorari be filed and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall file such a petition. If appellant requests that a petition for a writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with the Court of Appeals. The motion must reflect that a copy was served on the client and that the client was informed of the right to file a response to the motion within seven days. The Clerk will hold the motion after filing for fifteen days before submitting it to the Court to allow time for appellant's response, if any, to be received.

Assignment of counsel is discretionary in other indigent cases. Therefore, such cases receive a preliminary review before a decision is made regarding appointment of counsel. In assigning counsel, the Court may direct counsel to brief a particular issue, but counsel is free to address any additional issues which appear to be meritorious.

Payment of counsel appointed under the CJA is governed by 18 U.S.C. § 3006A(d) and this Circuit's Plan in Implementation of the Criminal Justice Act. Unless compensation for legal services becomes available to assigned counsel by statute, the Court will pay counsel assigned for appellate representation not covered by the CJA a maximum fee of $750 plus expenses from the Attorney Admission Fund.

To receive payment from the Court, court-appointed or court-assigned counsel in all cases must submit to the Clerk's Office an itemized statement of expenses, with receipts, within sixty days of final disposition of the case. Depending upon the course of the case, this may be sixty days from (1) the date of judgment, (2) dismissal of the appeal, or (3) denial of a petition for rehearing. Before the expiration of the sixty-day time period the Court, for good cause shown, may grant counsel an extension of time to file the application for compensation and reimbursement. If court-appointed counsel files a petition for writ of certiorari with the Supreme Court, the 60-day period for applying for compensation and reimbursement runs from the date of filing the petition for writ of certiorari. (Amended effective December 1, 1995; amended effective February 1, 2001.)

Rule 46(e). Attorney's fees and expenses.

The Court may award attorney's fees and expenses whenever authorized by statute. Any application for an award must include a reference to the statutory basis for the request and a detailed itemization of the amounts requested. Court-appointed counsel may apply for an award of fees and expenses, but any award by the Court is in lieu of the regular appointment fees provided by the Court. In certain agency cases, counsel may submit the standard government form for fees and expenses provided by the agency for approval by the Court. (Amended effective December 1, 1995.)

Legal Periodicals. — For note, "Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies," see 26 Wm. & Mary L. Rev. 349 (1985).

Rule 46(f). Proceeding pro se.

An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will limit its review to the issues raised in the informal briefs and will consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument. (Amended effective December 1, 1995; further amended September 25, 1996.)

Rule 46(g). Rules of disciplinary enforcement.

(1) A member of the bar of this Court may be disciplined by this Court as a result of

(a) Conviction in any court of the United States, the District of Columbia, or any state, territory or commonwealth of the United States, of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, or theft;

(b) Imposition of discipline by any other court of whose bar the attorney is a member, or an attorney's disbarment by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;

(c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal Rules of Appellate Procedure, the local rules of this Court, or orders or other instructions of this Court; or

(d) Any other conduct unbecoming a member of the bar of this Court.

(2) Discipline may consist of disbarment, suspension from practice before this Court, monetary sanction, removal from the roster of attorneys eligible for appointment as court-appointed counsel, reprimand, or any other sanction that the Court may deem appropriate. Disbarment is the presumed discipline for conviction of a crime specified in paragraph (1)(a) above. The identical discipline imposed by another court is presumed appropriate for discipline taken as a result of that other court's action pursuant to paragraph (1)(b). A monetary sanction imposed on disciplinary grounds is the personal responsibility of the attorney disciplined, and may not be reimbursed by a client.

(3) The clerk reviews reports received from other courts concerning discipline imposed on members of the bar of this Court. He refers to the Court all disbarments, suspensions, resignations during the pendency of misconduct investigations, and other actions sufficient to cast doubt upon the member's continuing qualification to practice before this Court.

(4) The clerk issues a notice to show cause why a member of the bar shall not be disciplined by this Court upon receipt of official notification of an attorney's conviction

of a crime specified in paragraph (1)(a) or of the imposition of discipline by another court referred to this Court pursuant to paragraph (3) above, or upon the Court's determination that cause may exist for discipline pursuant to paragraphs (1)(c) or (1)(d). Such notice is sent by certified mail, directs that a response be filed within 30 days of the date of the notice, and directs that the attorney complete and return to the clerk within that time a declaration of the names and addresses of other bars to which he or she is admitted, using the form supplied by the clerk, whether or not the attorney chooses otherwise to respond to the notice. The clerk also appends a copy of Local Rule 46(g).

(5) Upon receiving official notification that a member of the bar has been convicted of a crime specified in paragraph (1)(a), the clerk automatically will issue an order suspending the attorney's privilege to practice before this Court pending the Court's determination of appropriate discipline.

(6) An attorney to whom a notice to show cause has been sent may consent to disbarment, by filing with the clerk an affidavit stating that the attorney desires to consent to disbarment and that:

(a) The attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;

(b) The attorney is aware that there is a presently pending proceeding involving allegations that there exist grounds for the attorney's discipline, the nature of which the attorney shall specifically set forth;

(c) The attorney acknowledges that the material facts so alleged are true; and

(d) The attorney so consents because the attorney knows that he or she cannot successfully defend himself or herself.

The order disbarring the attorney on consent is a matter of public record. However, the affidavit will not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

(7) If the attorney fails to respond to the notice within 30 days, or such other time as the court shall allow, the clerk enters an order imposing the presumptive discipline. If no presumptive discipline is specified for the conduct, the clerk notifies the court of the attorney's non-response and the court takes such action as it deems appropriate.

(8) All matters pertaining to discipline of attorneys are submitted to the court's Standing Panel on Attorney Discipline, which consists of three active circuit judges, each of whom is appointed by the Chief Judge to serve on the Panel for a three-year term. The initial members of the Standing Panel are appointed for terms of one, two, and three years so that the Panel members' terms are staggered for continuity of decisionmaking. If any member of the Standing Panel is unable to hear a particular matter, the clerk randomly designates another active circuit judge to the Panel for the purpose of disposing of that matter.

(9) The Standing Panel considers all materials submitted by an attorney to whom notice to show cause has issued. The Panel may request further information from a court that has previously imposed discipline on the attorney, or from its disciplinary agency. A copy of any such information is made available to the attorney or to his or her counsel. Should an attorney request a hearing on the matter it will be heard by the Standing Panel at a time and place of its choosing.

(10) The Court may at any time appoint counsel to investigate or prosecute a disciplinary matter, or to represent an indigent attorney instructed to show cause. The Court prefers to appoint as prosecuting counsel the disciplinary agency of the highest court of the state in which the attorney maintains his or her principal office. However, if the state disciplinary agency declines appointment, or the Court deems other counsel more appropriate, it may appoint any other member of the bar as prosecuting counsel. Counsel appointed either for prosecution or defense will be compensated for his or her services according to the Court's plan for appointment of counsel in criminal cases, from the attorney admission fund.

(11) The Court's order imposing discipline will set forth the nature of the discipline imposed; if disbarment or suspension from practice before the court, the terms upon which reinstatement will occur or be considered by the court; and any instructions to the clerk concerning the notification of the court's action to be given to other courts or official bodies.

(12) The clerk is responsible for

(a) Automatically initiating show cause proceedings when official notice of an attorney's conviction of a crime specified in paragraph (1)(a) or discipline by another court pursuant to paragraph (3) is brought to his or her attention;

(b) Bringing to the attention of the Standing Panel instances of violations by members of the bar of this court of the Federal Rules of Appellate Procedure, this court's local rules, or this Court's orders or other instructions that may warrant discipline;

(c) Obtaining declarations of the names and addresses of other bars of which an attorney possibly subject to discipline by this court may be a member; and

(d) Unless directed otherwise by the Court, within 10 days of the imposition of discipline upon a member of the bar of this Court, notifying all other courts of those bars the attorney reports that he or she is a member, and the American Bar Association's National Disciplinary Data Bank, of the Court's action, enclosing a certified copy of the Court's order. (Amended effective December 1, 1995.)

Rule 47(a). Procedures for adoption of local rules and internal operating procedures.

Following tentative approval of an amendment to its Local Rules or Internal Operating Procedures, and consultation with its Advisory Committee on Rules and Procedures, the Court of Appeals will provide public notice of the proposed amendment and an opportunity for comment.

The Court will set a period for comment for each proposed amendment, based upon the urgency of the matter involved. If the Court determines that there is an immediate need for a rule, the Court may provide that an amendment take immediate effect, and promptly thereafter afford notice and opportunity for comment.

Notice of a proposed amendment will be provided by distribution of the proposed change to all district judges, bankruptcy judges, magistrate judges, district and bankruptcy clerks, United States Attorneys, and state bar associations within the Circuit. Notice will also be sent to all legal newspapers and bar journals within the Circuit. Such notice shall include the text of a proposed amendment, unless it is lengthy. If the amendment is lengthy, the notice will describe the purpose and effect of the proposed amendment, and advise interested parties to obtain copies of the text of the proposed amendment from the clerk. Any person or organization requesting routine notice of proposed amendments to the Court's rules and internal operating procedures may, by letter to the clerk, be placed on the mailing list for such proposed changes.

All comments will be addressed to the Clerk of the Court of Appeals. If comments are received, they will be circulated to all members of the Court prior to the effective date of the proposed amendment, unless the amendment was given immediate effect.

Rule 47(b). Advisory committee on rules and procedures.

The Court's Advisory Committee on Rules and Procedures shall consist of five attorneys, one from each of the states constituting the Fourth Circuit.

The members shall be appointed by the Chief Judge of the Circuit for three-year terms. The terms shall be staggered, so that no more than two members' terms expire in any year. No person may serve more than two full three-year terms.

The Chief Judge of the Circuit shall designate one of the members to serve as chair of the Committee. The Clerk shall serve as the Court's principal liaison with the Committee.

The Committee shall study the Court's local rules and internal operating procedures, make recommendations concerning them, and advise the Court concerning all proposed changes to them.

APPENDIX OF FORMS

Form 1. Notice of appeal to a court of appeals from a judgment or order of a district court.

United States District Court for the ____________
District of ____________
File Number ____________

A. B., Plaintiff)
)
v.) Notice of Appeal
)
C. D., Defendant)

Notice is hereby given that ________ (here name all parties taking the appeal) ________ (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the ________ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the ____ day of ____________, ____.

(s) ____________

(Address)
Attorney for ____________
Address: ____________

____

---

*See Rule 3(c) for permissible ways of identifying appellants.

Form 2. Notice of appeal to a court of appeals from a decision of the tax court.

United States Tax Court
Washington, D.C.

A. B., Petitioner)
v.) Docket No. ________
Commissioner of Internal Revenue,)
Respondent)

Notice of Appeal

Notice is hereby given that ____here name all parties taking the appeal*____, hereby appeal to the United States Court of Appeals for the ________ Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the ________ day of ________, ____ [relating to ________________].

(s) ________________
Counsel for ________________
Address: ________________

Form 3. Petition for review of order of an agency, board, commission or officer.

United States Court of Appeals for the ____________________ Circuit

A. B., Petitioner)
)
v.) Petition for Review
)
XYZ Commission, Respondent)

________(here name all parties bringing the petition)________ hereby petition the court for review of the order of the XYZ Commission (describe the order) entered on ____________, ____.

____
Attorney for Petitioners
Address: ______________________

Form 4. Motion and affidavit for permission to appeal in forma pauperis.

Motion and Affidavit for Permission to Appeal In Forma Pauperis

v.

Appeal No. ________________
District Court or Agency No. ______________

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: ______________________________	Date: ______________________________

My issues on appeal are:

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$______	$______	$_____	$_____
Self-employment	$______	$______	$_____	$_____
Income from real property (such as rental income)	$______	$______	$_____	$_____
Interest and dividends	$______	$______	$_____	$_____
Gifts	$______	$______	$_____	$_____
Alimony	$______	$______	$_____	$_____

12/03/07

Child support	$____	$____	$____	$____
Retirement (such as social security, pensions, annuities, insurance)	$____	$____	$____	$____
Disability (such as social security, insurance payments)	$____	$____	$____	$____
Unemployment payments	$____	$____	$____	$____
Public-assistance (such as welfare)	$____	$____	$____	$____
Other (specify):________	$____	$____	$____	$____
Total monthly income:	$____	$____	$____	$____

2. *List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

3. *List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $________

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	(Value)	**Other real estate**	(Value)	**Motor vehicle #1**	(Value)
				Make & year:	
				Model:	
				Registration #:	

Motor vehicle #2	(Value)	**Other assets**	(Value)	**Other assets**	(Value)
Make & year:					
Model:					
Registration #:					

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**

7. State the persons who rely on you or your spouse for support.

Initials	**Relationship**	**Age**

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	**Your Spouse**
Rent or home-mortgage payment (include lot rented for mobile home)	$	$

Are real-estate taxes included? [ ] Yes [ ] No

Is property insurance included? [ ] Yes [ ]No

	You	**Your Spouse**
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$

Food	$______	$______
Clothing	$______	$______
Laundry and dry-cleaning	$______	$______
Medical and dental expenses	$______	$______
Transportation (not including motor vehicle payments)	$______	$______
Recreation, entertainment, newspapers, magazines, etc.	$______	$______
Insurance (not deducted from wages or included in Mortgage payments)	$______	$______
Homeowner's or renter's	$______	$______
Life	$______	$______
Health	$______	$______
Motor Vehicle	$______	$______
Other: ________________	$______	$
Taxes (not deducted from wages or included in Mortgage payments) (specify): ________________	$______	$______
Installment payments		
Motor Vehicle	$______	$______
Credit card (name): ____________	$______	$______
Department Store (name): __________	$______	$______
Other:______________________	$______	$______
Alimony, maintenance, and support paid to others	$______	$______
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$______	$______
Other (specify): ____________________________	$______	$______
Total monthly expenses:	$______	$______

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

[ ] Yes [ ] No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* [ ] Yes [ ] No

If yes, how much? $__________

If yes, state the attorney's name, address, and telephone number:

____

____

____

11. *Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
[ ] Yes [ ] No

If yes, how much? $__________

If yes, state the person's name, address, and telephone number:

____

____

____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

Form 5. Notice of appeal to a court of appeals from a judgment or order of a district court or a bankruptcy appellate panel.

United States District Court for the ________________
District of ______________

In re

_________________________,
Debtor
A. B., Plaintiff)
)
) File No. ____________________
v.)
)
C. D., Defendant)

Notice of Appeal to United States Court of Appeals
for the _________ Circuit

__________________, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the __________ Circuit from the final judgment [or order or decree] of the district court for the district of __________ [or bankruptcy appellate panel of the __________ circuit], entered in this case on _________, ___ [here describe the judgment, order, or decree] ___________________________.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated ____________________________
Signed ___________________________
Attorney for Appellant
Address: _________________________
____

Form 6. Certificate of compliance with Rule 32(a).

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); *or*

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s) ______________________

Attorney for ______________________
Dated: ______________

(Added by order adopted April 29, 2002, effective December 1, 2002.)

FOURTH CIRCUIT FORMS

Form A. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. ______ Caption: ______________________________

Pursuant to FRAP 26.1 and Local Rule 26.1,

______________________________, who is ______________________________,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
( ) YES ( ) NO

2. Does party/amicus have any parent corporations?

( ) YES ( ) NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:n

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

( ) YES ( ) NO

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

( ) YES ( ) NO

If yes, identify entity and nature of interest:

5. Is party a trade association?
( ) YES ( ) NO

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. Does this case arive out of a bankrupty proceeding?
( ) YES ( ) NO

If yes, identify any trustee and the members of any creditors' committee:

______________________________ ______________________________
(Signature of counsel) (date)

Form B. Appearance of counsel.

No. ____________

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ amicus curiae
☐ petitioner(s) ☐ respondent(s) ☐ intervenor(s)

____
(signature)

Area Code & Phone No.: ____________

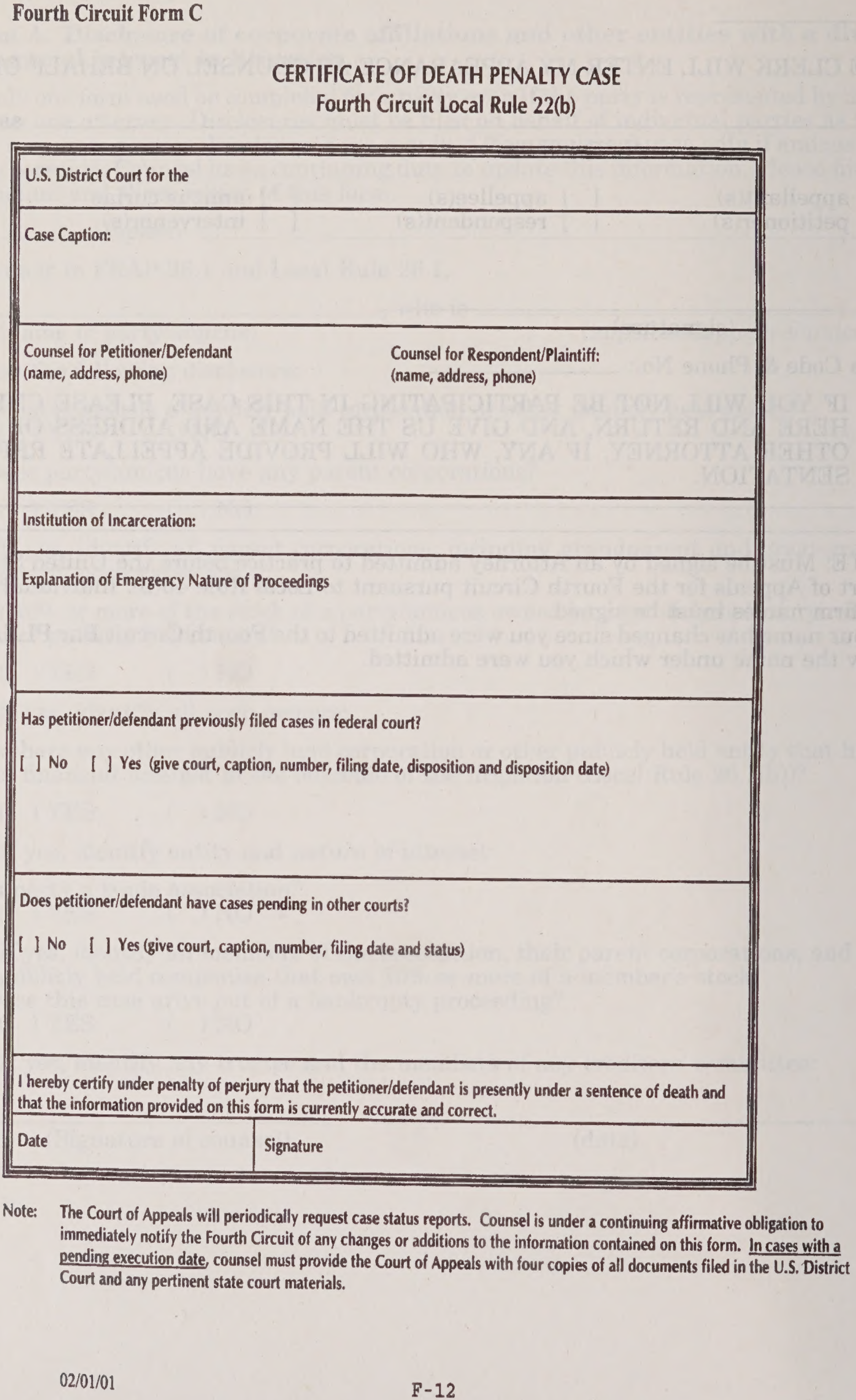
☐ IF YOU WILL NOT BE PARTICIPATING IN THIS CASE, PLEASE CHECK HERE AND RETURN, AND GIVE US THE NAME AND ADDRESS OF ANOTHER ATTORNEY, IF ANY, WHO WILL PROVIDE APPELLATE REPRESENTATION.

____

____

NOTE: Must be signed by an Attorney admitted to practice before the United States Court of Appeals for the Fourth Circuit pursuant to Local Rule 46(b). Individual and not firm names must be signed.
If your name has changed since you were admitted to the Fourth Circuit Bar PLEASE show the name under which you were admitted.

Form C. Certificate of death penalty case — Fourth Circuit Local Rule 22(b).



Fourth Circuit Form C

CERTIFICATE OF DEATH PENALTY CASE

Fourth Circuit Local Rule 22(b)

U.S. District Court for the	
Case Caption:	
Counsel for Petitioner/Defendant (name, address, phone)	Counsel for Respondent/Plaintiff: (name, address, phone)
Institution of Incarceration:	
Explanation of Emergency Nature of Proceedings	
Has petitioner/defendant previously filed cases in federal court? ☐ No ☐ Yes (give court, caption, number, filing date, disposition and disposition date)	
Does petitioner/defendant have cases pending in other courts? ☐ No ☐ Yes (give court, caption, number, filing date and status)	
I hereby certify under penalty of perjury that the petitioner/defendant is presently under a sentence of death and that the information provided on this form is currently accurate and correct.	
Date	Signature

Note: The Court of Appeals will periodically request case status reports. Counsel is under a continuing affirmative obligation to immediately notify the Fourth Circuit of any changes or additions to the information contained on this form. In cases with a pending execution date, counsel must provide the Court of Appeals with four copies of all documents filed in the U.S. District Court and any pertinent state court materials.

02/01/01

Form D. Application for admission to the bar.

Instructions: Only attorneys admitted to the bar of the United States Court of Appeals for the Fourth Circuit may practice before the Court. An attorney who has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States Court of Appeals, or a United States District Court (including the District Courts for Guam, the Northern Mariana Islands, and the Virgin Islands), and who is of good moral and professional character, may become a member of the bar by:

1. providing the information requested below;
2. having a member of the bar of the Court move admission by signing the Motion for Admission;
3. swearing or affirming the Oath before the clerk, a deputy clerk, a notary public or the Court (admission by personal appearance before the Court is usually reserved for ceremonial occasions);
4. paying the admission fee of $170.00 by check made payable to "Clerk, United States Court of Appeals." (The fee is waived for attorneys appointed to represent a party in forma pauperis, law clerks to federal judges within this Circuit, and counsel for the United States or any agency thereof who have a case pending before the Court. If a fee waiver is sought, add the Fourth Circuit docket number here: ________); and
5. mailing or delivering the completed form and check to the Clerk of the United States Court of Appeals, 1100 E. Main Street, Suite 501, Richmond, VA 23219-3517.

NAME (present practicing name):

Last ________________________________

First ________________ Middle ________________

Generation (Jr., Sr., II, III, etc.) __________ Title (if applicable) ______________

Prefix (Mr., Mrs., Miss, Ms., Professor, etc.) ____________

STATE OF RESIDENCE (for use on your certificate): ______________

FIRM: ________________________________

BUSINESS ADDRESS: ________________________________

____

____

City ________________________

State ______ Zip Code _____ - _____ Phone (____) ____ - ______ Ext. ________

Fax (____) ______ - ______ E-mail ________________

DATE OF BIRTH: _____ - ____ - ____
Month Day Year

PLEASE COMPLETE PAGE TWO OF THIS FORM

STATE AND FEDERAL COURT ADMISSIONS (attach additional page if more space is needed):

	Status (active, inactive)	Approx. Date Admitted (if available)
1. ______		
2. ______		
3. ______		

OATH

I, ________, do solemnly swear (or affirm) that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

____
(signature)

Subscribed and sworn to before me this ______ day of ________, 20____.

Notary commission expires:

______________________ (date)

______________________ (signature and title)

MOTION FOR ADMISSION

I, __________, a member of the Bar of the United States Court of Appeals for the Fourth Circuit, hereby move the admission of the applicant to the Bar of the Court. I am satisfied that the applicant possesses the qualifications provided by Federal Rule of Appellate Procedure 46(a). [This rule states, in part: "An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, or another United States court of appeals, or a United States district court …."]

______________________ (date)

______________________ (signature and title)

Form E. Docketing Statement — Tax Court.

DOCKETING STATEMENT - TAX COURT

1. Counsel for appellant must file two copies of a docketing statement with all attachments for every case appealed or cross-appealed to the court of appeals within fourteen days of the docketing of the appeal. The docketing statement must be received by the clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties.

2. The attorney filing the notice of appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal. In the case of multiple appellants represented by separate counsel, the parties must confer and decide who will file the docketing statement. Appellants proceeding pro se may file a docketing statement, but are not required to do so.

3. The docketing statement is not a brief and should not contain argument or motions. The nature of proceedings and relief sought should be stated succinctly. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as "the judgment of the tax court is not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement will be used in any mediation conducted under Fourth Circuit Local Rule 33. If counsel in a case in which all parties are represented by counsel believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissal of the appeal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven (7) days of service of the docketing statement, with copies to all other parties.

DOCKETING STATEMENT - TAX COURT

Caption of Case **4CCA Docket No. (IF KNOWN)** ____________

Tax Court Docket Number ____________ Judge ____________
Statute or other authority establishing jurisdiction in the:
Tax Court ____________
Court of Appeals ____________

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from ____________
2. Date this notice of appeal filed ____________
If cross appeal, date first notice of appeal filed ____________

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits? yes ( ) no ( )
2. If no, Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? yes ( ) no ( )
If yes, explain

C. Has this case previously been appealed? yes ( ) no ( )
If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are any related cases or cases raising related issues pending in this Court, the Tax Court or the Supreme Court? yes ( ) no ( )
If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator? yes ( ) no ( )

E. State the nature of the suit, the relief sought and the outcome below. Attach additional page if necessary.

F. Issues to be raised on appeal. Attach additional page if necessary.

G. Is settlement being discussed? yes ( ) no ( )

H. Is expedited disposition of this case necessary?
yes ( ) no ( )

If yes, you must file an appropriate motion.
Is oral argument necessary? yes ( ) no ( )

I. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

Adverse party______________________________
Attorney______________________________
Address______________________________
____
Telephone______________________________

J. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.

Appellant(s) Name ______________________________
Address ______________________________
____
Telephone ______________________________

Attorney's Name ______________________________
Firm ______________________________
Address ______________________________
____
Telephone ______________________________

Will you be handling the appeal? yes ( ) no ( )

FRAP 12(b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature ______________________________

Date ______________________________

ATTACH:

1. ADDITIONAL PAGES, IF ANY, CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
4. ANY OPINION OR FINDINGS.
5. A CERTIFICATE OF SERVICE.

DOCKETING STATEMENT - AGENCY

INSTRUCTIONS

1. Counsel for the petitioner or applicant must file two copies of a docketing statement for any petition for review, cross petition, application for enforcement, or cross application within fourteen days of docketing of the petition or application. The docketing statement must be received by the clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties. Petitioners proceeding pro se may file a docketing statement but are not required to do so.

2. Only one docketing statement shall be filed for each petition or application. If there are multiple petitioners or applicants, the parties should confer and decide who will file the docketing statement. A list of all names and addresses of parties, their attorneys and attorneys' names and addresses, and a certification that all parties have conferred and concurred in the filing must be attached to the docketing statement.

3. The docketing statement is not a brief and should not contain argument or motions. The nature of proceedings and relief sought should be stated succinctly. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as "the findings of the administrative law judge are not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement will be used in any mediation conducted under Fourth Circuit Local Rule 33. If counsel in a case in which all parties are represented by counsel believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven (7) days of service of the docketing statement, with copies to all other parties.

Form F. Docketing Statement — Agency.

DOCKETING STATEMENT-AGENCY

Caption of Case **4CCA Docket No. (If Known)** ____________

Type of Action

__ Application for Enforcement
__ Petition for Review
__ Cross Petition

Name of Agency ____________
Administrative Law Judge ____________
Agency Number ____________
Statute or other authority establishing jurisdiction in the Court of Appeals ____________

A. Timeliness
1. Date of entry of order ____________
2. Time allowed for review or enforcement ____________
Authority ____________

B. Finality
1. Tribunal or board issuing order or regulation ____________
2. Is the order or judgment appealed from a final decision on the merits? yes [ ] no [ ]
3. If no, is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? yes [ ] no [ ]
If yes, explain

C. If INS case, is petitioner subject to deportation while this petition is pending?
yes [ ] no [ ]
If yes, do you intend to file a motion to stay deportation?
yes [ ] no [ ]

D. Has this case been before the Court previously?
yes [ ] no [ ]
If yes, give case name, docket number, and disposition of each prior appeal on a separate sheet.

E. Is there any case now pending or about to be brought before this Court, any other court or administrative agency, or the Supreme Court which either arises from the same case or controversy or involves substantially related issues?
yes [ ] no [ ]

If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator?
yes [ ] no [ ]

F. State the nature of the proceeding, the relief sought, and the outcome below. Attach additional page if necessary.

G. Issues to be raised on petition or application. Attach additional page if necessary.

H. Is settlement being discussed? yes [ ] no [ ]

I. Is expedited disposition of this case necessary? yes [ ] no [ ]

If yes, you must file an appropriate motion.
Is oral argument necessary? yes [ ] no [ ]

J. List each adverse party to this action. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

Adverse party______________________________
Attorney__________________________________
Address__________________________________
Telephone________________________________

K. Petitioner's or Applicant's Name__________________________
Address ____
Telephone ______________________________________

L. Attorney or pro se litigant filing this docketing statement. Will you be handling the appeal?
yes[ ] no[ ]
Name ____
Attorney [ ] Pro Se [ ]
Firm ____
Address ____
Telephone ______________________________________

If this is a joint statement by multiple petitioners or applicants, add the names and addresses of other petitioners or applicants and their counsel on an additional sheet, accompanied by a certification that all petitioners or applicants concur in this filing.

Signature ______________________

Date ______________________

EACH COPY OF THE DOCKETING STATEMENT SERVED OR FILED SHALL HAVE ATTACHED TO IT COPIES OF:

(1) THE APPLICATION FOR ENFORCEMENT, OR PETITION FOR REVIEW;
(2) THE DOCKET SHEET OF THE AGENCY FROM WHICH THE APPEAL IS TAKEN;
(3) THE JUDGMENT OR ORDER SOUGHT TO BE REVIEWED AND ANY OPINION OR FINDING;
(4) ANY OPINION, FINDINGS, OR RECOMMENDATION OF AN ADMINISTRATIVE LAW JUDGE UNDERLYING THE ORDER AT ISSUE;
(5) ANY TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY); AND
(6) A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

Form G. Docketing Statement — Civil and Criminal Court.

DOCKETING STATEMENT

INSTRUCTIONS

1. Counsel for appellant must file two copies of a docketing statement with all attachments within fourteen days of filing the notice of appeal for every case appealed or cross-appealed to the court of appeals. The docketing statement must be received by the court of appeals clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties.

2. The attorney filing the notice of appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal. In the case of multiple appellants represented by separate counsel, the parties must confer and decide who will file the docketing statement. Appellants proceeding pro se may file a docketing statement, but are not required to do so.

3. The docketing statement is not a brief but will be used by the circuit mediator for pre-briefing review of civil cases in which all parties are represented by counsel, and in mediation conducted in such cases under Fourth Circuit Local Rule 33. The nature of proceedings and relief sought should be stated succinctly. The issues should be framed with reference to the specific facts and circumstances of the case. Conclusory statements such as "the judgment of the trial court is not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues in the brief, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement should not contain motions or other requests for interim relief. If counsel in a civil case believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth will cause the Court to initiate the process for dismissal of the appeal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven days of service of the docketing statement, with copies to all other parties.

6. You must attach to this docketing statement:

   - ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
   - THE NOTICE OF APPEAL.
   - THE DISTRICT COURT DOCKET SHEET.

- A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN (in criminal cases, DO NOT attach any confidential sections of the Judgment Order, such as the Statement of Reasons).
- ANY OPINION OR FINDINGS.
- ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
- A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY).
- A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Courthouse
1100 East Main Street, 5th Floor
Richmond, Virginia 23219-3517
(804) 916-2700

DOCKETING STATEMENT

Caption of Case **4CCA Docket No.(IF KNOWN)**____________

Type of Action
___ Civil
v. ___ Criminal/Prisoner
___ Cross Appeal

District______________Judge__________ District Court Docket Number______________
Statute or other authority establishing jurisdiction in the:
District Court_
Court of Appeals_

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from____________________
2. Date this notice of appeal filed________________________________
If cross appeal, date first notice of appeal filed____________________
3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b)____________________
4. Date of entry of order deciding above post-judgment motion______________
5. Filing date of any motion to extend time under FRAP 4(a)(5), 4(a)(6) or 4(b)____

____

Time extended to________________________________

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits?
[ ] Yes [ ] No
2. If no,

a.) Did the district court order entry of judgment as to fewer than all claims or all parties pursuant to FRCP 54(b)? [ ] Yes [ ] No

b.) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? [ ] Yes [ ] No

If yes, explain ______________________________________

(Criminal only)

3. Has the defendant been convicted? [ ] Yes [ ] No
4. Has a sentence been imposed? [ ] Yes [ ] No Term____________
5. Is the defendant incarcerated? [ ] Yes [ ] No

C. Has this case previously been appealed? [ ] Yes [ ] No
If yes, give the case name, docket number and disposition of each prior appeal on a separate page.

D. Based on your present knowledge:
Will this appeal involve a question of first impression?
[ ] Yes [ ] No
If yes, please explain briefly on a separate page.

E. Are any related cases or cases raising related issues pending in this Court, any district court of this circuit, or the Supreme Court? [ ] Yes [ ] No
If yes, cite the case and the manner in which it is related on a separate page. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.
If a related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator? [ ] Yes [ ] No

F. State the nature of the suit, the relief sought, and the outcome below. Attach additional page if necessary.

G. Issues to be raised on appeal. Attach additional page if necessary.

H. Does this appeal challenge the constitutionality of a federal or state statute in a case to which the United States or the affected state is not a party? [ ] Yes [ ] No

If yes, you must given written notice to the circuit clerk for certification of that fact to the United States Attorney General or the state attorney general.

I. Is settlement being discussed? [ ] Yes [ ] No

J. Is expedited disposition of this case necessary? [ ] Yes [ ] No
If yes, you must file an appropriate motion.

Is oral argument necessary?
[ ] Yes [ ] No

K. Were there any in-court proceedings below? [ ] Yes [ ] No
Is a transcript necessary for this appeal? [ ] Yes [ ] No
If yes, is transcript already on file with district court?
[ ] Yes [ ] No
If transcript is not already on file, attach copy of transcript order.

L. List each adverse party to the appeal. If no attorney, give address and telephone number of the adverse party. Attach additional page if necessary.

1. Adverse party____________________
Attorney____________________
Address____________________
____
Telephone____________________

2. Adverse party____________________
Attorney____________________
Address____________________
____
Telephone____________________

M. If this case arises out of a bankruptcy proceeding, attach a copy of the caption of the case in the bankruptcy court showing the parties' status as debtor, creditor, trustee, plaintiff, defendant, etc.

N. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.

Appellant(s) name____________________________________
Address____
____
____
Telephone____

Attorney's name ____________________________________
Firm____
Address____
____
Telephone____

Will you be handling the appeal? (In criminal cases counsel below will handle the appeal unless relieved by this court.)

[ ] Yes [ ] No

FRAP 12(b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature______________________________
Date __________________________________

ATTACH:

1. ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. THE DISTRICT COURT DOCKET SHEET.
4. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN (DO NOT attach Statement of Reasons or other confidential sections of Criminal Judgment).
5. ANY OPINION OR FINDINGS.
6. ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
7. A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY).
8. A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

Index to Local Rules of the United States Court of Appeals for the Fourth Circuit

A

ABEYANCE.
Holding case in abeyance, 4thCirFRAP 12(d).

AGENCIES.
Forms.
  Petition for review of order of agency, 4thCirFRAP Form 3.
Petition for review of order of agency.
  Attachment of order required, 4thCirFRAP 15(b).
  List of respondents attached, 4thCirFRAP 15(b).

AMICUS CURIAE.
Corporations.
  Disclosure required, 4thCirFRAP 26.1(b).

APPEARANCE OF COUNSEL, 4thCirFRAP 46(c), 4thCirFRAP Form B.

APPENDIX.
Abbreviated appendix.
  Motion to proceed on original record granted, 4thCirFRAP 30(d).
Attorney sanctions for unnecessary appendix designations, 4thCirFRAP 30.
Contents, 4thCirFRAP 30(b).
Copies.
  Number of copies, 4thCirFRAP 30(b).
Court-appointed cases.
  Copying expenses, length, joint appendix, 4thCirFRAP 32(a).
Dispensing with appendix, 4thCirFRAP 30(d).
Filing, 4thCirFRAP 31(c).
In banc hearing.
  Additional copies, 4thCirFRAP 35(d).
Length of appendix, 4thCirFRAP 30(b).
Parties.
  Responsibilities, 4thCirFRAP 30(c).
Reproduction, 4thCirFRAP 32(a).
Responsibility of parties, 4thCirFRAP 30(c).
Sentencing hearing transcript and presentence report.
  Review of application of sentencing guidelines, 4thCirFRAP 30(b).
Service, 4thCirFRAP 31(c).

ARGUMENT.
Oral argument, 4thCirFRAP 34.

ARGUMENT CALENDAR.
Preparation, 4thCirFRAP 34(c).
Removal of case, 4thCirFRAP 34(c).

ASSOCIATIONS.
Trade associations.
  Disclosure of financial interest.
    Form, 4thCirFRAP Form A.

ATTACHMENTS TO BRIEFS.
Supplemental material, 4thCirFRAP 28(b).

ATTACHMENTS TO MOTIONS.
Petitions for review, 4thCirFRAP 15(b).

ATTORNEYS AT LAW.
Admission to practice, 4thCirFRAP 46(b).
Appearance, 4thCirFRAP Form B.
Appearance of counsel, 4thCirFRAP 46(c).
Appointment of counsel, 4thCirFRAP 46(d).
Fees.
  Expenses and attorneys' fees, 4thCirFRAP 46(e).
Pro se proceeding, 4thCirFRAP 46(f).
Record on appeal.
  Access of counsel to original record, 4thCirFRAP 11(d).
Rules of disciplinary enforcement, 4thCirFRAP 46(g).
Substitution of counsel, 4thCirFRAP 46(c).
Withdrawal of counsel, 4thCirFRAP 46(c).

AUTHORITY.
Citation of additional authority, 4thCirFRAP 28(e).

B

BILL OF COSTS.
Taxation of costs, 4thCirFRAP 39(b).

BOARDS.
Forms.
  Petition for review of order of board, 4thCirFRAP Form 3.

BRIEFING ORDERS.
Civil and criminal cases, 4thCirFRAP 31(b).

BRIEFS.
Addenda at end of brief, 4thCirFRAP 28(b).
Additional memoranda.
  Leave to file, 4thCirFRAP 28(c).
Attachments to briefs.
  Supplemental material, 4thCirFRAP 28(b).
Certificate of confidentiality.
  Document containing or disclosing material under seal, 4thCirFRAP 25(c).
Citation of additional authorities, 4thCirFRAP 28(e).
Consolidated brief, 4thCirFRAP 28(d).
Consolidated cases and briefs, 4thCirFRAP 28(a).
Copies.
  Number of copies, 4thCirFRAP 31(d).
Criminal cases.
  Shortened time for service and filing of briefs, 4thCirFRAP 31(a).
Extension of time to file, 4thCirFRAP 31(c).
Failure to comply with rules or standards, 4thCirFRAP 32(c).
Filing, 4thCirFRAP 31(c).
Hearing panel.
  Argument time, 4thCirFRAP 34(d).
Illegible briefs.
  Failure to comply with rules or standards, 4thCirFRAP 32(c).
In banc hearing.
  Additional copies, 4thCirFRAP 35(d).

BRIEFS —Cont'd
Informal briefs, 4thCirFRAP 34(b).
Joint brief, 4thCirFRAP 28(d).
Length, 4thCirFRAP 32(b).
Motion for permission to submit longer brief, 4thCirFRAP 32(b).
Motion to submit on brief, 4thCirFRAP 34(e).
Number of copies, 4thCirFRAP 31(d).
Printing costs, 4thCirFRAP 39.
Reproduction, 4thCirFRAP 32(a).
Service, 4thCirFRAP 31(c).
Statement of facts, 4thCirFRAP 28(f).
Supplemental authorities.
  Counsel's letter drawing court's attention to, 4thCirFRAP 28(c).

C

CALENDAR.
Argument calendar.
  Preparation, 4thCirFRAP 34(c).

CAPITAL PUNISHMENT.
Certificate of death penalty case.
  Form, 4thCirFRAP Form C.
Death penalty cases, 4thCirFRAP 22(b).
Forms.
  Certificate of death penalty case, 4thCirFRAP Form C.
Motions for authorization, 4thCirFRAP 22(d).
Petition for rehearing, 4thCirFRAP 22(c).
Stay of execution.
  Motion for stay, 4thCirFRAP 22(b).

CERTIFICATE OF CONFIDENTIALITY.
Document containing or disclosing material under seal, 4thCirFRAP 25(c).

CERTIFICATE OF SERVICE, 4thCirFRAP 25(b).

CIRCUIT MEDIATION CONFERENCE, 4thCirFRAP 33.

CIRCUIT MEDIATORS, 4thCirFRAP 33.

CITATION.
Additional authorities, 4thCirFRAP 28(e).

CLERK.
Entry of procedural orders, 4thCirFRAP 27(b).

COMMISSIONS.
Forms.
  Petition for review of order of commission, 4thCirFRAP Form 3.

CONFIDENTIAL INFORMATION.
Certificate of confidentiality.
  Document containing or disclosing material under seal, 4thCirFRAP 25(c).
Disclosures in mediation conference, 4thCirFRAP 33.
Filing, 4thCirFRAP 25(c).
Sealing of records, 4thCirFRAP 25(c).

CONSOLIDATED APPEALS, 4thCirFRAP 12(b).

CONSOLIDATED CASES AND BRIEFS, 4thCirFRAP 28(a).

CONTEMPT.
Recalcitrant witnesses, 4thCirFRAP 9(c).

CONVICTIONS.
Notice of appeal.
  Release after conviction and notice of appeal, 4thCirFRAP 9(b).

CONVICTIONS —Cont'd
Release prior to judgment of conviction, 4thCirFRAP 9(a).

COPIES.
Appendix.
  Number of copies, 4thCirFRAP 30(b).
Number of copies.
  Appendix, 4thCirFRAP 30(b).
  Briefs, 4thCirFRAP 31(d).
Petition for rehearing, 4thCirFRAP 40(a).
Published and unpublished opinions.
  Availability, fee, website, 4thCirFRAP 36(b).

CORPORATIONS.
Amicus curiae.
  Disclosure requirements, 4thCirFRAP 26.1.
Disclosure of corporate affiliations and other entities with direct financial interest in litigation, 4thCirFRAP 26.1.
  Form, 4thCirFRAP Form A.
  To accompany motion, 4thCirFRAP 27(c).

COSTS.
Bill of costs, 4thCirFRAP 39(b).
Printing costs, 4thCirFRAP 39.
Recovery in district court, 4thCirFRAP 39(c).

COURT APPOINTED COUNSEL, 4thCirFRAP 46(d).

COURT SESSIONS, 4thCirFRAP 34(c).

CRIMINAL CASES.
Appendix.
  Review of application of sentencing guidelines.
    Sentencing hearing transcript and presentence report, 4thCirFRAP 30(b).
Appointment of counsel for indigents, 4thCirFRAP 46(d).
Briefs.
  Shortened time for service and filing of briefs, 4thCirFRAP 31(a).
Disclosure of corporate affiliations and entities with financial interest in litigation.
  Corporate party must file, 4thCirFRAP 26.1.

CROSS APPEALS.
Docketing statement, 4thCirFRAP 3(b).
Identifying cross appeals, 4thCirFRAP 12(b).

D

DEATH PENALTY CASES.
Forms.
  Certificate of death penalty case, 4thCirFRAP Form C.
Generally, 4thCirFRAP 22(b).
Motions for authorization, 4thCirFRAP 22(d).
Petition for rehearing, 4thCirFRAP 22(c).

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH DIRECT FINANCIAL INTEREST IN LITIGATION.
Amendment, 4thCirFRAP Rule 26.1(e).
Corporate amicus curiae, 4thCirFRAP Rule 26.1(b).
Form, 4thCirFRAP Form A.
  Provided by clerk, 4thCirFRAP Rule 26.1(c).
Information disclosed, 4thCirFRAP 26.1(a).

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH DIRECT FINANCIAL INTEREST IN LITIGATION —Cont'd
Intervenors.
  Disclosure requirements, 4thCirFRAP 26.1(a).
Negative statement required.
  No disclosures to make, 4thCirFRAP Rule 26.1(c).
Time for filing, 4thCirFRAP Rule 26.1(d).
Who must file, 4thCirFRAP 26.1(a).

DISMISSAL.
Docketing statement untimely filed, 4thCirFRAP 3(b).
Voluntary dismissals, 4thCirFRAP 42.
Want of prosecution, 4thCirFRAP 45.

DOCKET.
Docketing statement, 4thCirFRAP 3(b).
  Agency.
    Form, 4thCirFRAP Form F.
  Civil or criminal.
    Form, 4thCirFRAP Form G.
  Tax.
    Form, 4thCirFRAP Form E.
Fees, 4thCirFRAP 3(a).
  Review of agency order, 4thCirFRAP 15.

E

ELECTRONIC CASE FILING SYSTEM, 4thCirFRAP 25(a).

EXECUTION.
Motions for stay of execution, 4thCirFRAP 22(b).

EXHIBITS.
Documentary exhibits.
  Included in record, 4thCirFRAP 11(c).

EXPEDITION OF APPEALS, 4thCirFRAP 12(c).

EXPENSES.
Attorneys' fees and expenses, 4thCirFRAP 46(e).

F

FACSIMILE FILING, 4thCirFRAP 25(b).

FAILURE TO PROSECUTE.
Dismissal for want of prosecution, 4thCirFRAP 45.

FAX FILING, 4thCirFRAP 25(b).

FEES.
Attorneys' fees and expenses, 4thCirFRAP 46(e).
Copies of published or unpublished opinions, 4thCirFRAP 36(b).
Docket fees, 4thCirFRAP 3(a).
  Review of agency order, 4thCirFRAP 15.
Filing fees, 4thCirFRAP 3(a).
Writs of mandamus and prohibition.
  Prisoner petitions, 4thCirFRAP 21(c).

FILING.
Appendix, 4thCirFRAP 31(c).
Briefs in criminal cases.
  Shortened time for service and filing of briefs, 4thCirFRAP 31.

FILING —Cont'd
Civil cases, 4thCirFRAP 31(c).
Confidential material, 4thCirFRAP 25(c).
Courier service used.
  Timely filed, 4thCirFRAP Rule 31(c).
Criminal cases, 4thCirFRAP 31(c).
Disclosure of corporate affiliations and other entities with financial interest in litigation.
  Time for filing, 4thCirFRAP 26.1(d).
Docketing statements, 4thCirFRAP 3(b).
Electronic filing, 4thCirFRAP 25(a).
Fax filing, 4thCirFRAP 25(b).
Fees, 4thCirFRAP 3(a).
Holidays, 4thCirFRAP 26.
Inclement weather, 4thCirFRAP 26.
Petition for rehearing, 4thCirFRAP 40(a).
Sealed material, 4thCirFRAP 25(c).
Time.
  Effect of holiday or bad weather, 4thCirFRAP 26.
Timely filing, 4thCirFRAP 25(b).
When deemed filed, 4thCirFRAP 25(b).

FINANCIAL INTEREST IN LITIGATION.
Disclosure by corporations or other entities, 4thCirFRAP 26.1.
  To accompany motion, 4thCirFRAP 27(c).

FORMS.
Agencies.
  Petition for review of order of agency, 4thCirFRAP Form 3.
Appearance of counsel, 4thCirFRAP Form B.
Boards.
  Petition for review of order of board, 4thCirFRAP Form 3.
Capital punishment.
  Certificate of death penalty case, 4thCirFRAP Form C.
Commissions.
  Petition for review of order of commission, 4thCirFRAP Form 3.
Death penalty cases.
  Certificate of death penalty case, 4thCirFRAP Form C.
Disclosure of corporate affiliations and other entities with direct financial interest in litigation, 4thCirFRAP Form A.
Docketing statement.
  Agency, 4thCirFRAP Form F.
  Civil or criminal, 4thCirFRAP Form G.
  Tax, 4thCirFRAP Form E.
In forma pauperis.
  Affidavit to accompany motion for leave to appeal, 4thCirFRAP Form 4.
Notice of appeal.
  Decision of United States tax court, 4thCirFRAP Form 2.
  Judgment or order of bankruptcy appellate panel, 4thCirFRAP Form 5.
  Judgment or order of district court, 4thCirFRAP Forms 1, 5.
Officer.
  Petition for review of order of officer, 4thCirFRAP Form 3.

H

HABEAS CORPUS.
Certificates of appealability, 4thCirFRAP 22(a).

HABEAS CORPUS —Cont'd
Death penalty cases, 4thCirFRAP 22(b).

HOLIDAYS.
Filing, 4thCirFRAP 26.

I

IN BANC HEARING.
Appendix.
  Additional copies, 4thCirFRAP 35(d).
Briefs.
  Additional copies, 4thCirFRAP 35(d).
Petition for rehearing requesting, 4thCirFRAP 40(a).

IN BANC PROCEEDINGS.
Decision of cases heard or reheard in banc, 4thCirFRAP 35.
Decision to hear or rehear a case in banc, 4thCirFRAP 35.
Petition for rehearing in banc, 4thCirFRAP 35.

INCLEMENT WEATHER.
Filing, 4thCirFRAP 26.

INDIGENT PERSONS.
Appointment of counsel for indigents, 4thCirFRAP 46(d).
Forms.
  Affidavit to accompany motion for leave to appeal, 4thCirFRAP Form 4.
In forma pauperis proceedings, 4thCirFRAP 24.
Law students.
  Legal assistance to indigents by law students, 4thCirFRAP 46.
Prisoner appeals, 4thCirFRAP 24.

INJUNCTIONS.
Stay or injunction pending appeal, 4thCirFRAP 8.

INTERLOCUTORY ORDERS, 4thCirFRAP 5.

INTERNAL OPERATING PROCEDURES.
Advisory committee, 4thCirFRAP 47(b).
Procedure for adoption, 4thCirFRAP 47(a).

INTERVENTION.
Disclosure of corporate affiliations and other entities with financial interest in litigation.
  Intervenors to file, 4thCirFRAP 26.1(a).
Motion to intervene, 4thCirFRAP 12(e).
Notice of appearance, 4thCirFRAP 12(e).

J

JUDGES.
Single judges.
  Applications to a single judge, 4thCirFRAP 27(f).
  Application to single judge, exceptional circumstance, 4thCirFRAP 27(e).
  Motions before single judge, 4thCirFRAP 27(f).

JUDGMENT OF CONVICTION.
Release prior to judgment of conviction, 4thCirFRAP 9(a).

L

LAW STUDENTS.
Indigent persons.
  Legal assistance to indigents by law students, 4thCirFRAP 46.

LEGAL ASSISTANCE TO INDIGENTS BY LAW STUDENTS, 4thCirFRAP 46.

LIST OF RESPONDENTS.
Petitions for review of agency orders.
  Required, 4thCirFRAP 15(b).

LOCAL RULES.
Advisory committee, 4thCirFRAP 47(b).
Procedure for adoption, 4thCirFRAP 47(a).

M

MANDAMUS.
Case captions, 4thCirFRAP 21(a).
Crime victims' rights, petition to assert, 4thCirFRAP 21(d).
Petitions for special writs, 4thCirFRAP 21(b).

MANDATE.
Motion for stay of the mandate, 4thCirFRAP 41.

MEDIATION CONFERENCE, 4thCirFRAP 33.

MOTIONS.
Assignment to motion panel.
  Application to single judge, exceptional circumstance, 4thCirFRAP 27(e).
Attachments, motion supported by, 4thCirFRAP 27(c).
Authorization for second or successive application for relief, 4thCirFRAP 22(d).
Briefs.
  Permission to submit longer brief, 4thCirFRAP 32(b).
  Submitting the case on the brief, 4thCirFRAP 34(e).
Certificate of confidentiality.
  Document containing or disclosing material under seal, 4thCirFRAP 25(c).
Consented to or unopposed, entry by clerk, 4thCirFRAP 27(b).
Content, 4thCirFRAP 27(a).
Disclosure of corporate affiliations and other entities with financial interest in litigation, 4thCirFRAP 27(c).
Emergency motions, 4thCirFRAP 27(e).
Form generally, 4thCirFRAP 27(c).
Notice of intent to file motion, statement by counsel, 4thCirFRAP 27(a).
Number of copies to be filed, 4thCirFRAP 27(c).
Procedure and substantive relief.
  Not requested in single motion, 4thCirFRAP 27(c).
Publication of unpublished decisions, 4thCirFRAP 36(b).
Reply to response, 4thCirFRAP 27(d).
Response, 4thCirFRAP 27(d).
Sealing records, 4thCirFRAP 25(c).
Single judge.
  Application to single judge, exceptional circumstance, 4thCirFRAP 27(e).

MOTIONS —Cont'd
Single judge entertaining and deciding, 4thCirFRAP 27(e).
Statement by counsel that other parties informed of intended filing of motion, 4thCirFRAP 27(a).
Summary disposition, 4thCirFRAP 27(f).

N

NON-PARTIES.
Appeals by aggrieved non-parties in lower court, 4thCirFRAP 12(a).

NOTICE.
Appearance as intervenor, 4thCirFRAP 12(e).
Oral argument.
  Attorneys appearing, 4thCirFRAP 34(c).
Release after conviction and notice of appeal, 4thCirFRAP 9(b).

NOTICE OF APPEAL.
Forms.
  Decision of United States tax court, 4thCirFRAP Form 2.
  Judgment or order of bankruptcy appellate panel, 4thCirFRAP Form 5.
  Judgment or order of district court, 4thCirFRAP Forms 1, 5.

O

OPINIONS.
Citation, 4thCirFRAP 32.1.
Publication of decisions, 4thCirFRAP 36(a).
Unpublished opinions, 4thCirFRAP 36(b).

ORAL ARGUMENT.
Generally, 4thCirFRAP 34(a).
Notice.
  Attorneys appearing, 4thCirFRAP 34(c).
Statement regarding need for oral argument, 4thCirFRAP 34(a).
Time allocated, 4thCirFRAP 34(d).

ORDERS.
Briefing orders.
  Civil and criminal cases, 4thCirFRAP 31(b).
Certificate of confidentiality.
  Document containing or disclosing material under seal, 4thCirFRAP 25(c).
Interlocutory orders, 4thCirFRAP 5.
Procedural orders, entry by clerk, 4thCirFRAP 27(b).
Protective order.
  Sealed records, 4thCirFRAP 25(c).
Reconsideration of order entered by clerk, party adversely affected, 4thCirFRAP 27(b).
Transcript order acknowledgments, 4thCirFRAP 11.

ORIGINAL RECORD.
Motion to proceed on.
  Not usually granted, abbreviated appendix if granted, 4thCirFRAP 30(d).

P

PARTIES.
Aggrieved non-parties.
  Appeals from lower court, 4thCirFRAP 12(a).

PARTIES —Cont'd
Appendix.
  Responsibility of parties, 4thCirFRAP 30(c).
Disclosure of corporate affiliations and financial interest.
  Form, 4thCirFRAP Form A.
Disclosure of corporate affiliations and other entities with financial interest in litigation, 4thCirFRAP 26.1.
Multiple parties.
  Consolidated or joint brief, 4thCirFRAP 28(d).

PETITIONS.
Death penalty cases.
  Rehearing in death penalty cases, 4thCirFRAP 22(c).
Extraordinary writs, 4thCirFRAP 21(b).
Rehearing, 4thCirFRAP 40(a).
  Death penalty cases, 4thCirFRAP 22(c).
  Denial of petition.
    Papers filed after denial, 4thCirFRAP 40(d).
  En Banc, 4thCirFRAP 35.
  Panel rehearing, 4thCirFRAP 40(d).
  Statement of purpose, 4thCirFRAP 40(b).
  Strict enforcement of time limits for filing, 4thCirFRAP 40(c).
Review of agency orders.
  Agency order attached, 4thCirFRAP 15(b).
  List of respondents attached, 4thCirFRAP 15(b).

PRINTING COSTS, 4thCirFRAP 39.

PRISONERS.
In forma pauperis proceedings, 4thCirFRAP 24.
Writs.
  Fees and cost for prisoner petitions, 4thCirFRAP 21(c).

PROBABLE CAUSE.
Certificates of appealability, 4thCirFRAP 22(a).

PROHIBITION, WRIT OF.
Case captions, 4thCirFRAP 21(a).
Petitions for special writs, 4thCirFRAP 21(b).

PRO SE PROCEEDINGS, 4thCirFRAP 46(f).

PROTECTIVE ORDER.
Sealed records, 4thCirFRAP 25(c).

PUBLICATION OF DECISIONS, 4thCirFRAP 36(a).
Unpublished decisions.
  Motion for publication, 4thCirFRAP 36(b).

R

RECONSIDERATION OF ORDERS ENTERED BY CLERK, 4thCirFRAP 27(b).

RECORD ON APPEAL.
Attorneys at law.
  Access of counsel to original record, 4thCirFRAP 11(d).
Certificate that record of docket entries available upon request.
  Transmitted with notice of appeal, 4thCirFRAP 10(a).
Composition, 4thCirFRAP 10(b).
Confidential and sealed materials, 4thCirFRAP 25(c).
Notification to court of subsequent filing of transcript, 4thCirFRAP 10(a).

RECORD ON APPEAL —Cont'd
Original record.
Access of counsel to original record, 4thCirFRAP 11(d).
Motion to proceed on.
Not usually granted, abbreviated appendix if granted, 4thCirFRAP 30(d).
Preparation and transmittal, 4thCirFRAP 10(b).
Retention in district court, 4thCirFRAP 10(a).
Transcript, 4thCirFRAP 10(c).
Transmittal, time.
Request by clerk of court of appeals, 4thCirFRAP 10(a).

REHEARING.
En banc, 4thCirFRAP 35.
Petition, 4thCirFRAP 40(a).
Death penalty case, 4thCirFRAP 22(c).
Denial.
Papers filed after denial, 4thCirFRAP 40(d).
En banc, 4thCirFRAP 35.
Introduction statement by counsel that certain situation exists, 4thCirFRAP 40(b).
Panel rehearing, 4thCirFRAP 40(d).
Statement of purpose, 4thCirFRAP 40(b).
Strict enforcement of time limits for filing, 4thCirFRAP 40(c).

RELEASE.
After conviction and notice of appeal, 4thCirFRAP 9(b).
Judgment of conviction.
Prior to judgment of conviction, 4thCirFRAP 9(a).

REPLY TO RESPONSE TO MOTION, 4thCirFRAP 27(d).

RESPONSE TO MOTION, 4thCirFRAP 27(d).

RULES OF DISCIPLINARY ENFORCEMENT, 4thCirFRAP 46(g).

S

SEALED MATERIALS.
Certificate of confidentiality.
Filing containing sealed material, 4thCirFRAP 25(c).
Filing, 4thCirFRAP 25(c).

SEALING RECORDS.
Motion to seal, 4thCirFRAP 25(c).

SENTENCING GUIDELINES.
Appendix.
Review of application.
Sentencing hearing transcript and presentence report, 4thCirFRAP 30(b).

SERVICE.
Appendix, 4thCirFRAP 31(c).
Briefs in criminal cases.
Shortened time for service and filing of briefs, 4thCirFRAP 31.
Certificate of service, 4thCirFRAP 25(b).
Civil cases, 4thCirFRAP 31(c).
Courier service used.
Timely filed, 4thCirFRAP Rule 31(c).
Criminal cases, 4thCirFRAP 31(c).
On counsel of record, 4thCirFRAP 25(b).

SERVICE —Cont'd
Time.
Effect of holiday or bad weather, 4thCirFRAP 26.

SESSIONS OF COURT, 4thCirFRAP 34(c).

SINGLE JUDGE.
Application to single judge, exceptional circumstance, 4thCirFRAP 27(e).

STATEMENT OF FACTS.
Briefs, 4thCirFRAP 28(f).

STAYS.
Execution.
Motions for stay of execution, 4thCirFRAP 22(b).
Injunction or stay pending appeal, 4thCirFRAP 8.
Mandate.
Motion for stay of the mandate, 4thCirFRAP 41.
Pending review, 4thCirFRAP 18.

SUBSTITUTION OF COUNSEL, 4thCirFRAP 46(c).

SUMMARY DISPOSITION OF APPEALS.
Motions, 4thCirFRAP 27(f).
Pre-argument review and summary disposition, 4thCirFRAP 34(a).

T

THREE JUDGE PANELS.
Argument time, 4thCirFRAP 34(d).

TIME.
Holidays or bad weather.
Effect on filing and service dates, 4thCirFRAP 26.

TRADE ASSOCIATIONS.
Disclosure of financial interest.
Form, 4thCirFRAP Form A.

TRANSCRIPTS, 4thCirFRAP 10(c).
Dismissal by clerk for want of prosecution.
Failure to timely order, make financial arrangements, specify proceedings, 4thCirFRAP 10(c).
Docketing statements.
Transcript order attached, 4thCirFRAP 3(b).
Financial arrangements prior to ordering, 4thCirFRAP 10(c).
Guidelines for preparation, 4thCirFRAP 10(c).
Order acknowledgments, 4thCirFRAP 11(a).
Ordering, responsibility, 4thCirFRAP 10(c).
Statement in lieu, 4thCirFRAP 10(c).
Time limits for filing, 4thCirFRAP 11(b).

U

UNPUBLISHED OPINIONS, 4thCirFRAP 36(b).
Citation, 4thCirFRAP 32.1.

V

VICTIMS OF CRIME.
Mandamus.
Petition to assert rights of crime victims, 4thCirFRAP 21(d).

W

WANT OF PROSECUTION.
Dismissal for failure to prosecute, 4thCirFRAP 45.

WITHDRAWAL OF COUNSEL, 4thCirFRAP 46(c).

WITNESSES.
Recalcitrant witnesses, 4thCirFRAP 9(c).

WRITS.
Case captions for extraordinary writs, 4thCirFRAP 21(a).
Petitions.
- Mandamus or prohibition, 4thCirFRAP 21(b).
  - Crime victims' rights, assertion of, 4thCirFRAP 21(d).

Prisoners.
- Fees and cost for prisoner petitions, 4thCirFRAP 21(c).

INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Revised effective October, 1992,
with amendments received through December 1, 2008.

IOP
3.1. Transmission of district court order.
6.1. Bankruptcy appeals.
11.1. Sanctions for court reporter's failure to file a timely transcript.
12.1. Organization of the court's docket (Deleted December 1, 1998).
22.1. Death penalty cases.
34.1. Calendar assignments and panel composition.
34.2. Disposition without oral argument.
36.1. Opinion preparation assignments.
36.2. Circulation of opinions in argued cases.
36.3. Summary opinions.
40.1. Submission of petitions for rehearing to the court.
40.2. Panel rehearing.
41.1. Issuance of the mandate.
41.2. Petitions for writs of certiorari.
45.1. Clerk's office.
45.2. Public information.
47.1. Judicial conference.
IOP
47.2. Bar membership in the judicial conference of the circuit.

Appendices

Appx.
A. Resolution respecting bar membership in the judicial conference of the circuit.
B. Guidelines for preparation of appellate transcripts in the Fourth Circuit.
C. Plan of the United States Court of Appeals for the Fourth Circuit in implementation of the Criminal Justice Act.
C. Plan of the United States Court of Appeals for the Fourth Circuit in implementation of the Criminal Justice Act.
D. Docketing Statement — Instructions.
E. Docketing Statement — Agency Instructions.
F. Docketing Statement — Tax court.
G. Death Penalty Representation.

Index follows Rules.

Editor's Note. — Each operating procedure (I.O.P.) has been given a number which corresponds to the number of the rule in the Federal Rules of Appellate Procedure to which it pertains, and the court has attempted not to repeat any information that can be found in the body of any rule. Whenever possible, information concerning practices and procedures of this court are set forth in the published internal operating procedures of the court rather than in the local rules. The court has adopted a local rule only in those circumstances where the rule establishes specific affirmative obligations on the parties proceeding before the court, delegates additional authority to the clerk or creates certain options which the Federal Rules of Appellate Procedure indicate can only be exercised by creation of a local rule.

For website, see **www.ca4.uscourts.gov/.**

IOP 3.1. Transmission of district court order.

The clerk of the district court shall transmit to the clerk of the court of appeals a copy of the order appealed from, along with copies of the materials required by FRAP 3(d)(1). (Amended effective December 1, 1995; amended effective December 1, 1998.)

IOP 6.1. Bankruptcy appeals.

The Fourth Circuit has not established panels of three bankruptcy judges to hear appeals from bankruptcy courts pursuant to 28 U.S.C. § 158.

IOP 11.1. Sanctions for court reporter's failure to file a timely transcript.

The Fourth Circuit Judicial Council has implemented a resolution of the Judicial Conference of the United States which mandates sanctions for the late delivery of transcripts. For transcripts not delivered within the time limits set forth in Local Rule 11(b), the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 30 days after that time the reporter may charge only 80 percent of the prescribed fee. The time period in criminal proceedings fro the preparation of transcripts that are ordered before sentencing shall not begin to run until after entry of the judgment and commitment order. (Amended effective December 1, 1995; amended effective December 1, 2002.)

IOP 12.1. Organization of the court's docket (Deleted December 1, 1998).

IOP 22.1. Death penalty cases.

Once a notice of appeal has been filed in a case involving a sentence of death where an execution date has been set, a panel of three judges will be promptly identified for consideration of all matters related to the case. The position of coordinator of case information in death penalty cases has been established in the Clerk's Office of the Court of Appeals for the purpose of establishing personal liaison with district court personnel and counsel to aid in the expeditious treatment of appeals involving a sentence of death. An expedited briefing schedule will be established when necessary to allow the Court the opportunity to review all issues presented. (Amended effective December 1, 1995; amended effective June 1, 1999; amended effective July 8, 2003.)

IOP 34.1. Calendar assignments and panel composition.

The Clerk of Court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three-judge panels provided by a computer program designed to achieve total random selection.

The composition of each panel usually changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. Every effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a preargument motion or prior appeal in the matter, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to a hearing panel. The varied assignment of judges to panels and the independent assignment of varied cases to panels is designed, insofar as practicable, to assure the opportunity for each judge to sit with all other judges an equal number of times, and to assure that both the appearance and the fact of presentation of particular types of cases to particular judges is avoided. (Amended effective December 1, 1995; amended effective February 1, 2001.)

IOP 34.2. Disposition without oral argument.

A decision against oral argument must be unanimous, and if a case is decided without oral argument the decision on the merits must be unanimous also. Whenever at least one member of the review panel determines that oral argument would be of assistance, the panel notifies the clerk who places the case on the oral argument calendar. (Amended effective December 1, 1995.)

IOP 36.1. Opinion preparation assignments.

The custom of the Fourth Circuit is to reserve judgment at the conclusion of oral argument. A conference of the panel is held promptly after oral argument, usually immediately after the presentation of the case. Although a tentative decision may be reached at this conference, additional conferences are sometimes necessary. Opinion assignments are made by the Chief Judge on the basis of recommendations from the presiding judge of each panel on which the Chief Judge did not sit.

IOP 36.2. Circulation of opinions in argued cases.

Although one judge writes the opinion, every panel member is equally involved in the process of decision. An appeal may be heard and decided by two of the three judges assigned to a panel, when one judge becomes unavailable. If a panel is reduced to two and the two cannot agree, however, the case will be reargued before a new three-judge panel which may or may not include prior panel members.

When a proposed opinion in an argued case is prepared and submitted to other panel members, copies are provided to the non-sitting judges, including the senior judges, and their comments are solicited. The opinion is then finalized. The Clerk's Office never receives advance notice of when a decision will be rendered, so counsel should not call for such information. (Amended effective December 1, 1995; amended April 1, 2008.)

IOP 36.3. Summary opinions.

If all judges on a panel of the Court agree following oral argument that an opinion in a case would have no precedential value, and that summary disposition is otherwise appropriate, the Court may decide the appeal by summary opinion. A summary opinion identifies the decision appealed from, sets forth the Court's decision and the reason or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the Court's reasoning.

IOP 40.1. Submission of petitions for rehearing to the court.

The Clerk's Office will hold any petition for rehearing or petition for rehearing en banc until the time for filing all such petitions, or any extension thereof granted in the particular case, has run. Thereafter, all petitions for rehearing in the same case will be distributed to the Court simultaneously. (Amended effective December 1, 1995; amended effective December 1, 1998.)

IOP 40.2. Panel rehearing.

The panel of judges who heard and decided the appeal will rule on the petition for rehearing. Such panel may include a senior circuit judge or a visiting judge sitting in the Fourth Circuit by designation.

If a petition for rehearing is granted, the original judgment and opinion of the Court are vacated and the case will be reheard before the original panel. The Court may direct the filing of additional briefs, or the parties may seek leave of Court to file additional briefs. (Amended effective December 1, 1995.)

IOP 41.1. Issuance of the mandate.

On the date of issuance of the mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day. The trial court record will be returned to the clerk of that court once the mandate has issued.

IOP 41.2. Petitions for writs of certiorari.

A petition for a writ of certiorari must be filed with the Supreme Court within 90 days of the entry of judgment in a criminal case or a civil case. The time for the petition does not run from the issuance of the mandate, but from the date of judgment which is also the opinion date. If a petition for rehearing or a petition for rehearing en banc is timely filed, the time runs from the date of denial of that petition. Counsel should consult the Rules of the Supreme Court for details on how to proceed with the petition.

The Rules of the Supreme Court do not require that the record accompany a petition for certiorari and the record will not be forwarded unless specifically requested by the petitioner or counsel. Requests to certify and transmit the record to the Supreme Court prior to action on the petition for a writ of certiorari are disfavored by the Supreme Court. The Clerk of the Supreme Court will request the record from the Court of Appeals when review of the record is desired by the Supreme Court prior to action on a petition for writ of certiorari or upon granting certiorari if the record has not been transmitted earlier. The same procedures are followed for Supreme Court review by certification pursuant to 28 U.S.C. § 1254(2).

If a case is remanded to the Court of Appeals from the Supreme Court, the case shall be reopened under the original docket number and the Court of Appeals may require additional briefs and oral argument, summarily dispose of the case, or take any other action consistent with the Supreme Court's opinion. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

I.O.P. 41.2 is amended to clarify, consistent with amendments to FRAP 35, that a timely petition for rehearing en banc will now stay the time to petition for certiorari.

IOP 45.1. Clerk's office.

The Clerk's Office is located on the fifth floor of the United States Courthouse Annex in Richmond, Virginia, and is open from 8:30 a.m. to 5:00 p.m. every weekday, except federal holidays. All correspondence concerning cases pending before the Court should be addressed to:

Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
Telephone 804/916-2700

IOP 45.2. Public information.

The Court's opinions, rules, procedures, forms, and argument calendar are available at www.ca4.uscourts.gov. Docket information is also available at www.ca4.uscourts.gov to users with a log-in name and password for the Judiciary's PACER system (Public Access to Court Electronic Records). Information concerning the status of appeals and the operation of rules and procedures may be obtained from the Clerk's Office by telephone inquiry. Matters of public record may be reviewed upon request at the Clerk's Office and case documents may be transmitted to the district court for review by counsel upon proper application to the Clerk's Office. (Amended effective December 1, 2002.)

IOP 47.1. Judicial conference.

(A) There shall be held pursuant to 28 U.S.C. § 333 a conference of all the circuit and district judges, all bankruptcy judges and all full-time magistrate judges of the Circuit for the purpose of considering the business of the courts, advising means of improving the administration of justice within the Circuit, and discussion of ideas with respect to the administration of justice. It shall be the duty of every judge of the Circuit in active service and every full-time magistrate judge to attend such conference.

(B) The first day of the conference shall be devoted to a session for the judges alone, in which there shall be discussed matters affecting the state of the dockets and the administration of justice in their respective districts.

(C) Members of the bar to be designated, as hereafter set forth, shall be members of the conference. Such members, except members emeritus, shall participate in the conference's discussions and deliberations on the second and third days.

(D) Members of the conference from the bar shall be as provided in I.O.P. 47.2 as approved by the active circuit judges sitting from time to time in administrative session.

(E) The Circuit Executive of this Court shall be the secretary of the conference, and shall make and preserve an accurate record of its proceedings.

(F) Each member of the bar designated as a member of the conference shall pay an annual membership fee in an amount fixed by the Court of Appeals, to be applied to the payment of the expenses of the conference as approved by the Chief Judge of the Circuit. The payment of the annual membership fee shall be a condition to retention of conference membership. The Chief Judge is entitled to excuse payment of such fee in the proper circumstances. (Amended August 1, 2005; amended effective December 1, 2008)

IOP 47.2. Membership in the judicial conference of the circuit.

Commencing with the 2009 conference, there shall be four types of members of the conference: ex officio members, invited members, permanent members, and members emeritus.

(A) Ex officio members.

(1) The Attorney General of the United States, or designee.

(2) The presidents of the state bar associations of the states of the Circuit. When two bar associations in the same state are both recognized under this rule, the president of each shall be entitled to attend, and the maximum number of members of the conference from the bar, from any state, under this provision, shall be limited to two. As long as there is only one state bar association in Maryland, the Bar Association of Baltimore City may be treated as a state bar association under this provision.

(3) One representative of the federal bar association elected to the Federal Bar Council from the Fourth Circuit, each conference year, on a rotational basis.

(4) All United States Attorneys in the Circuit.

(5) All Federal Public Defenders in the Circuit.

(6) All Community Defenders in the Circuit.

(7) All Chief Justices of the courts of last resort of the states comprising this Circuit.

(8) All Attorneys General of the states comprising this Circuit.

(9) The Chief Judge of the United States Court of Appeals for the Armed Forces.

(10) The Chief Judge of the United States Tax Court.

(11) One representative of each accredited law school within the Circuit.

(B) Members designated by judges.

(1) Invited members.

> Lawyers who are not permanent members of the conference as set forth under (B)(2) below are invited by the Chief Judge as guests of a scheduled conference upon designation by an active or senior circuit or district judge. Commencing with the 2009 conference:

(a) Each active or senior circuit judge may designate three guests for invitation to the conference.

(b) Each active or senior district judge may designate one guest for inviatation to the conference.

(2) Permanent members.

(a) By attending two biannual conferences (or, alternatively, one biannual and two annual conferences, or three annual conferences) as an invited member under (B)(1) above, a lawyer shall become a permanent member of the conference, entitled to attend future conferences. In order to retain such permanent member status, a permanent member must have, in a given year, paid the annual membership fee and, commencing after the 2009 conference, attended the most recent conference or at least one of the two conferences preceding it.

(b) A former or retired circuit or district judge of the Circuit shall be a permanent member of the conference, entitled for life to attend all conferences.

(3) Members emeritus.

A permanent member for ten years or more shall become a member emeritus upon either:

(a) Failing to satisfy the requirements for retaining permanent member status under (B)(2) above; or

(b) Electing to assume member emeritus status and properly notifying the conference secretary of such decision.

In order to retain member emeritus status, a member emeritus must have, in a given year, paid the annual membership fee in the amount fixed for emeritus membership. A member emeritus will not be invited to attend future conferences, except as an invited member under (B)(1) above. A member emeritus may be reinstated as a permanent member by designation of the Chief Judge for good cause shown, or by again qualifying for permanent membership under (B)(2) above. (Amended effective February 16, 1993; further amended September 25, 1996; further amended August 1, 2005; further amended April 16, 2007; futher amended December 1, 2008.)

APPENDICES

Appendix A. Resolution respecting bar membership in the judicial conference of the circuit.

Editor's note. — The United States Court of Appeals for the Fourth Circuit adopted new I.O.P. 47.2, which was formerly Appendix A, effective April 30, 1992.

Appendix B. Guidelines for preparation of appellate transcripts in the Fourth Circuit.

I. INTRODUCTION

A. Purpose

These guidelines set forth in detail the following:

1. Duties of the district court clerk's office, appellant and appellee in ordering the transcript;
2. Responsibilities of the court reporter for preparing and timely filing the transcript;
3. Duties of the court of appeals for acknowledging transcript orders and monitoring the timeliness of the filing of transcripts;
4. Procedures for court reporters to follow in requesting extensions of time and waivers of fee sanctions;
5. Criteria to be used by the court of appeals in acting on requests for extensions and waivers;
6. Common problems that have been encountered by court reporters and the court of appeals in the ordering, preparation and filing of transcripts; and
7. Provisions for supplementation of these Guidelines by local procedures adopted by a district court.

B. Relation to Federal Rules of Appellate Procedure

Although Rule 11(b), Federal Rules of Appellate Procedure, requires transcripts to be filed within thirty days of the purchase order date, the court of appeals will use the time limits set forth in the district court reporter management plans governing the application of fee sanctions as the time periods within which transcripts will be due. All of the plans establish a 60-day period for preparation of transcripts without financial penalty. Exceptions are:

1. Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants;
2. Special circumstances, such as
   (a) bail appeals,
   (b) death penalty cases,
   (c) expedited sentencing appeals,
   (d) recalcitrant witness appeals, or
   (e) other expedited procedures.

The Table on the next page sets forth the time requirements in detail.

TABLE OF TRANSCRIPT DUE DATES AND APPLICABLE SANCTIONS

NATURE OF CASE	LENGTH OF TRANSCRIPT	TRANSCRIPT DUE	10% FEE SANCTION	20% FEE SANCTION
Direct criminal appeals, appellant incarcerated	1000 pages or less	within days of30 transcript order or judgment and commitment order, whichever is later	if filed 30th day after	if filed after 60th day
	more than 1000 pages	as ordered by clerk following consultation with reporter and parties	if due date missed	if due date missed by more than 30 days
All other cases, in other than exceptional circumstances	Any length	within 60 days of transcript order or judgment and commitment order, whichever is later	if filed after 60th day	if filed after 90th day
Exceptional circumstances (e.g., bail appeals, death penalty cases, expedited sentencing appeals, etc.)	Any length	as ordered by clerk following consultation with reporter and parties	*	*

---

* Twenty percent fee sanction automatically imposed if due date missed. Letter to chief district judge, after consultation with chief circuit judge requiring immediate preparation of the transcript.

C. Effective Date

These guidelines will take effect on June 1, 1986, and will apply to all Fourth Circuit cases subject to F.R.A.P. 11(b) in which the transcript is ordered after that date.

D. Definitions

For purposes of these Guidelines, references to appellant-appellee will refer to counsel for appellant-appellee unless appellant-appellee is proceeding pro se, in which case all duties and responsibilities are those of appellant-appellee individually.

II. ORDERING AND ACKNOWLEDGING TRANSCRIPTS

A. Duties of District Court Clerk's Office

1. When a notice of appeal is filed, the district court clerk's office will furnish appellant with a copy of the Transcript Order form.

2. Upon entry of an order authorizing preparation of a transcript at government expense pursuant to the Criminal Justice Act or 28 U.S.C. § 753(f), the district court reporter coordinator or appeals deputy will notify the court of appeals of the date on which the order was entered.

3. When substitute reporters or contract reporters are used, the district court reporter coordinator or district court appeals deputy will furnish them with copies of these guidelines and explain the procedures to be followed in preparing appellate transcripts.

4. When the transcript is filed, the district court clerk's office will see that the court reporter or the court reporter coordinator mails a copy of the reporter's certification to the court of appeals.

B. Duties of Appellant

1. Within ten days after filing the notice of appeal, the appellant is required by F.R.A.P. 10(b)(1) to order from the court reporter such transcript of the proceedings as the appellant deems necessary.

2. By service of a copy of the Docketing Statement, appellant will notify appellee(s) that (a) a transcript is not needed for the appeal, (b) a transcript is already on file in

the district court, or (c) less than the complete transcript will be ordered. The statement of issues in the Docketing Statement will satisfy the requirement of F.R.A.P. 10(b)(3).

3. Before a transcript can be ordered, the appellant must obtain from the court reporter an estimate of the length of the transcript and make appropriate financial arrangements with the reporter (1) by immediate payment in full or by another payment arrangement acceptable to the reporter, (2) payment pursuant to the Criminal Justice Act, or (3) payment at government expense pursuant to 28 U.S.C. § 753(f). [Local Rule 10(c)(1)]. Payment or acknowledgment of financial arrangements satisfactory to the reporter must accompany the court reporter's copy of the Transcript Order. [F.R.A.P. 10(b)(4)].

4. In criminal cases, counsel may seek authorization from the district court to order transcript after entry of verdict but prior to sentencing. The district court may authorize the early ordering of transcript if it determines that defense counsel has informed the defendant of the right to appeal and the defendant has instructed counsel to appeal regardless of the nature or length of the sentence imposed. The time requirements for the preparation of transcripts that are ordered before sentencing shall not begin to run until after entry of the judgment and commitment order.

5. To order a transcript, the appellant completes the Transcript Order form furnished by the district court clerk's office and distributes the copies as follows:

court reporter — mail original to court reporter within 10 days of filing notice of appeal
district court — file copy in district court clerk's office within 10 days of filing notice of appeal
court of appeals — attach copies to both copies of Docketing Statement filed in court of appeals clerk's office within 14 days of filing notice of appeal
opposing counsel — attach copy to Docketing Statement served on opposing counsel within 14 days of filing notice of appeal

A separate Transcript Order must be prepared for each court reporter from whom a transcript is requested.

6. Failure by the appellant to timely order a transcript, failure to make satisfactory financial arrangements with the court reporter, or failure to specify in adequate detail those proceedings to be transcribed will subject the appeal to dismissal by the clerk of the court of appeals for want of prosecution pursuant to Local Rule 45.

7. When supplemental transcripts are requested, appellant must complete another Transcript Order form, make satisfactory financial arrangements with the reporter, and distribute copies to the same persons to whom the original Transcript Order was sent.

8. If payment is waived by the reporter at the time of ordering the transcript, the appellant must make full payment upon receipt of the reporter's invoice. If payment is not made within a reasonable period of time, the appeal will be subject to dismissal by the clerk of the court of appeals pursuant to Local Rule 45.

9. Transcripts ordered under the Criminal Justice Act do not include opening and closing statements, voir dire, or jury instructions unless prior special authorization has been received by appellant. CJA Form 24 forms should be obtained from the district court and submitted to the district court judge for approval. In multi-defendant cases involving CJA defendants, only original transcripts should be purchased from the court reporter(s). Requests for copies will be arranged by the district court using commercial printers. Contact the district court reporter coordinator or district court clerk's office for further instructions.

10. When an appellant has ordered a transcript, he or she is obligated to pay the reporter for it. If the appeal is dismissed voluntarily, the appellant is nonetheless responsible to the reporter for the cost of transcript prepared prior to the reporter's receipt of notification from the appellant of the appeal's dismissal.

C. Duties of Appellee

1. If the appellee deems a transcript of other parts of the proceedings to be necessary, he or she is required by F.R.A.P. 10(b)(3), within ten days after service of the Docketing Statement by the appellant, to file and serve on the appellant a designation of additional parts to be included. Unless within ten days after service of such designation the appellant has ordered such parts, and has so notified the

appellee, the appellee may within the following ten days either order the parts or move the district court for an order requiring the appellant to do so.

2. If the appellee wishes to obtain a copy of the transcript which has been ordered by the appellant, he or she may do so by ordering the copy directly from the court reporter. Satisfactory financial arrangements must be completed with the reporter before obtaining the copy. It is not appellant's responsibility to order and pay for a copy of the transcript for appellee.

D. Duties of the Court Reporter

1. Upon receipt of the Transcript Order form and completion of satisfactory financial arrangements, the reporter must prepare the required transcript within the time set forth in the applicable district court reporter management plan.

2. The appellant attaches copies of the transcript order to the two copies of the Docketing Statement filed with the court of appeals. Upon receiving the transcript order, the court of appeals will complete and send to the reporter, and to the court reporter coordinator and the district court, a Transcript Order Acknowledgment form to verify the transcript order. A copy of the Acknowledgment form will be sent to the reporter along with a photocopy of the Transcript Order. The Acknowledgment will contain the order date and the date by which the transcript must be filed to avoid sanctions. The order date set out in the Transcript Order Acknowledgment form will be the date the Transcript Order form was received by the court of appeals. The due date is computed from this date by the court of appeals in accordance with the time specified in the district court reporter management plans. If the Transcript Order form is complete and accurate and satisfactory financial arrangements have been completed, NO RESPONSE IS REQUIRED FROM THE COURT REPORTER TO THE TRANSCRIPT ORDER FORM OR THE TRANSCRIPT ACKNOWLEDGMENT FORM.

3. If there is a problem with the order date (e.g., the court reporter had not received the Transcript Order by the date it was received in the court of appeals), with financial arrangements with the appellant, with identification of the transcript ordered, with proper designation of the court reporters involved in the case, or with any other aspect of the Transcript Order, the court reporter must complete and mail a copy of the Acknowledgment form to the court of appeals within seven days of receipt by the reporter (time may be extended for vacation, serious illness or other unusual circumstances). A copy should also be sent to the court reporter coordinator. The court reporter need not inform the court of appeals if he or she in fact received the Transcript Order before the order date shown on the Acknowledgment. The court reporter may use any additional time so created for preparation of the transcript without fear of incurring a sanction for late filing. The court of appeals' Acknowledgment constitutes an implied fee sanction waiver to the due date set forth on the form.

4. The time for completion of the transcript will stop running automatically upon the reporter's mailing of the Acknowledgment form, indicating a problem with the terms of the order, for whatever reasonable period of time is required for the reporter or district court reporter coordinator to resolve the problem with the appellant. The court of appeals transcript coordinator will be in touch with the reporter or district court reporter coordinator upon receipt of the Acknowledgment form to offer assistance, such as notification to the appellant that the appeal will be dismissed if the problem is not remedied promptly.

5. When the problem has been remedied, the court of appeals will send a revised Transcript Order Acknowledgment setting forth a new transcript filing date reflecting the delay caused by the problem with the original Transcript Order.

6. Unless the court of appeals is notified of a problem with the Transcript Order, or of some other reason why the information on the Transcript Order Acknowledgment form prepared by the court of appeals is incorrect, the reporter will be held to the schedule set forth therein absent the granting of an extension of time. It is the court reporter's responsibility to notify the court of appeals of any problem.

7. If the transcript is estimated to be more than 1000 pages and is ordered in a criminal appeal in which the appellant is incarcerated, the reporter will receive an acknowledgment form with the order date and a due date which will be established by the court of appeals.

8. When the transcript has been completed and the court copy filed in the district court, a copy of the reporter's certification setting forth the date the transcript was filed in the district court must be sent to the court of appeals by the court reporter, or by the

court reporter coordinator, to notify the court of appeals that the transcript has been filed and to provide a means for the court of appeals to verify that the proper fee reduction was taken by the reporter if the transcript was not timely filed.

9. Unless a written motion is filed by the appellant with the court of appeals, and an extension granted by the clerk of the court of appeals, requests by an appellant that a reporter suspend or delay preparation of a transcript that has been ordered will have no effect on the date the transcript is due, or on the appellant's obligation to pay for it when it is prepared. The only exception is when a motion for voluntary dismissal of the appeal has been granted; in that instance the appellant is responsible for paying only for that portion of the transcript completed prior to the reporter's receipt of notification from the appellant of the appeal's dismissal.

E. Duties of Court of Appeals

1. F.R.A.P. 10(b)(1) requires the appellant to order the transcript within ten days after filing the notice of appeal. If the completed form is not received by the court of appeals within that time, making reasonable allowance for delivery by mail, the court of appeals will notify the appellant that no order has been received and that failure to comply with F.R.A.P. 10(b)(1) will subject the appeal to dismissal by the clerk for want of prosecution pursuant to Local Rule 45.

2. When the court of appeals receives the Transcript Order form, it will be reviewed for any obvious defects (e.g., multiple reporters on one form, or incompleteness as far as nature of proceedings requested or certification of satisfaction of financial requirements). If it appears to be in order, the court of appeals will prepare for the reporter a Transcript Order Acknowledgment showing the date the Transcript Order was received in the court of appeals and the due date, computed in accordance with the time limits set forth in the applicable district court reporter management plan. The court of appeals clerk's office will work together with reporters and parties to remedy any deficiencies in the Transcript Order that are brought to its attention by the reporter. (See Section D.3 - 8 for full description of procedures.)

III. REPORTS

Reports on outstanding transcripts will be generated monthly and will be distributed to the court reporters involved, as well as to the district court clerks or their court reporter coordinators. If the report shows a transcript outstanding when it has actually been filed, the reporter or district court reporter coordinator should call the court of appeals and report the date of filing. If everything in the report is correct and none of the transcripts are overdue, no response is required from the reporter.

IV. TIME LIMITS FOR FILING TRANSCRIPTS— FEE REDUCTION SANCTIONS

A. Requests for Extensions of Time

As set forth in the district court reporter management plans, all requests for extensions of time for the filing of appellate transcripts (F.R.A.P. 11(b) transcripts) are submitted to the clerk of the court of appeals. They should be in writing, on the designated form. A request for an extension of time will automatically constitute a corresponding request for a waiver of any applicable fee reduction sanction. Requests for extensions must be mailed ten days in advance of the deadline from which relief is sought, unless unforeseen circumstances make later requests necessary, in which case the reasons will be set out by the reporter in the request. When requesting an extension, the information furnished should be very specific. Failure to submit complete information will delay action on the request and lead to additional paperwork for the reporter. After reviewing the request for extension, the court of appeals will issue an order granting, granting in part, or denying the request, which will set forth the resulting timeframes for purposes of fee sanction imposition. Counsel, the district court reporter coordinator, and the district court clerk will also receive copies of this order.

B. Grounds for Extensions of Time

1. *Excessive burden of transcript, considering length and complexity of the proceedings ordered within a short period of time.* District court reporter coordinators are expected to make court reporter assignments within a district so as to anticipate and to avoid to the extent possible the imposition of excessive transcript loads on individual

reporters. When these efforts are unsuccessful, reporters may apply for relief from applicable fee sanctions and have the court of appeals assign the relative priority to be given to competing appellate transcript orders. The fact that a reporter has accumulated orders for more than 3000 pages within three months will be presumed to establish the existence of an "excessive burden." The existence of outstanding overdue transcripts may or may not be grounds for extending the time for subsequently ordered transcripts. In computing the amount of transcript for purposes of demonstrating excessive burden, the reporter can include all transcripts ordered within ninety days of the request for extension. The reporter may include transcript obligations for the district court as well as those ordered for appellate purposes. However, the orders must be "firm orders". A "firm order" for an appellate transcript is one for which the court of appeals has received a Transcript Order from the appellant. For a district court transcript it is an order communicated by a judge or a party; it cannot be a reporter's speculation that an order will be forthcoming.

2. *Vacation.* A reporter can plan to take reasonable vacations, as authorized by the district court, and obtain extensions of deadlines that would fall within those periods or become impossible to meet in light of them.

3. *Unavoidable, excessive time required for attendance in court.* It is the responsibility of the district court reporter coordinator to adjust reporter assignments to ensure that the needs of the trial and appellate courts can be met. Occasions may arise, nonetheless, when a court reporter's courtroom obligations, including official travel required to reach the courtroom, prevent his or her meeting transcript obligations. Reasonable extensions of time will be given in such instances.

4. *Incapacitation or serious illness.* A reporter may certify to the clerk of the court of appeals that he or she has become temporarily incapacitated or seriously ill, and obtain reasonable relief from pending deadlines. This ground does not include common colds or other ailments that would not prevent attendance in court.

5. *Unforeseen emergencies.* Reporters may seek extensions for any other good cause which makes the completion of a transcript within the allotted time impossible.

V. SANCTIONS

A. Fee Reduction Sanctions

An official court reporter will be required to deduct from his or her charges for a completed transcript not timely filed with the district court the amount of any fee reduction sanction applicable by the terms of a district court reporter management plan.

B. Removal from Courtroom and Request for Substitute Reporter

The chief judge of the court of appeals, following consultation with the chief judge of the district court, may order a reporter to remain out of the courtroom, and pay the costs of a satisfactory substitute reporter, if a transcript is ninety days overdue.

VI. MONITORING OF TRANSCRIPT FILING

The clerk of the court of appeals will monitor the filing of all appellate transcripts and the fees charged by reporters when a transcript is filed untimely. The fee sanction mechanism exists by virtue of the district court reporter management plans which require reporters to take fee reductions if a transcript is not filed on time. Therefore, the court of appeals will not issue a sanction order. It is the reporter's duty to abide by the provisions of his or her district court reporter management plan and to take a fee reduction if one is applicable.

The court of appeals will take no action if the transcript is filed on time or, if not filed on time, the appropriate fee reduction has been taken as shown by the copy of the certification that the reporter submitted to the court of appeals when the transcript was filed. If a fee reduction was applicable and was not taken by the reporter, the court of appeals will send a letter to the reporter setting forth the fee reduction that should have been taken. Copies of this letter will be sent to counsel, the district court reporter coordinator (if any) and the judge to whom the reporter reports or the chief district judge. If the certification is not submitted within a reasonable period after the filing of the transcript, the reporter will be requested to submit a copy of his or her invoice.

The court of appeals will also send a letter to the chief district judge when a transcript is sixty days overdue. The letter will identify the particular transcript involved and the date of the order. Copies of the letter will be sent to the judge (if any) to whom the reporter reports, the district court reporter coordinator, the district court clerk, and the reporter. The letter will alert the chief judge of the district court to the possibility that the reporter may be required to remain out of the courtroom, paying for a substitute reporter, until the transcript is completed, if the transcript becomes ninety days overdue.

VII. COMMON PROBLEMS

A. Transcripts Prepared at Government Expense

1. *Criminal Justice Act* [18 U.S.C. § 3006A(6)]. When the reporter receives the approved CJA form, preparation of the transcript should begin immediately. The date of receipt of the approved CJA form will begin the running of the time for delivery of the transcript and the imposition of sanctions, except when the transcript is ordered before sentencing as set forth in II.B.4 above.

Pursuant to the provisions of the September 1987 amendment to the Guidelines for the Administration of the Criminal Justice Act, in multi-defendant cases involving CJA defendants, no more than one original transcript should be purchased from the court reporter on behalf of CJA defendants. One of the appointed counsel or the district court should arrange for the duplication, at commercially competitive rates, of enough copies of the transcript(s) for each of the CJA defendants for whom a transcript has been approved.

2. *In Forma Pauperis Litigants* [28 U.S.C. § 753(f)]. When an order is entered directing preparation of a transcript at government expense pursuant to 28 U.S.C. § 753(f), the transcript order date is the date the reporter receives the court's order authorizing preparation of the transcript. The order date is not postponed until receipt of a completed AO Form 19, since the government is under an obligation to pay for the transcript once it is ordered by the court.

B. Supplemental Transcripts

Supplemental transcripts are usually ordered after the original transcript has been filed and a briefing schedule established by the court of appeals. Therefore, these transcripts should be expedited. Counsel is under an obligation to notify the court of appeals that a supplemental transcript has been ordered. The court of appeals will then send the Transcript Order Acknowledgment form to the reporter with the request that the reporter prepare these transcripts as quickly as possible.

C. Expedited Proceedings

When a transcript is requested for an expedited proceeding, the due date for filing the transcript is established by the court of appeals. If an expedited transcript is requested and prepared within seven days after receipt or notification of the order, the court reporter may charge the higher rates for expedited transcripts.

Transcripts for appeals arising from a criminal sentence imposed under 18 U.S.C. § 3742 will only be expedited if a motion for expedited review of criminal sentence is granted by the court of appeals. Only those portions of the transcript pertinent to the appeal must be prepared on an expedited basis. The court reporter will be notified by the court of appeals when a motion to expedite has been granted.

In bail appeals, only the portion of the transcript dealing with the bail issue should be ordered on a rush basis. Even though there may be other portions of the transcript that the appellant has ordered, the portion dealing with the bail issue should be prepared first.

In expedited proceedings, a twenty percent fee sanction from the regular transcript rate will be imposed if the due date is missed. At the same time, a letter will be sent to the chief judge of the district court, advising of the delinquency and warning that the chief judge of the court of appeals may order the reporter to remain out of the courtroom, and pay the costs of a satisfactory substitute reporter, if the transcript is not filed immediately. IF THE COURT REPORTER ANTICIPATES A PROBLEM WITH PROMPT PREPARATION OF AN EXPEDITED TRANSCRIPT, THE DISTRICT COURT REPORTER COORDINATOR AND THE COURT OF APPEALS SHOULD BE NOTIFIED IMMEDIATELY.

D. Payment for Transcript

The court of appeals approves of reporters' demanding a substantial deposit or full payment in advance for preparation of a transcript. In those instances where a reporter does not demand full payment in advance, and upon transcript completion has not been paid fully by the appellant, the following procedures should be followed:

1. Timely file the court copy of the transcript with the district court clerk's office.
2. Contact the court of appeals immediately and a letter will be sent to the appellant stating that if full payment is not made to the court reporter within fifteen days of the date of the letter, the appeal will be dismissed for failure to prosecute.

Fee reduction sanctions will be applicable if the court copy of the transcript is not timely filed. Problems with payment for the transcript after its completion will have no effect on the established due date.

E. Substitute Reporters

When an official court reporter hires a substitute, the official reporter still retains responsibility for the timely filing of the transcript. All provisions applicable to an official court reporter will be applicable to the substitute. If there is a problem with the filing of a transcript, the official court reporter will be notified as well as the substitute reporter. All correspondence and orders by the court of appeals will be sent to both reporters. The substitute can request extensions of time and waivers of applicable fee sanctions from the court of appeals. However, all guidelines applicable to the official reporter will be applicable to the substitute reporter and the proper procedures for requesting extensions must be followed.

F. Contract Reporters

Contractual reporting services in district courts are provided as supplements to the services of official staff. Contractual services are used after the district court reporter coordinator has determined that no official court reporter is available. Contract reporters must follow the procedures set out below.

1. All contractors are subject to the provisions of the Terms and Conditions of AO Form 355, Contracts for Court Reporting Services, governing time of filing (30 days from date of order) and fee sanctions for late delivery of transcripts (2% for each day or fraction of a day the transcript is late, but not less than 10% and not more than 50% of the price of the transcript).
2. All contractors — whether or not the written standard contract is signed — must meet the Terms and Conditions of AO Form 355 as set forth above.
3. Extensions of time for filing transcripts for F.R.A.P. 11(b) cases may be requested in writing following the procedures set forth in these Guidelines. However, the court of appeals cannot waive the fee sanctions set out in AO Form 355. A waiver of applicable fee reduction sanctions may be requested, in writing, from the contracting officer. A copy of the letter requesting a waiver of fee sanctions should be sent to the court of appeals.

G. Filing of Transcripts with the District Court

When the proceedings that are transcribed have been taken in another division of the district court, the reporter may file the court copy of the transcript in the district in which his or her office is located. That division will file stamp the copy and forward it to the appropriate division for inclusion in the record to be transmitted to the court of appeals.

VIII. ADDITIONAL LOCAL PROCEDURES

Following prior consultation with the clerk of the court of appeals, a district court may institute supplemental local procedures designed to adapt these Guidelines to the structure of court reporting services in place in that district.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TRANSCRIPT ORDER

READ INSTRUCTIONS ON BACK PAGE BEFORE COMPLETING

Case Style ______________________________

District Ct. No. __________ District ______________

Date Notice of Appeal filed ________ Ct. of Appeals No. __________

Name of Court Reporter/Electronic Rec. ______________

Address of Reporter ______________________________

TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT—DO NOT SUBMIT FORM UNTIL FINANCIAL ARRANGEMENTS HAVE BEEN MADE WITH THE REPORTER. IF THIS COMPLETED FORM IS NOT MAILED TO THE COURT REPORTER AND A COPY FILED WITH THE DISTRICT COURT CLERK WITHIN TEN (10) DAYS AFTER FILING NOTICE OF APPEAL, THE APPEAL WILL BE SUBJECT TO DISMISSAL PURSUANT TO FOURTH CIRCUIT LOCAL RULE 45. ADDITIONAL COPIES OF THIS FORM MUST BE FILED WITH TWO COPIES OF APPELLANT'S DOCKETING STATEMENT WITH THE CLERK OF THE COURT OF APPEALS WITHIN FOURTEEN DAYS OF FILING THE NOTICE OF APPEAL. A SEPARATE TRANSCRIPT ORDER MUST BE COMPLETED FOR EACH REPORTER FROM WHOM A TRANSCRIPT IS REQUESTED.

A. This constitutes an order of the transcript of the following proceedings [check appropriate box(es) and indicate total number of pages].

PROCEEDING	HEARING DATE(S)
☐ Voir Dire	______________
☐ Opening Statement (Plaintiff)	______________
☐ Opening Statement (Defendant)	______________
☐ Closing Argument (Plaintiff)	______________
☐ Closing Argument (Defendant)	______________
☐ Opinion of Court	______________
☐ Jury Instructions	______________
☐ Sentencing	______________
☐ Bail Hearing	______________
☐ Pre-Trial Proceedings (specify)	______________
______________	______________
☐ Testimony (specify) __________	______________
______________	______________
______________	______________
☐ Other (specify) __________	______________
______________	______________

TOTAL ESTIMATED PAGES ______________

NOTE: *FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED IS GROUNDS FOR DISMISSAL OF AN APPEAL.*

B. I certify that I have contacted the court reporter (or coordinator if electronic recording from the District of Maryland) and satisfactory financial arrangements for payment of the transcript have been made.

- ☐ Private funds. (Deposit of $______ enclosed with court reporter's copy. Check No. ______.)
- ☐ Criminal Justice Act. A CJA Form 24 has been submitted to the district judge. (Attach a photocopy of the CJA 24 to the court of appeals' and reporter's copies.)
- ☐ Government expense (civil case). IFP has been granted and a motion for transcript at government expense has been submitted to the district judge.
- ☐ Advance payment waived by court reporter.

☐ Federal Public Defender - no CJA Form 24 necessary.

Signature ____________________ Typed Name ____________________
Address ____
Telephone No. ____________ Date mailed to Reporter ____________

INSTRUCTIONS TO APPELLANT FOR ORDERING TRANSCRIPT

You have ten days after filing your notice of appeal to order transcript from the court reporter and file a copy of this form with the clerk of the district court. Within fourteen days of filing the notice of appeal, additional copies of this form must be filed with two copies of the Docketing Statement with the clerk of the court of appeals and served with the Docketing Statement on opposing counsel.

DO NOT SUBMIT THIS FORM UNTIL YOU HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH THE COURT REPORTER.

1. Contact each court reporter involved in reporting the proceedings, obtain an estimate of total pages, and make arrangements for payment. If you are unsure of the reporter(s) involved, contact the district court clerk's office for that information. A SEPARATE TRANSCRIPT ORDER MUST BE PREPARED FOR EACH COURT REPORTER FROM WHOM A TRANSCRIPT IS REQUESTED. MAKE COPIES OF BLANK FORM AS NECESSARY.

2. If payment is waived by the reporter until completion of the transcript, the appellant must remit full payment within a reasonable period of time upon receipt of the reporter's invoice.

3. If this was an electronic recording from the District of Maryland, contact the district court reporter coordinator for further instructions.

4. Transcripts ordered under the Criminal Justice Act do not include opening and closing statements, voir dire, or jury instructions unless prior special authorization has been received by the appellant. Request CJA Form 24 from the district court and submit the form(s) to the district court judge for approval. A separate CJA Form 24 must be completed for each court reporter. In multi-defendant cases involving CJA defendants, only original transcripts should be purchased from the court reporter(s). Requests for copies will be arranged by the district court using commercial printers. Contact the district court reporter coordinator or district court clerk's office for further instructions.

5. Complete the Transcript Order in its entirety.

6. Distribute the Transcript Order as follows:

court reporter	—	mail original to court reporter within 10 days of filing notice of appeal
district court	—	file copy in district court clerk's office within 10 days of filing notice of appeal
court of appeals	—	attach copies to both copies of Docketing Statement filed in court of appeals clerk's office within 14 days of filing notice of appeal. For CJA attorneys, a copy of the CJA Form 24 must also be attached
opposing counsel	—	attach copy to Docketing Statement served on opposing counsel within 14 days of filing notice of appeal

IF THE TRANSCRIPT ORDER IS NOT FILED WITHIN THE TIME PERIODS SET FORTH ABOVE, PROCEDURES WILL BE INITIATED TO DISMISS THE APPEAL FOR FAILURE TO PROSECUTE.

If you have further questions, contact the Clerk's Office, U.S. Court of Appeals (804-916-2700).

Appendix C. Plan of the United States Court of Appeals for the Fourth Circuit in implementation of the Criminal Justice Act.

The Judicial Council of the Fourth Circuit adopts the following plan, in implementation of the Criminal Justice Act.

I. RIGHT TO COUNSEL

1. *Direct Appeals:* In every direct appeal involving a person

(a) who is charged with a felony or misdemeanor (other than a petty offense), or with juvenile delinquency as defined in 18 U.S.C. § 5031, or with a violation of probation or supervised release; or who faces modification, reduction, or enlargement of a condition or extension or revocation of a term of supervised release; or who is under arrest and representation is required by law; or who is subject to a mental condition hearing under Chapter 13 of Title 18; or who is held in custody as a material witness; or who appeals from parole proceedings conducted pursuant to 18 U.S.C. § 4106A; or,

(b) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces the loss of liberty, any federal law requires the appointment of counsel,

whether the appeal be by a defendant from a judgment of conviction or other order, from an order revoking probation, or by the United States from a judgment of acquittal or dismissal, a defendant shall be entitled to be represented by counsel as a matter of right.

If the appeal involves a petty offense for which confinement is authorized, the court may appoint counsel for a financially eligible person upon a determination that the interests of justice so require.

In these cases, unless an application for the appointment of counsel has already been received, or notice of appearance has been filed by retained counsel, the clerk of this court shall promptly notify the defendant of his right to counsel and shall inform him that counsel will be appointed if he is financially unable to obtain adequate representation. Where an attorney had previously been appointed to represent the defendant in district court, that attorney shall be reappointed, without prior notice, upon the docketing of the appeal in this court. If there is no such reappointment, either because defendant appeared pro se or was represented by retained counsel in the district court, the clerk shall appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

In pro se cases in which the appellant exercises his right to represent himself as suggested by *Faretta v. California,* 422 U.S. 806 (1975); 28 U.S.C. § 1654, the court may find it appropriate to appoint standby counsel for the appellant to assist in the appeal to protect the integrity and ensure the continuity of the judicial proceedings. (*McKaskle v. Wiggins,* 465 U.S. 168 (1984); *Faretta, supra*). Accordingly, if a pro se appellant is represented, at least in part, by standby counsel, compensation may be provided under the CJA.

2. *Collateral Proceedings:* In an appeal in a post-conviction proceeding under 28 U.S.C. §§ 2254 or 2255, seeking to vacate or set aside a death sentence, a petitioner who is financially unable to obtain adequate representation shall be entitled to appointment of one or more attorneys. 18 U.S.C. § 3599(a)(2). In an appeal in a collateral proceeding brought by the petitioner from any other order denying the relief requested pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, a petitioner shall not be entitled to be represented by counsel as a matter of right. In these cases, counsel will be appointed only after the court has decided to hear the case on the merits, as in the granting of leave to appeal or the issuance of a certificate of appealability. However, in an appeal brought by the United States or a state from an order granting the relief requested, a petitioner shall be entitled to representation as a matter of right.

In any non-capital case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, the court may, on motion of the petitioner or on its own motion, appoint counsel where the court determines that (a) petitioner is financially unable to obtain adequate representation and (b) the interests of justice require legal representation, as when petitioner needs the assistance of counsel to go forward with an apparently meritorious petition. The clerk shall thereupon appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

Where a petitioner is under sentence of death, the clerk shall appoint counsel upon receipt of the notice of appeal.

II. APPOINTMENT OF COUNSEL

1. *Court Order:* Every appointment of counsel pursuant to the Criminal Justice Act and this Plan shall be made by an order of this court. A prerequisite to appointment shall be an affirmative finding by the court that a defendant is financially unable to employ counsel. However, where counsel was appointed in the lower court, this court will presume, until reason to the contrary appears, that the defendant remains financially unable to retain counsel, and no such finding shall be required.

The selection of counsel under the Criminal Justice Act shall be the exclusive responsibility of the court, and no person entitled to court-appointed counsel shall be permitted to select counsel to represent him.

2. *Retroactivity:* An appointment may be made retroactive to include any representation furnished to an indigent by an attorney prior to appointment pursuant to this Plan.

3. *Scope:* A person for whom counsel is appointed shall be represented at every stage of the proceedings, through appeal, including ancillary matters appropriate to the proceedings and including a petition for writ of certiorari to the Supreme Court if non-frivolous grounds exist for filing such a petition.

4. *Substitution of Counsel:* The court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings. The total compensation to be paid both attorneys shall not exceed the statutory maximum for one appointment, unless the case involves extended or complex representation.

5. *One Attorney for Multiple Defendants:* In appeals involving multiple defendants, separate counsel will normally be appointed for each defendant, unless there has been a waiver on the record by the defendants or good cause is shown. If one attorney is appointed to represent more than one defendant, a separate order of appointment shall be entered for each defendant. The attorney may be compensated for his services up to the maximum for each defendant represented; however, time spent in common on one or more defendants must be prorated.

6. *Multiple Appointments for One Defendant:* In capital cases, and in other cases of extreme difficulty where the interests of justice so require, the court may appoint an additional attorney to represent a defendant. Each attorney so appointed shall be eligible to receive the maximum compensation allowed under the Criminal Justice Act. Any defendant indicted for a capital offense is entitled to have two attorneys appointed. 18 U.S.C. § 3005.

7. *Defendant's Objection to Appointed Attorney:* The court shall give consideration to a defendant's expression of dissatisfaction with his counsel only if specific grounds for dissatisfaction are stated. Appointed counsel shall be relieved only when the court, in its discretion, determines that the interests of justice so require.

8. *Withdrawal of Counsel:* An attorney appointed to represent a defendant in the lower court is generally obliged to continue that representation upon appeal unless relieved by this court. *See infra* Part V.1. An attorney who does not desire to continue the representation must file a motion to withdraw with the clerk of this court promptly after filing the notice of appeal.

Counsel's request to be relieved from representation on appeal shall be given due consideration. While the court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel. Substitution of counsel shall not reflect negatively in any way on the conduct of the lawyer involved.

In its discretion, this court may appoint the attorney who represented the eligible person in the district court, a Federal Public Defender's office from the circuit, or a lawyer from the court's Criminal Justice Act panel. *See infra* Part IV.4.

III. DEFENDANT'S FINANCIAL STATUS

1. *Filing Application:* A defendant who, in the district court, was represented by employed counsel, or was unrepresented, or was represented by appointed counsel but has nonetheless been requested to file a new application in this court, may apply to this court for the appointment of counsel. Such application shall be accompanied by an affidavit disclosing the applicant's financial status and any resources available to him to compensate counsel.

2. *Re-examination by Court:* The court, at any time, may re-examine a defendant's financial status as it bears upon the appointment of counsel and, thereupon, (a)

appoint counsel to represent the defendant, if the defendant is not already represented or is unable to pay previously retained counsel, (b) terminate the appointment of counsel, or (c) require a partial payment of counsel fees by the defendant. The defendant shall furnish such financial and related information as may be requested during the re-examination, unless he desires to proceed without counsel.

3. *Insufficiency of Funds; Partial Payment:* If a defendant's net financial resources and anticipated income are in excess of the amount needed to provide him and his dependents with the necessities of life and to provide for his release on bond, but are insufficient to pay fully for retained counsel, this court will find the defendant eligible for the appointment of counsel but will direct him to pay the available excess funds to the clerk at the time of appointment. The court may increase or decrease the amount of such payments and impose appropriate conditions, where applicable. All such payments by the defendant shall be received pursuant to the prescriptions of subsection (f) of the Criminal Justice Act.

4. *Family Resources:* Funds and property standing in the name of, or held by, members of a defendant's family will be considered available for the payment of the fees of retained counsel if there is a finding, upon a reasonable basis of fact, that the family has indicated a willingness and a financial ability to pay all or part of the costs of representation. The initial determination of a defendant's eligibility for the appointment of counsel should be made without regard to family resources unless the family plans and is financially able to retain counsel promptly.

5. *Attorney's Information:* If at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal services in connection with his representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall so advise this court.

IV. PANEL OF ATTORNEYS

1. *CJA Appellate Panel Committee:* A CJA appellate panel committee will be appointed by the court for the purpose of recommending minimum standards of eligibility for the CJA appellate panel, developing legal education and training opportunities for panel members, and otherwise improving CJA appellate representation.

2. *Panel Composition:* The clerk, subject to this court's approval, shall prepare a list of attorneys from which appointments shall be made. Attorneys, to be eligible for appointment, must be admitted to practice before this court under Rule 46 of the Federal Rules of Appellate Procedure, and must meet the minimum standards of eligibility recommended by the CJA appellate panel committee and adopted by the court. In preparing a list, the clerk will review and consider the standards of eligibility adopted by the court and the court's experience with attorneys.

3. *Periodic Revision:* The panel shall be revised periodically to ensure an adequate number of competent attorneys to provide effective representation to all persons entitled to appointed counsel.

4. *Appointments:* Appointments shall be made by the clerk on a rotational basis, subject to this court's discretion. Consideration will be given to the nature of the case, the place of the trial, the residence of the indigent person if on bail, the place of confinement, and other relevant matters. In death penalty cases at least one attorney appointed must have been admitted to practice in the Fourth Circuit Court of Appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in the Fourth Circuit in felony cases. For good cause however, the court may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the petitioner, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. The Court will look to the factors articulated in the American Bar Association's guidelines for selection of appellate counsel in capital cases including the length of bar membership, general experience in criminal defense litigation, and specific experience in death penalty appeals and appeals of murder, aggravated murder or other serious felonies. The Court will also consider whether counsel has attended and successfully completed a recent training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed. Finally, the Court will review the availability of ongoing consultation support to appointed counsel from experienced counsel.

When the court determines that the appointment of an attorney, who is not a member of the CJA panel, is appropriate in the interest of justice, judicial economy, or some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA panel pro hac vice and appointed to represent the appellant. These appointments should be made only in exceptional circumstances, such as the appointment in a death penalty case of an attorney furnished by a state or local public defender organization or legal aid agency where the attorney had represented the appellant during prior state court proceedings. Further, the attorney should possess such qualities as would qualify him or her for admission to the CJA panel in the ordinary course of panel selection.

5. *Removal from the Panel:* An attorney may be removed from the panel by the clerk for twice refusing to accept an appointment or by the court for any good reason.

V. ATTORNEY'S DUTY TO CONTINUE REPRESENTATION

1. *Trial Counsel:* Every attorney, including retained counsel, who represented a defendant in the district court shall continue to represent the client after termination of those proceedings, unless relieved of further responsibility by this court. Where counsel has not been relieved:

If there is a judgment of conviction or an order revoking probation, counsel shall inform the defendant of his right to appeal and of his right to have counsel appointed on appeal. If so requested by the defendant, counsel shall file a timely notice of appeal. Thereafter, unless the defendant otherwise so instructs, counsel shall take appropriate and timely steps to perfect and present the appeal, including, where appropriate, the ordering of such part of the transcript as may be necessary for consideration on appeal.

Similarly, if there is an appeal by the United States from an order or judgment adverse to it, counsel shall continue to represent the client.

In any case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by the district court denying the relief requested, counsel shall inform the petitioner of his right to appeal and of the court's authority to appoint appellate counsel in its discretion. If so requested by the petitioner, counsel shall file a timely notice of appeal and a motion for appointment of appellate counsel, and counsel's duty is thereby ended. On the other hand, if petitioner is granted the relief requested, counsel shall continue to represent the petitioner in the event the respondent appeals the judgment.

2. *Appellate Counsel:* Every attorney, including retained counsel, who represents a defendant in this court shall continue to represent his client after termination of the appeal unless relieved of further responsibility by this court or the Supreme Court. Where counsel has not been relieved:

If the judgment of this court is adverse to the defendant, counsel shall inform the defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so requests and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall prepare and file a timely petition for such a writ and transmit a copy to the defendant. Thereafter, unless otherwise instructed by the Supreme Court or its clerk, or unless any applicable rule, order or plan of the Supreme Court shall otherwise provide, counsel shall take whatever further steps are necessary to protect the rights of the defendant, until the petition is granted or denied.

If the appellant requests that a petition for writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with this court wherein counsel requests to be relieved of the responsibility of filing a petition for writ of certiorari. The motion must reflect that a copy was served on the client.

If the United States seeks a writ of certiorari to review a judgment of this court, counsel shall take all necessary steps to oppose the United States' petition.

Similarly, in any proceeding brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by this court, appointed counsel shall take those steps necessary, as set forth above, to protect the rights of the defendant in the Supreme Court.

VI. COMPENSATION AND REIMBURSEMENT OF EXPENSES

1. *Voucher:* Upon the completion of service in this court, appointed counsel shall submit a voucher for compensation and reimbursement on the Criminal Justice Act

form currently approved by the Administrative Office of the United States Courts. Vouchers shall be submitted no later than 60 days after the final disposition of the case, unless good cause is shown. The clerk will determine the amount of compensation and reimbursement to be paid. The approved voucher will then be reviewed by the Circuit Executive, signed by the Chief Judge, and forwarded to the Administrative Office for payment or further handling.

2. *Hourly Rates:* Counsel may be compensated at rates authorized by the Judicial Conference pursuant to 18 U.S.C. § 3006A(d)(1) for non-capital cases and pursuant to 18 U.S.C. § 3599(g)(1) for capital cases.

3. *Maximum Compensation Allowable:* Limitations on maximum compensation shall be as prescribed in 18 U.S.C. § 3006A(d)(2) for non-capital cases. In capital cases, maximum compensation limits do not apply, and compensation shall be in such amounts as the court determines to be reasonably necessary.

In all cases where there has been a substitution of counsel, or where multiple defendants have been represented by one attorney or multiple appointments have been made for one defendant, total compensation shall be determined pursuant to Section II, Paragraphs 4, 5, and 6.

Payment in excess of the prescribed limitations may be made to provide fair compensation in a case involving extended or complex representation, upon approval by the Chief Judge of this court or other active circuit judge designated by him. Counsel claiming in excess of the statutory maximum must submit with his voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in a complex or extended case, and that the excess payment is necessary to provide fair compensation. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex". If more time is reasonably required for total processing than would normally be required in the average case, the case is "extended". Attorneys seeking compensation have the burden of providing sufficient details to support their claim that the case is more complex or time consuming than the average case. This burden also exists with regard to the reasonableness of hours claimed for representation.

4. *Reimbursable Expenses:* Counsel shall be entitled to reimbursement for reasonably incurred out-of-pocket expenditures. Travel by privately owned automobile should be claimed at the mileage rate currently applicable to federal employee travel, plus parking fees and tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Necessary airline travel will be reimbursed only at coach class rates. Expenditures for meals and lodging, as well as for telephone toll calls, telegrams, and copying are reimbursable. The cost of photocopying or similar copying services is reimbursable, while the cost of printing is not. Where photocopying services are performed in counsel's office, the reimbursement shall be limited to out-of-pocket expenses, not to exceed 15 cents per copy. For photocopying and other services in preparation of briefs and appendices by commercial printers, reimbursement shall not exceed 35 cents per copy. All materials contained in appendices prepared by commercial printers in court-appointed cases will be reproduced on both sides of a sheet. No joint appendix in a court-appointed case shall exceed 250 sheets without advance permission from the Court. Compensation paid to law students for legal research is reimbursable, but expenses incurred by the law student in assisting counsel are not. When necessary for adequate representation in death penalty cases, reasonable employment and compensation of public and private organizations which provide consulting services to counsel are reimbursable to assist in such areas as records completion, identification of potential issues, exhaustion of state remedies, and review of draft pleadings and briefs. Detailed receipts are required for all travel and lodging expenses, non-office copying services, and any other expense in excess of $50.00. Failure to provide detailed receipts may result in the expense being denied. Any expense in excess of $50.00 must be itemized in a manner which will permit a review of the amount expended.

5. *Representation to the Supreme Court:* Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari to the Supreme Court, and in the protection of the defendant's rights up until the time that Court disposes of a petition, should be included in the voucher for services performed in this court.

6. *Number of Copies:* Appointed counsel is required to file six copies of the brief and five copies of the appendix with the clerk of the court, with service of one copy on

counsel for each party separately represented. Appointed counsel shall be entitled to reimbursement for the cost of photocopying required copies.

7. *Non-reimbursable Expenses:* General office overhead, personal items and non-legal personal services for the person represented, filing fees, services of process, and printing are non-reimbursable. (A person represented under the Criminal Justice Act is not required to pay filing fees or costs, or give security therefor, nor must he file the 28 U.S.C. § 1915(a) affidavit, for an appeal.)

8. *Authorized Transcripts:* Authorized transcripts should not be claimed in the voucher by an attorney. The Administrative Office will pay the appropriate court reporter directly.

9. *Interim Payment of Expenses:* This court, in rare cases, will entertain requests for interim reimbursement of extraordinary and substantial expenses.

10. *Direct Payment from Person Represented:* No appointed counsel shall accept a payment or a promise of payment from a defendant for representation in this court without prior authorization from the court on an appropriate Criminal Justice Act form.

11. *Public Defender:* Where a defendant is represented by a federal public defender, the defender shall be compensated solely by his federal salary and shall not submit a Criminal Justice Act form for compensation.

12. *Non-appointed Co-Counsel:* Non-appointed attorneys may not be compensated, but an appointed attorney may claim compensation for services furnished by a partner, associate, or co-counsel, within the maximum compensation allowed to the appointed attorney.

VII. RULES, REGULATIONS, FORMS

1. *Rules and Regulations:* This Plan shall be subject to and held to have been amended pro tanto by any rule or regulation adopted by the Judicial Conference of the United States concerning the operation of plans under the Criminal Justice Act.

The Judicial Council or this court may adopt rules or regulations concerning the operation of this Plan, which, when promulgated, shall have the same force as provisions of this Plan.

2. *Forms:* Forms approved by the Administrative Office of the United States Courts for use in the administration of the Criminal Justice Act shall be used whenever appropriate. Where there are no approved forms, this court may approve and require the use of designated forms or other instruments.

VIII. ADMINISTRATION

Generally; clerk's office: Any act to be done by the court may be done by any judge of the court, by the clerk, or by a deputy clerk pursuant to delegated authority.

IX. DEFINITIONS

1. *Supreme Court:* Supreme Court of the United States.
2. *Administrative Office:* Administrative Office of the United States Courts.
3. *This court; the court:* The United States Court of Appeals for the Fourth Circuit.
4. *Criminal Justice Act:* Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as amended.
5. *Defendant; Defendants:* Where appropriate in this Plan, the word "defendant" or "defendants" shall be construed to include petitioner or petitioners in a collateral proceeding.
6. *Judicial Council:* Judicial Council of the Fourth Judicial Circuit of the United States.

X. AMENDMENTS

This Plan may be amended at any time by the Judicial Council effective when a copy of the amendatory resolution is filed with the Administrative Office or at such later date as may be specified in the resolution.

XI. EFFECTIVE DATE

This amended plan is effective October 1, 2008.

Appendix D. Docketing Statement — Instructions.

1. Counsel for appellant must file two copies of a docketing statement with all attachments within fourteen days of filing the notice of appeal for every case appealed or cross-appealed to the court of appeals. The docketing statement must be received by the court of appeals clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties.

2. The attorney filing the notice of appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal. In the case of multiple appellants represented by separate counsel, the parties must confer and decide who will file the docketing statement. Appellants proceeding pro se may file a docketing statement, but are not required to do so.

3. The docketing statement is not a brief but will be used by the circuit mediator for pre-briefing review of civil cases in which all parties are represented by counsel, and in mediation conducted in such cases under Fourth Circuit Local Rule 33. The nature of proceedings and relief sought should be stated succinctly. The issues should be framed with reference to the specific facts and circumstances of the case. Conclusory statements such as "the judgment of the trial court is not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues in the brief, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement should not contain motions or other requests for interim relief. If counsel in a civil case believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth will cause the Court to initiate the process for dismissal of the appeal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven days of service of the docketing statement, with copies to all other parties.

6. You must attach to this docketing statement:
   - ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
   - THE NOTICE OF APPEAL.
   - THE DISTRICT COURT DOCKET SHEET.
   - A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
   - ANY OPINION OR FINDINGS.
   - ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
   - A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS), IF ANY.
   - A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

DOCKETING STATEMENT

Caption of Case **4CCA Docket No. (IF KNOWN)** ________

Type of Action

v.

____ Civil
____ Criminal/Prisoner
____ Cross Appeal

District ______________________ Judge ________
District Court Docket Number ______________________
Statute or other authority establishing jurisdiction in the:
District Court ______________________
Court of Appeals ______________________

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from ________
2. Date this notice of appeal filed ________
If cross appeal, date first notice of appeal filed ________
3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b) ________
4. Date of entry of order deciding above post-judgment motion ________
5. Filing date of any motion to extend time under FRAP 4(a)(5), 4(a)(6) or 4(b) ________
Time extended to ________

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits? ☐ Yes ☐ No
2. If no,
a.) Did the district court order entry of judgment as to fewer than all claims or all parties pursuant to FRCP 54(b)? ☐ Yes ☐ No
b.) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? ☐ Yes ☐ No
If yes, explain
____

(Criminal only)
3. Has the defendant been convicted? ☐ Yes ☐ No
4. Has a sentence been imposed? ☐ Yes ☐ No
Term ________
5. Is the defendant incarcerated? ☐ Yes ☐ No

C. Has this case previously been appealed? ☐ Yes ☐ No
If yes, give the case name, docket number and disposition of each prior appeal on a separate sheet.

D. Based on your present knowledge:
Will this appeal involve a question of first impression?
☐ Yes ☐ No
If yes, please explain briefly on a separate sheet.

E. Are any related cases or cases raising related issues pending in this Court, any district court of this circuit, or the Supreme Court? ☐ Yes ☐ No
If yes, cite the case and the manner in which it is related on a separate page. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.
If a related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator? ☐ Yes ☐ No

F. State the nature of the suit, the relief sought, and the outcome below. Attach additional page if necessary.

G. Issues to be raised on appeal. Attach additional page if necessary.

H. Does this appeal challenge the constitutionality of a federal or state statute in a case to which the United States or the affected state is not a party? ☐ Yes ☐ No

I. Is settlement being discussed?
☐ Yes ☐ No

J. Is expedited disposition of this case necessary?
☐ Yes ☐ No
If yes, you must file an appropriate motion.
Is oral argument necessary?
☐ Yes ☐ No

K. Were there any in-court proceedings below? ☐ Yes ☐ No
Is a transcript necessary for this appeal? ☐ Yes ☐ No
If yes, is transcript already on file with district court?
☐ Yes ☐ No
If transcript is not already on file, attach copy of transcript order.

L. List each adverse party to the appeal. If no attorney, give address and telephone number of the adverse party. Attach additional page if necessary.

1. Adverse party __________
Attorney __________
Address __________
____
Telephone __________
E-mail __________

2. Adverse party __________
Attorney __________
Address __________
____
Telephone __________
E-mail __________

M. If this case arises out of a bankruptcy proceeding, attach a copy of the caption of the case in the bankruptcy court showing the parties' status as debtor, creditor, trustee, plaintiff, defendant, etc.

N. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.
Appellant(s) Name __________
Address __________
____
____
Telephone __________
E-mail __________

Attorney's Name __________
Firm __________
Address __________
____
Telephone __________
E-mail __________

Will you be handling the appeal? (In criminal cases counsel below will handle the appeal unless relieved by this court.)
☐ Yes ☐ No

FRAP 12(b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature __________
Date __________

ATTACH:

1. ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. THE DISTRICT COURT DOCKET SHEET.
4. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
5. ANY OPINION OR FINDINGS.
6. ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
7. A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY).
8. A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

Appendix E. Docketing Statement — Agency Instructions.

1. Counsel for the petitioner or applicant must file two copies of a docketing statement for any petition for review, cross petition, application for enforcement, or cross application within fourteen days of docketing of the petition or application. The docketing statement must be received by the clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties. Petitioners proceeding pro se may file a docketing statement but are not required to do so.

2. Only one docketing statement shall be filed for each petition or application. If there are multiple petitioners or applicants, the parties should confer and decide who will file the docketing statement. A list of all names and addresses of parties, their attorneys and attorneys' names and addresses, and a certification that all parties have conferred and concurred in the filing must be attached to the docketing statement.

3. The docketing statement is not a brief and should not contain argument or motions. The nature of proceedings and relief sought should be stated succinctly. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as "the findings of the administrative law judge are not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement will be used in any mediation conducted under Fourth Circuit Local Rule 33. If counsel in a case in which all parties are represented by counsel believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven (7) days of service of the docketing statement, with copies to all other parties.

DOCKETING STATEMENT—AGENCY

Caption of Case **4CCA District No. (If Known)** ________

Type of Action

____ Application for Enforcement
____ Petition for Review
____ Cross Petition

Name of Agency ________________
Administrative Law Judge ________________
Agency Number ________________
Statute or other authority establishing jurisdiction in the Court of Appeals ________________

A. Timeliness
   1. Date of entry of order ________________
   2. Time allowed for review or enforcement ________________
      Authority ________________

B. Finality
   1. Tribunal or board issuing order or regulation ________________
   2. Is the order or judgment appealed from a final decision on the merits?
      yes ( ) no ( )
   3. If no, is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule?
      yes ( ) no ( )
      If yes, explain ________________

C. If INS case, is petitioner subject to deportation while this petition is pending?
   yes ( ) no ( )
   If yes, do you intend to file a motion to stay deportation?
   yes ( ) no ( )

D. Has this case been before the Court previously?
   yes ( ) no ( )

   If yes, give case name, docket number, and disposition of each prior appeal on a separate sheet.

E. Is there any case now pending or about to be brought before this Court, any other court or administrative agency, or the Supreme Court which either arises from the same case or controversy or substantially related issues?
   yes ( ) no ( )

   If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

   If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator?
   yes ( ) no ( )

F. State the nature of the proceeding, the relief sought, and the outcome below. Attach additional page if necessary.

G. Issues to be raised on petition or application. Attach additional page if necessary.

H. Is settlement being discussed?
   yes ( ) no ( )

I. Is expedited disposition of this case necessary?
   yes ( ) no ( )
   If yes, you must file an appropriate motion.
   Is oral argument necessary?
   yes ( ) no ( )

J. List each adverse party to this action. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party ______
Attorney ______
Address ______
Telephone ______
E-mail ______

K. Petitioner's or Applicant's Name ______
Address ______
Telephone ______
E-mail ______

L. Attorney or pro se litigant filing this docketing statement.
Will you be handling the appeal?
yes ( ) no ( )
Name ______
Attorney ( ) Pro Se ( )
Firm ______
Address ______
Telephone ______
E-mail ______

If this is a joint statement by multiple petitioners or applicants, add the names and addresses of other petitioners or applicants and their counsel on an additional sheet, accompanied by a certification that all petitioners or applicants concur in this filing.

Signature ______

Date ______

EACH COPY OF THIS DOCKETING STATEMENT SERVED OR FILED SHALL HAVE ATTACHED TO IT COPIES OF:

(1) THE APPLICATION FOR ENFORCEMENT, OR PETITION FOR REVIEW;
(2) THE DOCKET SHEET OF THE AGENCY FROM WHICH THE APPEAL IS TAKEN;
(3) THE JUDGMENT OR ORDER SOUGHT TO BE REVIEWED AND ANY OPINION OR FINDING;
(4) ANY OPINION, FINDINGS, OR RECOMMENDATION OF AN ADMINISTRATIVE LAW JUDGE UNDERLYING THE ORDER AT ISSUE;
(5) ANY TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY); AND
(6) A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

Appendix F. Docketing Statement — Tax court.

1. Counsel for appellant must file two copies of a docketing statement with all attachments for every case appealed or cross-appealed to the court of appeals within fourteen days of the docketing of the appeal. The docketing statement must be received by the clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties.

2. The attorney filing the notice of appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal. In the case of multiple appellants represented by separate counsel, the parties must confer and decide who will file the docketing statement. Appellants proceeding pro se may file a docketing statement, but are not required to do so.

3. The docketing statement is not a brief and should not contain argument or motions. The nature of proceedings and relief sought should be stated succinctly. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as "the judgment of the tax court is not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement will be used in any mediation conducted under Fourth Circuit Local Rule 33. If counsel in a case in which all parties are represented by counsel believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissal of the appeal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven (7) days of service of the docketing statement, with copies to all other parties.

DOCKETING STATEMENT—TAX COURT

Caption of Case 4CCA Docket No. (IF KNOWN) ______________

Tax Court Docket Number ______________ Judge ________________
Statute or other authority establishing jurisdiction in the:
Tax Court ____
Court of Appeals ______________________________________

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from ________________.
2. Date this notice of appeal filed ______________.
If cross appeal, date first notice of appeal filed ______________.

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits? yes ( ) no ( )
2. If no, is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule?
yes ( ) no ( )
If yes, explain
____

C. Has this case previously been appealed?
yes ( ) no ( )
If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are any related cases or cases raising related issues pending in this Court, the Tax Court or the Supreme Court?
yes ( ) no ( )
If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator?
yes ( ) no ( )

E. State the nature of the suit, the relief sought and the outcome below. Attach additional page if necessary.

F. Issues to be raised on appeal. Attach additional page if necessary.

G. Is settlement being discussed?
yes ( ) no ( )

H. Is disposition on motions, memoranda, or an abbreviated briefing schedule appropriate?
yes ( ) no ( )
If yes, you must file an appropriate motion.
Is oral argument necessary?
yes ( ) no ( )

I. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.
1. Adverse party____
Attorney____
Address____
____
Telephone____
E-mail____

J. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary:

Appellant(s) Name ____
Address ____
____
Telephone ____
E-mail ____

Attorney's Name ____
Firm ____
Address ____
____
Telephone ____
E-mail ____

Will you be handling the appeal? yes ( ) no ( )

FRAP 12 (b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature ____
Date ____

ATTACH:

1. ADDITIONAL PAGES, IF ANY, CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
4. ANY OPINION OR FINDINGS.
5. A CERTIFICATE OF SERVICE.

Appendix G. Death Penalty Representation.

In the Matter of Death Penalty Representation

In the Fourth Circuit

ORDER

The Report of the Death Penalty Committee, which is attached to and made a part of this Order, is hereby adopted by the Fourth Circuit Judicial Council. The official policy of the Fourth Circuit shall be:

(1) Federal Public Defenders may be appointed to represent individuals charged with federal capital crimes and collateral attacks on federal capital convictions and sentences.

(2) Federal Public Defenders shall not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. Section 2254 for relief from a state death sentence.

(3) The limitations on time for decision set forth in 28 U.S.C.A. Section 2266 shall apply at the district and circuit court levels and the Circuit Executive is authorized to inquire into the reasons for any noncompliance with the limitations.

and it so ORDERED

FOR THE COUNCIL:

/s/ J. Harvie Wilkinson III

Chief Judge

Date: October 3, 1996

DEATH PENALTY REPRESENTATION IN THE FOURTH CIRCUIT

I. STATUTORY PROVISIONS PRESENTLY APPLICABLE TO APPOINTMENT OF ATTORNEYS FOR CAPITAL REPRESENTATION

A. APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS IS STATUTORILY GUARANTEED FOR FEDERAL TRIALS, DIRECT APPEAL FROM FEDERAL CONVICTIONS, § 2255 PROCEEDINGS, AND § 2254 PROCEEDINGS.

Congress has enacted special provisions guaranteeing that "in every criminal action in which a defendant is charged with a crime which may be punishable by death" and in "any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation ... shall be entitled to the appointment of one or more attorneys." 18 U.S.C.A. § 3599(a)(1) & (2). Any defendant indicted for a federal capital crime is entitled to have two attorneys appointed. 18 U.S.C.A. § 3005.

B. THE MINIMUM QUALIFICATIONS OF APPOINTED COUNSEL ARE STATUTORILY DEFINED.

The lead attorney appointed to represent one indicted on an offense punishable by death "must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court." 18 U.S.C.A. § 3599(b). And, at least one of the attorneys appointed to represent a defendant indicted with a federal capital crime must "be learned in the law applicable to capital cases." 18 U.S.C.A. § 3005.

A lead attorney appointed after conviction to represent a capital defendant on direct appeal, or during § 2255 proceedings, "must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." 18 U.S.C.A. § 3599(c).

A court may, for good cause shown, appoint another attorney who does not meet the requirements set forth in 18 U.S.C.A. § 3599(b)-(c), but whose experience otherwise enables him or her to adequately represent the defendant. 18 U.S.C.A. § 3599(d).

Attorneys that have been appointed typically continue the representation on appeal. *See* 18 U.S.C.A. § 3599(e) (providing that once appointed attorneys continue representation throughout subsequent proceedings); 18 U.S.C.A. § 3006A(c).

C. COMPENSATION FOR FEES IS PRESENTLY LIMITED ONLY TO A "REASONABLE FEE" IN THE VIEW OF THE DISTRICT COURT.

Attorneys appointed pursuant to § 3599 may be compensated at the rate authorized by the Judicial Conference pursuant to 3599(g)(1). Counsel is also bound by the limitation of $7,500 for investigative, expert, and other reasonablynecessary expenses unless a higher fee is approved by the court. 18 U.S.C.A. § 3599(g)(2).

II. RECOMMENDATIONS

A. SOLICIT QUALIFIED AND INTERESTED COUNSEL AND MAINTAIN LISTS OF ATTORNEYS QUALIFYING FOR APPOINTMENT AS LEAD COUNSEL AND SECOND-CHAIR COUNSEL.

District Court

** **It is recommended that a plan be adopted under which the district court would contact the bar and solicit applications for a panel of attorneys qualified to represent capital defendants.**

Some districts have experienced difficulty in locating qualified and interested counsel to undertake capital representation. But, it is believed that there are many attorneys who would seek the opportunity for appointment if they were made aware of that opportunity. Accordingly, it is recommended that on a district-by-district basis, a program of solicitation of the bar should be implemented in order to increase the number of attorneys seeking appointment.

**** It is recommended that the district courts maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel and that these attorneys' expertise in trial, appellate, and habeas representation be identified.**

Because the statutory requirements for lead counsel are more stringent than those for second-chair counsel, courts should maintain separate lists of those attorneys who are qualified for each type of appointment. In addition to the statutory qualifications, specialized skills and experience are necessary to represent capital defendants in trial, appellate, and habeas proceedings. Courts may find separate lists of attorneys with trial, appellate, and/or habeas experience useful. Alternatively, courts may conclude that some other method of identifying various types and levels of expertise is preferable.

In ascertaining which attorneys of those expressing an interest in capital representation and seeking appointment are qualified to be placed on lists of those available for appointment as lead and second-chair counsel, the court may wish to consider appointment of an oversight committee composed of district judges, magistrate judges, district court clerks, and the Federal Public Defender, *see* 18 U.S.C.A. § 3005.

It is envisioned that over time attorneys chosen for appointment from the second-chair counsel list will develop the qualifications to be placed on the lead counsel list, and that appointment of second-chair attorneys is desirable in order to develop a wider range of expertise available for lead counsel appointment. In addition, special consideration should be given to appointment of the attorney who represented a § 2254 petitioner during state collateral proceedings, if interested in appointment and qualified for it. *See* 18 U.S.C.A. § 3599(d).

Circuit Court

**** It is recommended that the circuit court solicit the bar for applications, maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel, and identify attorneys' expertise in appellate and habeas representation.**

Although attorneys that have been appointed at the district court level typically continue their representation on appeal, from time to time it is necessary to appoint attorneys pursuant to § 3599 during appellate proceedings. Consequently, it is recommended that a plan to solicit the bar for applications for appointment to capital representation be adopted and that lists of those attorneys qualified and interested in capital representation as lead and second-chair counsel be maintained.

B. USE FEDERAL PUBLIC DEFENDERS FOR REPRESENTATION OF FEDERAL CAPITAL CHARGES AND COLLATERAL ATTACKS ON FEDERAL CAPITAL CONVICTIONS AND SENTENCES; DO NOT UTILIZE FEDERAL PUBLIC DEFENDERS FOR PROSECUTION OF HABEAS PROCEEDINGS FILED BY STATE PRISONERS.

**** It is recommended that Federal Public Defenders be utilized for representation of individuals charged with federal capital crimes and collateral attacks on federal capital convictions.**

Providing representation for defendants charged with federal crimes punishable by the death penalty is within the statutory responsibility of the Federal Public Defender (FPD) to provide representation for all indigents charged with federal crimes. It is contemplated that FPDs will be placed in the pool of attorneys available to represent capital defendants in federal capital trials, on direct appeal, and in § 2255 proceedings. For some period of time, until FPDs develop the qualifications and experience, their appointments may be limited to second-chair positions. *See* 18 U.S.C.A. § 3599(d). However, such appointments should be encouraged whenever possible in order to permit FPDs to attain expertise in this area.

**** It is recommended that FPDs not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. § 2254 for relief from a state death sentence.**

The consensus of opinion among FPDs in the circuit is that FPD representation in § 2254 proceedings challenging a state sentence of death is undesirable for a number of reasons. First, the prospect of a federal agency opposing the validity of state convictions creates the appearance of an unacceptable conflict between separate and independent sovereigns. Second, although the FPD is authorized to represent defendants seeking a writ of habeas corpus, encouraging such representation is problematic because litigation of collateral state-court proceedings and issues may be necessary, raising the question of the appropriateness of FPDs appearing in state court and presenting issues outside their traditional area of expertise. Finally, appointing FPDs to represent § 2254 petitioners could be viewed as an attempt to circumvent the will of Congress, given its recent decision to withdraw funding from death penalty resource centers.

C. IMPOSE RESTRAINTS ON TIME FOR DECISION.

** **It is recommended that the limitations on time for decision set forth in 28 U.S.C.A. § 2266 be adopted at the district and circuit court levels and that the Circuit Executive be authorized to inquire into the reasons for any noncompliance with the limitations.**

Under 28 U.S.C.A. § 2266 (enacted by the Antiterrorism and Effective Death Penalty Act of 1996), proceedings brought pursuant to § 2254 that are governed by Chapter 154 of Title 28 and proceedings brought pursuant to § 2255 in which the defendant was sentenced to death must be decided by the district court and the circuit court within specified time limits. The district court is required to render a decision and enter a final judgment (including a resolution of any motion to alter or amend the judgment) within 450 days of the date on which the petition is filed or 60 days after the date on which the case is submitted for decision, whichever is earlier, subject to an extension of up to 30 days if the district court determines that the ends of justice would best be served by the delay. *See* 28 U.S.C.A. § 2266(a)-(b). The court of appeals is required to render a decision within 120 days of the date on which the reply brief is filed and to rule on any petition for rehearing or rehearing en banc within 30 days of the date the petition is filed or the date a response thereto is filed, whichever is later. *See* 28 U.S.C.A. § 2266(c). Furthermore, if the petition is granted, any hearing must be conducted and a final decision rendered within 120 days of the entry of the order granting rehearing. *Id.* And, following a remand by the court of appeals en banc or the Supreme Court for further proceedings, the period for decision runs from the date the remand is ordered. *Id.*

The time limitations imposed by § 2266 are applicable only in those § 2254 proceedings governed by Chapter 154, (*i.e.*, those challenging a state death sentence where the state has adopted specified procedures for appointment of counsel to represent the defendant in state post-conviction proceedings) and in § 2255 proceedings in which the defendant was sentenced to death. As such, the limitations presently will not apply to the majority of § 2254 petitions challenging a death sentence because of the relatively recent adoption of those mechanisms. *See* Bennett v. Angelone, No. 95-4004, 1996 WL 469705, at *4 (4th Cir. Aug. 20, 1996) (stating that question of whether Virginia's mechanism for appointment of counsel satisfied requirements for application of Chapter 154 was irrelevant because Chapter 154 would not apply when the mechanism was not in place during the petitioner's state collateral proceedings). Time constraints, however, are sorely needed at present. *See, e.g.,* Correll v. Thompson, 63 F.3d 1279, 1285 n.4 (4th Cir. 1995), *cert. denied,* 116 S. Ct. 688 (1996) (noting that § 2254 petition was pending in district court for in excess of three years prior to final decision). Consequently, it is recommended that the time limitations for decision imposed by § 2266 be adopted and implemented by rule immediately. It is contemplated that the limitations would apply to cases pending when the rule became effective, but that the limitations would apply prospectively. (For example, an appeal in a § 2255 proceeding challenging a death sentence that had been argued to this court and was pending decision would have to be decided within 120 days of the date the rule becomes effective.)

Additionally, it is recommended that a mechanism be established to track cases to which the time limitations apply, and in the event that cases remain pending after the date on which they were due to be decided, the Circuit Executive be authorized to make appropriate inquiry on behalf of the Judicial Council to seek an explanation of the reasons why the judge or panel of judges failed to comply with the time limitation.

Index to Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit

A

ANNOUNCEMENT OF DECISION, 4thCirIOP 36.2.

ATTORNEYS AT LAW.
Appointment of counsel.
  Federal public defenders, 4thCirIOP Appx G.
  Implementation of criminal justice act.
    Plan, 4thCirIOP Appx C.

B

BANKRUPTCY APPEALS.
Manner of taking appeals, 4thCirIOP 6.1.

BRIEFS.
Oral argument.
  Calendar assignments and panel composition, 4thCirIOP 34.1.
  Disposition without oral argument, 4thCirIOP 34.2.

C

CALENDAR.
Argument calendar.
  Assignments, 4thCirIOP 34.1.

CAPITAL PUNISHMENT.
Death penalty cases generally, 4thCirIOP 22.1.
  Appointment of federal public defenders, 4thCirIOP Appx G.

CERTIORARI.
Petitions for writs, 4thCirIOP 41.2.

CLERK'S OFFICE.
Address, 4thCirIOP 45.1.
Hours, 4thCirIOP 45.1.
Location, 4thCirIOP 45.1.

CONFERENCES.
Judicial conference, 4thCirIOP 47.1.
  Bar membership resolution, 4thCirIOP Appx A.
Opinion preparation assignments, 4thCirIOP 36.1.

CRIMINAL JUSTICE ACT.
Implementation of act.
  Plan, 4thCirIOP Appx C.

D

DEATH PENALTY CASES.
Expedited briefing schedule, 4thCirIOP 22.1.
Federal public defenders.
  Appointment, 4thCirIOP Appx G.
Generally, 4thCirIOP 22.1.

DISTRICT COURTS.
Bankruptcy appeals, 4thCirIOP 6.1.

DISTRICT COURTS —Cont'd
Orders.
  Transmission of district court order, 4thCirIOP 3.1.

DOCKET.
Docketing statement.
  Agencies, 4thCirIOP Appx E.
  Instructions, 4thCirIOP Appx D.
  Tax court, 4thCirIOP Appx F.

F

FEDERAL PUBLIC DEFENDERS.
Death penalty cases.
  Appointment, 4thCirIOP Appx G.

J

JUDGES.
Three judge panels, 4thCirIOP 34.1.

JUDICIAL CONFERENCE, 4thCirIOP 47.1.
Bar membership, 4thCirIOP 47.2.

M

MANDATE.
What constitutes the mandate, 4thCirIOP 41.1.

O

OPERATION OF RULES AND PROCEDURES.
Public information, 4thCirIOP 45.2.

OPINIONS.
Assignments, 4thCirIOP 36.1.
Circulation of opinions in argued cases and announcement of decision, 4thCirIOP 36.2.
Summary opinions, 4thCirIOP 36.3.

ORAL ARGUMENT.
Disposition of case without oral argument, 4thCirIOP 34.2.

ORDERS.
District courts.
  Transmission of district court order, 4thCirIOP 3.1.
Preparation of orders, 4thCirIOP 27.4.

P

PETITIONS.
Rehearing.
  Application from United States for extension of time, 4thCirIOP 40.1.
  Statement of purpose, 4thCirIOP 40.2.
Writs of certiorari, 4thCirIOP 41.2.

PUBLIC DEFENDERS.
Federal public defenders.
  Death penalty cases.
    Appointment, 4thCirIOP Appx G.

PUBLIC INFORMATION, 4thCirIOP 45.2.

R

REHEARING.
Petition.
  Extension of time.
    Application from United States, 4thCirIOP 40.1.
  Statement of purpose, 4thCirIOP 40.2.

S

STATUS OF APPEALS.
Public information, 4thCirIOP 45.2.

SUMMARY OPINIONS, 4thCirIOP 36.3.

T

THREE JUDGE PANELS.
Composition of panel, 4thCirIOP 34.1.

TRANSCRIPTS.
Appellate transcripts.
  Preparation guidelines, 4thCirIOP Appx B.
Sanctions for court reporter's failure to file.
  Timely transcript, 4thCirIOP 11.1.
Time limits for filing.
  Sanctions for failure to file timely transcript, 4thCirIOP 11.1.

W

WRIT OF CERTIORARI.
Petitions for writs, 4thCirIOP 41.2.

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Adopted March 11, 2008.

Article I. General Provisions

Rule
1. Scope.
2. Effect and Construction.
3. Definitions.
4. Covered Judges.

Article II. Initiation of a Complaint

5. Identification of a Complaint.
6. Filing a Complaint.
7. Where to Initiate Complaints.
8. Action by Clerk.
9. Time for Filing or Identifying a Complaint.
10. Abuse of the Complaint Procedure.

Article III. Review of a Complaint by the Chief Judge

11. Review by the Chief Judge.

Article IV. Investigation and Report by Special Committee

12. Composition of Special Committee.
13. Conduct of an Investigation.
14. Conduct of Hearings by Special Committee.
15. Rights of Subject Judge.
16. Rights of Complainant in Investigation.

Rule
17. Special-Committee Report.

Article V. Judicial-Council Review

18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e).
19. Judicial-Council Disposition of Petitions for Review.
20. Judicial-Council Consideration of Reports and Recommendations of Special Committees.

Article VI. Review by Judicial Conference Committee on Conduct and Disability

21. Committee on Judicial Conduct and Disability.
22. Procedures for Review.

Article VII. Miscellaneous Rules

23. Confidentiality.
24. Public Availability of Decisions.
25. Disqualification.
26. Transfer to Another Judicial Council.
27. Withdrawal of Complaints and Petitions for Review.
28. Availability of Rules and Forms.
29. Effective Date.

Form — Complaint of Judicial Misconduct or Disability

Index follows Rules.

Preface

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial and Disability Act, 28 U.S.C. §§ 351-364.

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

These Rules govern proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

COMMENT

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Committee Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. *Id.* at 212-15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were promulgated by the Judicial Conference on March 11, 2008.

Rule 2. Effect and Construction.

(a) *Generally.* These Rules are mandatory; they supersede any conflicting judicial council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) *Exception.* A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

COMMENT

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

Rule 3. Definitions.

(a) *Chief Judge.* "Chief judge" means the chief judge of a United States Court of Appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) *Circuit Clerk.* "Circuit clerk" means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) *Complaint.* A complaint is:

(1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) *Court of Appeals, District Court, and District Judge.* "Courts of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) *Disability.* "Disability" is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(f) *Judicial Council and Circuit.* "Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(g) *Magistrate Judge.* "Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

(h) *Misconduct.* Cognizable misconduct:

(1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) having improper discussions with parties or counsel for one side in a case;

(D) treating litigants or attorneys in a demonstrably egregious and hostile manner;

(E) engaging in partisan political activity or making inappropriately partisan statements;

(F) soliciting funds for organizations; or

(G) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

(2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(3) does not include:

(A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

(B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(i) *Subject Judge.* "Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

COMMENT

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. *See* 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process — "identify a complaint," *see* 28 U.S.C. § 351(b) and Rule 5 — and conduct an investigation without becoming a party. *See* 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, instead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. *See* Breyer Committee Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be an accusation. This definition is codified in (c)(2).

Rule 3(e) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (h)(1) therefore provides some specific examples. Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.

Even where specific, mandatory rules exist — for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations — the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these Rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge solicited funds for a charity or participated in a partisan political event are cognizable under the Act.

On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a spouse (not including physical abuse) even though this might cause some reasonable people to have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered, for example, when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge — without more — is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation — however unsupported — that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — "the merits" — of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper *ex parte* communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief judge until the appellate proceedings are concluded in order to avoid, *inter alia*, inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand — for example a statement that a claim is legally or factually "frivolous" — then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge — in other words, assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules to the various kinds of courts covered.

Rule 4. Covered Judges.

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

COMMENT

This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against persons not covered by the Act, such as other court personnel, or against both covered judges and noncovered persons.

ARTICLE II. INITIATION OF A COMPLAINT

Rule 5. Identification of a Complaint.

(a) *Identification.* When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) *Noncompliance with Rule 6(d).* Rule 6 complaints that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

COMMENT

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245-46.

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. *See* 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, *see* Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for the chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 3(h)(3)(A), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only: (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information, and proceed to follow the process described in Rule 5(a).

Rule 6. Filing a Complaint.

(a) *Form.* A complainant may use the form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) *Brief Statement of Facts.* A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

(1) what happened;

(2) when and where the relevant events happened;

(3) any information that would help an investigator check the facts; and

(4) for an allegation of disability, any additional facts that form the basis of that allegation.

(c) *Legibility.* A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) *Complainant's Address and Signature; Verification.* The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).

(e) *Number of Copies; Envelope Marking.* The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

COMMENT

The Rule is adapted from the Illustrative Rules and is self-explanatory.

Rule 7. Where to Initiate Complaints.

(a) *Where to File.* Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) *Misconduct in Another Circuit; Transfer.* If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

COMMENT

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar — *ex parte* contact between an attorney and a judge, for example — it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

Rule 8. Action by Clerk.

(a) *Receipt of Complaint.* Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

(b) *Distribution of Copies.* The clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge. The clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) *Complaints Against Noncovered Persons.* If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) *Receipt of Complaint about a Judge and Another Noncovered Person.* If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must inform the complainant of the limitation.

COMMENT

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

Rule 9. Time for Filing or Identifying a Complaint.

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(1)(E).

COMMENT

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

Rule 10. Abuse of the Complaint Procedure.

(a) *Abusive Complaints.* A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) *Orchestrated Complaints.* When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept further ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

COMMENT

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

Rule 11. Review by the Chief Judge.

(a) *Purpose of Chief Judge's Review.* When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25. If the complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing the complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) *Inquiry by Chief Judge.* In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.

(c) *Dismissal.*

(1) Allowable grounds. A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivolous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations which are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) Disallowed grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.

(d) *Corrective Action.* The chief judge may conclude the complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6, or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) *Intervening Events.* The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

(f) *Appointment of Special Committee.* If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) *Notice of Chief Judge's Action; Petitions for Review.*

(1) When special committee is appointed. If a special committee is appointed, the chief judge must notify the complainant and the subject judge that the matter has been referred to a special committee and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

(2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(3) Right of petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If a petition for review is filed, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the judicial council.

(h) *Public Availability of Chief Judge's Decision.* The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

COMMENT

Subsection (a) lists the actions available to a chief judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. A chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. Some formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry ... demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together, so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to a special committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's — in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability — then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur when the complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. *Id.* The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. *Id.* In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. *Id.*

Similarly, under (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary.

Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as "frivolous," under Rule 11(c)(1)(C), will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper *ex parte* contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. *Id.* The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. *Id.* The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. *Id.* at 243-44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. *Id.*

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. 244-45. The Act authorizes the chief judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. *Id.* Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. *Id.* The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. *Id.* Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on the identical conduct.

"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. *Id.* Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). *Id.* Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. *Id.*

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. *Id.* While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. *Id.* In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise. *Id.*

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244-45. In other words, minor corrective action will not suffice to dispose of a serious matter. *Id.*

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. *Id.*

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief judges, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. *See also* Commentary on Rule 24, dealing with public availability.

Rule 11(g) provides that the complainant and subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. A copy of a chief judge's order and memorandum, which may be one document, disposing of a complaint must be sent by the circuit clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

Rule 12. Composition of Special Committee.

(a) *Membership.* Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) *Presiding Officer.* When appointing the committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) *Bankruptcy Judge or Magistrate Judge as Adviser.* If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a committee member.

(d) *Provision of Documents.* The chief judge must certify to each other member of the committee and to any adviser copies of the complaint and statement of facts in whole or relevant part, and any other relevant documents on file.

(e) *Continuing Qualification of Committee Members.* A member of a special committee who was qualified to serve when appointed may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) *Inability of Committee Member to Complete Service.* If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) *Voting.* All actions by a committee must be by vote of a majority of all members of the committee.

COMMENT

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another committee member as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge.

Subsection (c) also provides that the adviser will have all the privileges of a committee member except a vote. The adviser, therefore, may participate in all deliberations of the committee, question witnesses at hearings, and write a separate statement to accompany the special committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

Rule 13. Conduct of an Investigation.

(a) *Extent and Methods of Special-Committee Investigation.* Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief judge for action under Rule 5 or Rule 11.

(b) *Criminal Conduct.* If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) *Staff.* The committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judicial branch or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) *Delegation of Subpoena Power; Contempt.* The chief judge may delegate the authority to exercise the committee's subpoena powers. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

COMMENT

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. *Id.* Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. *See* Rule 12(g).

Rule 14. Conduct of Hearings by Special Committee.

(a) *Purpose of Hearings.* The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) *Committee Evidence.* Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) *Counsel for Witnesses.* The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) *Witness Fees.* Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) *Oath.* All testimony taken at a hearing must be given under oath or affirmation.

(f) *Rules of Evidence.* The Federal Rules of Evidence do not apply to special-committee hearings.

(g) *Record and Transcript.* A record and transcript must be made of all hearings.

COMMENT

This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty — and that of their staff — is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

Rule 15. Rights of Subject Judge.

(a) *Notice.*

(1) *Generally.* The subject judge must receive written notice of:

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) *Suggestion of additional witnesses.* The subject judge may suggest additional witnesses to the committee.

(b) *Report of the Special Committee.* The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) *Presentation of Evidence.* At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine committee witnesses, in person or by counsel.

(d) *Presentation of Argument.* The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) *Attendance at Hearings.* The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the committee.

(f) *Representation by Counsel.* The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

COMMENT

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint … be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings — for example, meetings at which the committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

Rule 16. Rights of Complainant in Investigation.

(a) *Notice.* The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) *Opportunity to Provide Evidence.* If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.

(c) *Presentation of Argument.* The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) *Representation by Counsel.* A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) *Cooperation.* In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

COMMENT

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

Rule 17. Special-Committee Report.

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

COMMENT

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statement to the Judicial Conference Committee is new.

ARTICLE V. JUDICIAL-COUNCIL REVIEW

Rule 18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e).

(a) *Petitions for Review.* After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) *When to File; Form; Where to File.* A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of ..." and state the reasons why the petition should be granted. It must be signed.

(c) *Receipt and Distribution of Petition.* A circuit clerk who receives a petition for review filed within the time allowed and in proper form must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;
(B) all materials obtained by the chief judge in connection with the inquiry;
(C) the chief judge's order disposing of the complaint;
(D) any memorandum in support of the chief judge's order;
(E) the petition for review; and
(F) an appropriate ballot;

(3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Unless the Judicial Conference Committee requests them, the clerk will not send copies of the materials obtained by the chief judge.

(d) *Untimely Petition.* The clerk must refuse to accept a petition that is received after the deadline in (b).

(e) *Timely Petition Not in Proper Form.* When the clerk receives a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk's letter about the deficiencies or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

COMMENT

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, a chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. *See* Fed. R. App. P. 25(a)(2)(A) and (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

Rule 19. Judicial-Council Disposition of Petitions for Review.

(a) *Rights of Subject Judge.* At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) *Judicial-Council Action.* After considering a petition for review and the materials before it, a judicial council may:

(1) affirm the chief judge's disposition by denying the petition;

(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) *Notice of Council Decision.* Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) *Memorandum of Council Decision.* If the council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) *Review of Judicial-Council Decision.* If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented on the ground that a special committee should be appointed under Rule 11(f), the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely on the issue of whether a special committee should be appointed.

(f) *Public Availability of Judicial-Council Decision.* Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

COMMENT

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

Rule 20. Judicial-Council Consideration of Reports and Recommendations of Special Committees.

(a) *Rights of Subject Judge.* Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.

(b) *Judicial-Council Action.*

(1) *Discretionary actions.* Subject to the judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa—12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(E) take any combination of actions described in (b)(1)(A)-(D) of this Rule that is within its power.

(2) *Mandatory actions.* A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) *Inadequate Basis for Decision.* If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) *Council Vote.* Council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) *Recommendation for Fee Reimbursement.* If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office of the United States Courts use funds appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) *Council Action.* Council action must be by written order. Unless the council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

COMMENT

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

Rule 20(c) provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1)(A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

Rule 21. Committee on Judicial Conduct and Disability.

(a) *Review by Committee.* The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) *Reviewable Matters.*

(1) *Upon petition.* A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) *Upon Committee's initiative.* At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) *Committee Vote.* Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition for review, the decision must be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who will determine the petition must be selected based on committee membership as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only four members are qualified to vote, the Chief Justice must appoint, if available, an ex-member of the Committee or, if not, another United States judge to consider the petition.

(d) *Additional Investigation.* Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) *Oral Argument; Personal Appearance.* There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) *Committee Decisions.* Committee decisions under this Rule must be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) *Finality.* All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

COMMENT

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion, whether or not such a dissent occurred, and only as to the appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

Rule 22. Procedures for Review.

(a) *Filing a Petition for Review.* A petition for review of a judicial-council decision may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition to the complainant or subject judge, as the case may be.

(b) *Form and Contents of Petition for Review.* No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the judicial council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition should not normally exceed 20 pages plus necessary attachments.

(c) *Time.* A petition must be submitted within 63 days of the date of the order for which review is sought.

(d) *Copies.* Seven copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) *Action on Receipt of Petition for Review.* The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

COMMENT

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES

Rule 23. Confidentiality.

(a) *General Rule.* The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) *Files.* All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) *Disclosure in Decisions.* Except as otherwise provided in Rule 24, written decisions of the chief judge, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d) *Availability to Judicial Conference.* On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee to records of proceedings under the Act at the site where the records are kept.

(e) *Availability to District Court.* If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) *Impeachment Proceedings.* If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) *Subject Judge's Consent.* If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a chief judge, a special committee, or the judicial council, not be revealed.

(h) *Disclosure in Special Circumstances.* The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) *Disclosure of Identity by Subject Judge.* Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j) *Assistance and Consultation.* Nothing in this Rule precludes the chief judge or judicial council acting on a complaint filed under the Act from seeking the help of qualified staff or from consulting other judges who may be helpful in the disposition of the complaint.

COMMENT

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, judicial council, the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief judge from "communicat[ing] orally or in writing with ... [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this. The chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

Rule 24. Public Availability of Decisions.

(a) *General Rule; Specific Cases.* When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure.

(b) *Manner of Making Public.* The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability will make available on the Federal Judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) *Orders of Judicial Conference Committee.* Orders of this Committee constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the clerk of the relevant court of appeals. The Committee will also make such orders available on the Federal Judiciary's website, www.uscourts.gov. When authorized by the Committee, other orders related to complaint proceedings will similarly be made available.

(d) *Complaints Referred to the Judicial Conference of the United States.* If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

COMMENT

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of the chief judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest — particularly if a judicial officer resigns in the course of an investigation — to make the identity of the judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Rule 25. Disqualification.

(a) *General Rule.* Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) *Subject Judge.* A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) *Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order.* If a petition for review of a chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not disqualified from participating in the council's consideration of the petition.

(d) *Member of Special Committee Not Disqualified.* A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) *Subject Judge's Disqualification After Appointment of a Special Committee.* Upon appointment of a special committee, the subject judge is automatically disqualified from participating in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) *Substitute for Disqualified Chief Judge.* If the chief judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these Rules must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) *Judicial-Council Action When Multiple Judges Are Disqualified.* Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) *Disqualification of Members of the Judicial Conference Committee.* No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

COMMENT

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference Committee. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings; Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. *See, e.g., In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

Rule 26. Transfer to Another Judicial Council.

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

COMMENT

Rule 26 is new; it implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint — for example, reference to the transferee chief judge, appointment of a special committee, etc.

Rule 27. Withdrawal of Complaints and Petitions for Review.

(a) *Complaint Pending Before Chief Judge.* With the chief judge's consent, a complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent a chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) *Complaint Pending before Special Committee or Judicial Council.* After a complaint has been referred to a special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) *Petition for Review.* A petition for review addressed to a judicial council under Rule 18, or the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22 may be withdrawn if no action on the petition has been taken.

COMMENT

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection 27(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

Rule 28. Availability of Rules and Forms.

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

Rule 29. Effective Date.

These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

Judicial Council of the ______ Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 5 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The rules are available in federal court clerks' offices, on individual federal courts' Web sites, and on www.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: ____________________
   Contact Address: ____________________
   ____
   ____
   Daytime telephone: (____) ____________

2. Name(s) of Judge(s): ____________________
   Court: ____________________

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?
   ☐ Yes ☐ No
   If "yes," give the following information about each lawsuit:
   Court: ____________________
   Case Number: ____________________
   Docket number of any appeal to the ______ Circuit: ____________________
   Are (were) you a party or lawyer in the lawsuit?
   ☐ Party ☐ Lawyer ☐ Neither
   If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:
   ____
   ____
   ____

4. Have you filed any lawsuits against the judge?
   ☐ Yes ☐ No
   If "yes," give the following information about each lawsuit:
   Court: ____________________
   Case number: ____________________
   Present status of lawsuit: ____________________
   Name, address, and telephone number of your lawyer for the lawsuit against the judge:
   ____
   ____
   ____
   Court to which any appeal has been taken in the lawsuit against the judge:
   ____
   Docket number of the appeal: ____________________
   Present status of the appeal: ____________________

5. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

6. **Declaration and signature:**

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature) ____________________ (Date) ____________________

Index to Rules for Judicial-Conduct and Judicial-Disability Proceedings

A

- **ABUSIVE COMPLAINTS,** JCJD Rule 10(a).
- **ADDITIONAL RULES.**
  - **Judicial councils may promulgate,** JCJD Rule 2(a).
- **ARGUMENT.**
  - **Hearings conducted by special committee.**
    - Right of complainant, JCJD Rule 16(c).
    - Right of subject judge, JCJD Rule 15(d).
- **AVAILABILITY OF RULES AND FORMS,** JCJD Rule 28.

B

- **BANKRUPTCY JUDGE.**
  - **Advisor to special committee,** JCJD Rule 12(c).

C

- **CHIEF JUDGE.**
  - **Considering petition for review of chief judges order.**
    - Not disqualified, JCJD Rule 25(c).
  - **Defined,** JCJD Rule 3(a).
  - **Review of complaint,** JCJD Rule 11(a).
    - Corrective action, JCJD Rule 11(d).
    - Dismissal, JCJD Rule 11(c).
    - Inquiry.
      - Determining action to take, JCJD Rule 11(b).
    - Moot, remedial action impossible.
      - Intervening events rendering, JCJD Rule 11(e).
    - Petition to judicial council for review, JCJD Rule 11(g).
    - Public availability of decision, JCJD Rule 11(h).
    - Special committee appointed to investigate, JCJD Rule 11(f).
      - Notice, JCJD Rule 11(g).
  - **Substitute for disqualified chief judge,** JCJD Rule 25(f).
  - **Withdrawal of complaint pending before,** JCJD Rule 27(a).
- **CIRCUIT CLERK.**
  - **Complaint.**
    - Action on receipt, JCJD Rule 8.
  - **Defined,** JCJD Rule 3(b).
- **COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY.**
  - **Disqualification,** JCJD Rule 25(h).
  - **Public availability of order,** JCJD Rule 24(c).
  - **Request for records,** JCJD Rule 23(d).
  - **Review of judicial council's decision,** JCJD Rule 21(a).
    - Additional investigation.
      - Return for, JCJD Rule 21(d).
- **COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY** —Cont'd
  - **Review of judicial council's decision** —Cont'd
    - Argument, personal appearance, JCJD Rule 21(e).
    - Finality of decisions, JCJD Rule 21(g).
    - Petition for review.
      - Action on receipt, JCJD Rule 22(d).
      - Copies, JCJD Rules 22(c), (d).
      - Filing, JCJD Rule 22(a).
      - Form and contents, JCJD Rule 22(b).
      - Time for submitting, JCJD Rule 22(b).
    - Procedure, JCJD Rule 22.
    - Reviewable matter, JCJD Rule 21(b).
    - Transmittal of decision, JCJD Rule 21(f).
    - Vote, JCJD Rule 21(c).
- **COMPLAINT.**
  - **Abusive complaint,** JCJD Rule 10(a).
  - **Address and signature of complainant,** JCJD Rule 6(d).
    - Failure to comply, JCJD Rule 5(b).
  - **Against covered judge and noncovered person.**
    - Clerk to accept, JCJD Rule 8(d).
  - **Against noncovered persons.**
    - Clerk not to accept, JCJD Rule 8(c).
  - **Confidentiality of considerations,** JCJD Rule 23(a).
  - **Copies,** JCJD Rule 6(e).
    - Distribution by clerk, JCJD Rule 8(b).
  - **Defined,** JCJD Rule 3(c).
  - **Envelope marking,** JCJD Rule 6(e).
  - **Files pertaining to.**
    - Requirements, JCJD Rule 23(b).
  - **Filing,** JCJD Rule 6.
    - Misconduct in another circuit alleged, JCJD Rule 7(b).
    - Where to file, JCJD Rule 7(a).
  - **Forms,** JCJD Appx, JCJD Rule 6(a).
  - **Identification,** JCJD Rule 5(a).
  - **Informal resolution,** JCJD Rule 5(a).
  - **Investigation by special committee,** JCJD Rules 11(f), 12.
    - Conduct, JCJD Rule 13.
    - Hearings, JCJD Rule 14.
    - Report, JCJD Rule 17.
    - Review by judicial council, JCJD Rule 20.
    - Rights of complainant, JCJD Rule 16.
    - Rights of subject judge, JCJD Rule 15.
  - **Joinder, severance,** JCJD Rule 11(f).
  - **Legibility,** JCJD Rule 6(c).
  - **Orchestrated complaint,** JCJD Rule 10(b).
  - **Receipt by clerk,** JCJD Rule 8(a).
  - **Review by chief judge,** JCJD Rule 11.
  - **Statement of complaint,** JCJD Rule 6(b).
  - **Time for filing or identifying,** JCJD Rule 9.
  - **Verification of truth of statements,** JCJD Rule 6(d).
    - Failure to comply, JCJD Rule 5(b).
  - **Withdrawal,** JCJD Rules 27(a), (b).

CONFIDENTIALITY, JCJD Rule 23(a).

CONFLICTING JUDICIAL COUNCIL RULES.
Superseded, JCJD Rule 2(a).

CONSENT.
Disclosure of materials from files, JCJD Rule 23(g).

CONSULTATION WITH OTHER JUDGES, JCJD Rule 23(j).

CONTEMPT.
Failure to comply with subpoena, JCJD Rule 13(d).

CORRECTIVE ACTION BY SUBJECT JUDGE, JCJD Rule 11(d).

COURT OF APPEALS.
Defined, JCJD Rule 3(d).

COVERED JUDGES, JCJD Rule 4.

D

DEFINITIONS, JCJD Rule 3.

DISABILITY.
Defined, JCJD Rule 3(e).

DISCLOSURES IN DECISION, JCJD Rule 23(c).

DISMISSAL OF COMPLAINT, JCJD Rule 11(c).
Expense reimbursement to subject judge, JCJD Rule 20(e).

DISQUALIFICATION FROM PARTICIPATING IN PROCEEDING.
Chief judge.
  Considering petition for review of chief judge's order.
   Not disqualified, JCJD Rule 25(c).
  Substitute for disqualified chief judge, JCJD Rule 25(f).
Committee on judicial conduct and disability members, JCJD Rule 25(h).
General rule, JCJD Rule 25(a).
Multiple judges disqualified.
  Judicial council action, JCJD Rule 25(g).
Special committee member.
  Participation in council consideration of committee's report.
   Not disqualified, JCJD Rule 25(d).
Subject judge, JCJD Rule 25(b).
  After appointment of special committee, JCJD Rule 25(e).

DISTRICT COURT.
Defined, JCJD Rule 3(d).
Removal of magistrate judge.
  Special committee's report recommending.
   Report provided court, JCJD Rule 23(e).

E

EFFECTIVE DATE OF RULES, JCJD Rule 29.

EVIDENCE.
Hearings conducted by special committee, JCJD Rules 14(b), (f).
  Right of complainant to provide, JCJD Rule 16(b).
  Right of subject judge to present, JCJD Rule 15(c).

EXCEPTION TO APPLICATION OF RULES, JCJD Rule 2(b).

F

FILES PERTAINING TO COMPLAINT.
Requirements, JCJD Rule 23(b).

FILING.
Complaint, JCJD Rule 6.
  Time, JCJD Rule 9.
  Where to file, JCJD Rule 7.
Petition for review, JCJD Rule 18(b).
  Review by committee on judicial conduct and disability, JCJD Rule 22(a).

FORMS.
Complaint, JCJD Appx.

H

HEARINGS.
Special committee, JCJD Rule 14.
  Rights of complainant, JCJD Rule 16.
  Rights of subject judge, JCJD Rule 15.

I

IDENTIFICATION OF COMPLAINT, JCJD Rule 5(a).
Time, JCJD Rule 9.

IMPEACHMENT PROCEEDINGS.
Transmittal of record, JCJD Rule 23(f).

IMPOSSIBILITY.
Intervening events rendering remedial action, JCJD Rule 11(e).

INFORMAL RESOLUTION, JCJD Rule 5(a).

INQUIRY BY CHIEF JUDGE.
Determining action to take, JCJD Rule 11(b).

INVESTIGATION OF COMPLAINT.
Committee on judicial conduct and disability.
  Return after review for additional investigation, JCJD Rule 21(d).
Judicial council.
  Consideration of special committee's report and recommendations, JCJD Rule 20.
Special committee, JCJD Rules 11(f), 12.
  Conduct, JCJD Rule 13.
  Hearings, JCJD Rule 14.
  Report, JCJD Rule 17.
  Rights of complainant, JCJD Rule 16.
  Rights of subject judge, JCJD Rule 15.

J

JOINDER OF COMPLAINTS, JCJD Rule 11(f).

JUDICIAL CONFERENCE.
Committee on judicial conduct and disability.
  Review of judicial council's decision, JCJD Rule 21.
   Procedure, JCJD Rule 22.
Public availability of complaints referred to, JCJD Rule 24(d).
Request for records, JCJD Rule 23(d).

JUDICIAL COUNCIL.
Consideration of special committee's report and recommendations.
Actions authorized, JCJD Rules 20(b), (f).
Expense reimbursement to subject judge, JCJD Rule 20(e).
Inadequate basis for decision found, JCJD Rule 20(c).
Response.
Right of subject judge, JCJD Rule 20(a).
Rights of subject judge, JCJD Rule 20(a).
Voting, JCJD Rule 20(d).
Defined, JCJD Rule 3(f).
Multiple judges disqualified.
Judicial council action, JCJD Rule 25(g).
Review of chief judge's decision by judicial council.
Action authorized after considering petition, JCJD Rule 19(b).
Memorandum of decision, JCJD Rule 19(d).
Notice of council decision, JCJD Rule 19(c).
Petition for review, JCJD Rules 11(h), 18(a).
Filing, JCJD Rule 18(b).
Forms, JCJD Rule 18(b).
Receipt, distribution, JCJD Rule 18(c).
Timely filed but not in proper form, JCJD Rule 18(e).
Untimely filing, JCJD Rule 18(d).
Where filed, JCJD Rule 18(b).
Public availability of decision, JCJD Rule 19(f).
Response by subject judge, JCJD Rule 19(a).
Review of council's decision, JCJD Rule 19(e).
Rights of subject judge, JCJD Rule 19(a).
Review of council's decision.
Committee on judicial conduct and disability, JCJD Rule 21.
Procedure, JCJD Rule 22.
Transfer of proceeding to another council, JCJD Rule 26.
Withdrawal of complaint pending before, JCJD Rule 27(b).

M

MAGISTRATE JUDGE.
Advisor to special committee, JCJD Rule 12(c).
Defined, JCJD Rule 3(g).
Removal proceedings.
Special committee's report provided district court, JCJD Rule 23(e).

MANDATORY RULES, JCJD Rule 2(a).

MEMORANDUM OF DECISION.
Review of chief judge's decision by judicial council, JCJD Rule 19(d).

MISCONDUCT.
Defined, JCJD Rule 3(h).

MOOT.
Intervening events rendering complaint, JCJD Rule 11(e).

N

NOTICE.
Investigation by special committee.
Right of complainant to receive, JCJD Rule 16(a).

NOTICE —Cont'd
Investigation by special committee —Cont'd
Right of subject judge to receive, JCJD Rule 15(a).
Review of chief judge's decision by judicial council.
Council decision, JCJD Rule 19(c).
Special committee appointed to investigate complaint, JCJD Rule 11(g).

O

OATH OR AFFIRMATION.
Hearings conducted by committee, JCJD Rule 14(e).

ORCHESTRATED CAMPAIGN AGAINST JUDGE, JCJD Rule 10(b).

P

PETITION FOR REVIEW.
Review of chief judge's decision by judicial council, JCJD Rules 11(g), 18.
Review of judicial council's decision, JCJD Rule 22.
Withdrawal, JCJD Rule 27(c).

PUBLIC AVAILABILITY OF DECISIONS.
Committee on judicial conduct and disability's orders, JCJD Rule 24(c).
Complaint referred to judicial conference, JCJD Rule 24(d).
General rule, JCJD Rule 24(a).
Manner of making public, JCJD Rule 24(b).
Review of complaint by chief judge, JCJD Rule 11(h).
Special cases, JCJD Rule 24(a).

R

RECORD OF HEARINGS.
Hearings conducted by committee, JCJD Rule 14(g).

REMEDIAL ACTION IMPOSSIBLE.
Intervening events rendering, JCJD Rule 11(e).

REPORT BY SPECIAL COMMITTEE.
Investigation of complaint, JCJD Rule 17.

REVIEW OF CHIEF JUDGE'S DECISION.
Judicial council.
Disposition, JCJD Rule 19.
Petition for review, JCJD Rules 11(h), 18.

REVIEW OF COMPLAINT.
Chief judge, JCJD Rule 11.

REVIEW OF JUDICIAL COUNCIL'S DECISION.
Committee on judicial conduct and disability, JCJD Rule 21.
Procedure, JCJD Rule 22.

REVIEW OF SPECIAL COMMITTEE'S REPORT AND RECOMMENDATIONS.
Judicial council, JCJD Rule 20.

RIGHTS OF COMPLAINANT.
Investigations by special committee, JCJD Rule 16.

RIGHTS OF SUBJECT JUDGE.
Consideration of special committee's report and recommendations, JCJD Rule 20(a).
Investigations by special committees, JCJD Rule 15.
Review of chief judge's decision, JCJD Rule 19(a).

RIGHT TO COUNSEL.
Hearings conducted by special committee, JCJD Rule 14(c).
  Complainant, JCJD Rule 16(d).
  Subject judge, JCJD Rule 15(f).

RULES OF EVIDENCE.
Hearings conducted by committee, JCJD Rule 14(f).

S

SCOPE OF RULES, JCJD Rule 1.

SEVERANCE OF COMPLAINTS, JCJD Rule 11(f).

SPECIAL CIRCUMSTANCES.
Disclosure, JCJD Rule 23(h).

SPECIAL COMMITTEE.
Advisor, bankruptcy judge or magistrate judge, JCJD Rule 12(c).
Appointment, JCJD Rule 11(f).
Certification of documents, JCJD Rule 12(d).
Continuing qualification of members, JCJD Rule 12(e).
Inability to complete service, JCJD Rule 12(f).
Investigation of complaint.
  Additional witnesses.
    Suggestion by subject judge, JCJD Rule 15(a).
  Argument presented by subject judge.
    Right, JCJD Rule 15(d).
  Conduct.
    Contempt.
      Failure to comply with subpoena, JCJD Rule 13(d).
    Criminal conduct involved, JCJD Rule 13(b).
    Extent and methods, determining, JCJD Rule 13(a).
    Hearings, JCJD Rule 14.
    Staff assistance, JCJD Rule 13(c).
    Subpoena power, delegation, JCJD Rule 13(d).
  Cooperation of complainant in preserving confidentiality, JCJD Rule 16(e).
  Copy of committee report.
    Subject judge sent, JCJD Rule 15(b).
  Hearings conducted by committee.
    Argument.
      Right of complainant, JCJD Rule 16(c).
      Right of subject judge, JCJD Rule 15(d).
    Attendance.
      Right of subject judge, JCJD Rule 15(e).
    Counsel's presence when witness testifies, JCJD Rule 14(c).
    Evidence, JCJD Rule 14(b).
      Right of complainant to provide, JCJD Rule 16(b).
      Right of subject judge to present, JCJD Rule 15(c).
      Rules of evidence, JCJD Rule 14(f).
    Oath or affirmation, JCJD Rule 14(e).
    Purpose, JCJD Rule 14(a).

SPECIAL COMMITTEE —Cont'd
Investigation of complaint —Cont'd
  Hearings conducted by committee —Cont'd
    Record and transcript, JCJD Rule 14(g).
    Right of subject judge to present evidence, JCJD Rule 15(c).
    Right to counsel, JCJD Rule 15(f).
      Complainant, JCJD Rule 16(d).
      Subject judge, JCJD Rule 14(c).
    Witness fees, JCJD Rule 14(d).
  Judicial council.
    Consideration of special committee's report and recommendations, JCJD Rule 20.
  Notice.
    Right of complainant to receive, JCJD Rule 16(a).
    Right of subject judge to receive, JCJD Rule 15(a).
  Participation in council consideration of committee's report.
    Not disqualified, JCJD Rule 25(d).
  Report, JCJD Rule 17.
  Rights of complainant, JCJD Rule 16.
  Rights of subject judges, JCJD Rule 15.
  Withdrawal of complaint pending before, JCJD Rule 27(b).
Membership, JCJD Rule 12(a).
Presiding officer, JCJD Rule 12(b).
Voting, JCJD Rule 12(g).

STAFF ASSISTANCE, JCJD Rule 23(j).

SUBJECT JUDGE.
Acknowledging subject of decision, JCJD Rule 23(i).
Consent.
  Disclosure of materials from files, JCJD Rule 23(g).
Consideration of special committee's report and recommendations.
  Rights, JCJD Rule 20(a).
Defined, JCJD Rule 3(i).
Disqualification from considering complaint, JCJD Rule 25(b).
  After appointment of special committee, JCJD Rule 25(e).
Investigation by special committee.
  Rights, JCJD Rule 15.
Review of chief judge's decision.
  Rights, JCJD Rule 19(a).

SUBPOENAS.
Special committee conducting investigation, JCJD Rule 13(d).

T

TIME.
Filing or identifying complaint, JCJD Rule 9.
Filing petition for review by committee on judicial conduct and disability, JCJD Rule 22(c).
Filing petition for review of chief judge's decision, JCJD Rule 18(b).

TRANSCRIPT.
Hearings conducted by committee, JCJD Rule 14(g).

TRANSFER OF PROCEEDINGS.
Misconduct in another circuit alleged, JCJD Rule 7(b).

TRANSFER OF PROCEEDINGS —Cont'd
To another judicial conference, JCJD Rule 26.

V

VENUE.
Where complaint filed, JCJD Rule 7.
Where petition for review filed, JCJD Rule 18(b).

VERIFICATION OF STATEMENTS IN COMPLAINT, JCJD Rule 6(d).
Failure to comply, JCJD Rule 5(b).

W

WITHDRAWAL OF COMPLAINT OR PETITION FOR REVIEW, JCJD Rule 27.

WITNESSES.
Investigation of complaint by special committee.
Additional witnesses.
Suggestion by subject judge, JCJD Rule 15(a).

WITNESS FEES.
Hearings conducted by committee, JCJD Rule 14(d).

RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Revised April 2007.

Civil Rules

Rule

1.1. Scope and citation of local rules.
2.1. Reserved for future purpose.
3.1. Subsequent litigation by parties proceeding in forma pauperis.
3.2. Denial of in forma pauperis applications.
3.3. Disclosure Statements in *Pro Se* Litigation
4.1. Reserved for future purpose.
5.1. Filing and service of papers by conventional means.
5.2. Filing documents by electronic means.
5.3. Service of documents by electronic means.
6.1. Motions for an extension of time to perform act.
7.1. Motion practice.
7.2. Supporting memoranda.
7.3. Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation.
8.1. Reserved for future purpose.
9.1. Reserved for future purpose.
10.1. Forms of pleadings, motions and documents.
10.2. Form of Exhibits to Motions.
10.3. [Implementing Requirements of the E-Government Act of 2002].
11.1. Frivolous or delaying motions.
11.2. Sanctions.
11.3. Disclosure Statements.
12.1. Reserved for future purpose.
13.1. Reserved for future purpose.
14.1. Reserved for future purpose.
15.1. Reserved for future purpose.
16.1. Final civil pre-trial conference.
17.1. Minors and incompetents as parties.
18.1. Reserved for future purpose.
19.1. Reserved for future purpose.
20.1. Reserved for future purpose.
21.1. Reserved for future purpose.
22.1. Reserved for future purpose.
23.1. Reserved for future purpose.
24.1. Reserved for future purpose.
25.1. Reserved for future purpose.
26.1. Discovery.
27.1. Reserved for future purpose.
28.1. Reserved for future purpose.
29.1. Reserved for future purpose.
30.1. Deposition exhibits.
31.1. Reserved for future purpose.
32.1. Depositions for use at trial.
33.1. Form of interrogatories, responses and objections.
34.1. Reserved for future purpose.
35.1. Reserved for future purpose.
36.1. Reserved for future purpose.
37.1. Reserved for future purpose.
38.1. Reserved for future purpose.
39.1. Attorney preparations for trial.
39.2. Late developments in the case.
39.3. Opening statements.

Rule

39.4. Closing statements.
40.1. Court schedule and conduct of business.
40.2. Electronic Designation of Judges.
41.1. Reserved for future purpose.
42.1. Reserved for future purpose.
43.1. Reserved for future purpose.
44.1. Reserved for future purpose.
45.1. Witnesses.
46.1. Reserved for future purpose.
47.1. Jurors.
48.1. Taking verdicts and polling the jury.
49.1. Reserved for future purpose.
50.1. Reserved for future purposes.
51.1. Requests for Jury Instructions.
52.1. Proposed Findings of Fact and Conclusions of Law.
53.1. Reserved for future purposes.
54.1. Application for costs.
54.2. Taxation of juror costs.
55.1. Reserved for future purposes.
56.1. Reserved for future Purposes.
57.1. Reserved for future purposes.
58.1. Reserved for future purposes.
59.1. Reserved for future purposes.
60.1. Reserved for future purposes.
61.1. Reserved for future purposes.
62.1. Reserved for future Purposes.
63.1. Reserved for future purposes.
64.1. Seizure of person or property.
65.1. Sureties.
66.1. Reserved for future purposes.
67.1. Deposit of registry funds in interest bearing accounts.
68.1. Reserved for future purposes.
69.1. Reserved for future purposes.
70.1. Reserved for future purposes.
71.1. Reserved for future purposes.
72.1. Magistrate judges: Standards of performance.
72.2. Magistrate judges: Assignments of matters.
72.3. Authority of magistrate judges.
72.4. Review and appeal.
73.1. Consent of parties to civil trial jurisdiction of magistrate judges.
74.1. Reserved for future purposes.
75.1. Reserved for future purposes.
76.1. Reserved for future purposes.
77.1. Court in continuous session.
77.2. Orders and judgments.
78.1. Reserved for future purposes.
79.1. Exhibits.
79.2. Sealed documents.
80.1. Reserved for future purposes.
81.1. Civil rights actions by prisoners (42 U.S.C. § 1983).
81.2. Habeas corpus actions (28 U.S.C. section 2255 motions).
81.3. Naturalization.
82.1. Reserved for future purposes.
83.1. Attorneys.

Rule
83.2. Student practice rule.
83.3. Change of address.
83.4. Release of information to news media.
83.5. Correspondence.
83.6. Photographing and reproducing court proceedings.
100.1. Court libraries.
100.2. Jurisdictional agreements with other courts.
100.3. Civil contempt.
100.4. Standing orders.

Alternative Dispute Resolution

101. Alternative Dispute Resolution (ADR).
101.1. Mediated Settlement Conferences.
101.1a. Selection of Cases for Mediated Settlement Conferences.
101.1b. Mediators.
101.1c. Selection of the Mediator.
101.1d. Procedures for Mediated Settlement Conferences.
101.1e. Completion of the Mediated Settlement Conference.
101.1f. Evaluation of the Mediation Program.
101.2. Court-Hosted Settlement Conferences.
101.3. Summary Trials.
101.3a. Summary Jury Trials.
101.3b. Summary Non-Jury Trials.

Admiralty and Maritime Claims

200.00. Title and scope.
201.00. Process.
202.00. Issuance of process.
203.00. Post arrest procedure.
204.00. Publication.
205.00. Stipulations for costs and security.
206.00. Stipulations and undertakings.
207.00. Pleadings and parties.
208.00. Verification of pleadings and answers to interrogatories.
209.00. Intervention.
210.00. Default in action in rem.
211.00. Entry of default.
212.00. Custody of property.
213.00. Appraisal.
214.00. Sale of property.
215.00. Release of seizures — Custodial cost — General bonds.
216.00. Taxation of costs.
217.00. Stay of execution or of release of property after judgment or dismissal.
218.00. Possessory actions — Short day return.
219.00. Claims after sale — How limited.
220.00. Alternative dispute resolution.

Patent Rules

301.1. Title.
301.2. Purpose, Scope and Construction.
301.3. Effective Date.
302.1. Governing procedure.
302.2. Confidentiality.
302.3. Certification of Initial Disclosures.
302.4. Admissibility of disclosures.
302.5. Relationship to Federal Rules of Civil Procedure.
303.1. Disclosure of asserted claims and preliminary infringement contentions.
303.2. Document production accompanying disclosure.
Rule
303.3. Preliminary non-infringement and invalidity contentions.
303.4. Document production accompanying Preliminary Non-Infringement and Invalidity Contentions.
303.5. Disclosure requirement in patent cases for declaratory judgment.
303.6. Final contentions.
303.7. Amendment to contentions.
303.8. Willfulness; discovery of opinions of counsel.
304.1. Exchange of proposed terms and claim elements for construction.
304.2. Exchange of preliminary claim constructions and extrinsic evidence.
304.3. Joint Claim Construction Statement.
304.4. Completion of claim construction discovery.
304.5. Claim construction briefs.
304.6. Claim Construction Hearing.
305.1. Disclosure of experts and expert reports.
305.2. Depositions of experts.

Criminal Rules

1.1. Scope and citation of local rules.
2.1. Reserved for future purpose.
3.1. Reserved for future purposes.
4.1. Reserved for future purposes.
5.1. Assignment of magistrate judges — Criminal cases.
5.2. Electronic Designation of Judges.
6.1. Reserved for future purposes.
7.1. Reserved for future purposes.
8.1. Reserved for future purpose.
9.1. Reserved for future purpose.
10.1. Arraignment.
10.2. Appearance bonds.
11.1. Reserved for future purposes.
12.1. Time period for filing pre-trial motions in criminal cases.
12.2. Further discovery and inspection.
12.3. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.
13.1. Reserved for future purpose.
14.1. Reserved for future purpose.
15.1. Reserved for future purpose.
16.1. Motions relating to discovery and inspection.
17.1. Time of issuance of subpoenas in criminal cases.
17.2. Reserved for future purposes.
18.1. Reserved for future purpose.
19.1. Reserved for future purpose.
20.1. Reserved for future purpose.
21.1. Reserved for future purpose.
22.1. Reserved for future purpose.
23.1. Reserved for future purpose.
24.1. Attorney preparations for criminal trial.
24.2. Jurors.
25.1. Reserved for future purpose.
26.1. Reserved for future purposes.
27.1. Reserved for future purpose.
28.1. Reserved for future purpose.
29.1. Reserved for future purpose.
30.1. Requests for jury instructions.
31.1. Taking verdicts and polling the jury.
32.1. Petition for disclosure of presentence or probation records.
32.2. Procedures implementing sentencing guidelines.

Rule
33.1. Reserved for future purposes.
34.1. Reserved for future purpose.
35.1. Reserved for future purpose.
36.1. Reserved for future purpose.
37.1. Reserved for future purpose.
38.1. Reserved for future purpose.
39.1. Reserved for future purposes.
40.1. Reserved for future purposes.
41.1. Reserved for future purpose.
42.1. Reserved for future purpose.
43.1. Waiver of appearance in misdemeanors cases FED. R. CRIM. P. 43(c)(2).
44.1. Appearance of counsel in criminal cases.
44.2. Disclosure Statements in *Pro Se* Litigation
45.1. Reserved for future purposes.
46.1. Reserved for future purpose.
47.1. Motion practice.
47.2. Supporting memoranda.
47.3. Forms of pleadings, motions and documents.
47.4. Form of exhibits to motions.
47.5. [Implementing Requirements of the E-Government Act of 2002].
48.1. Reserved for future purposes.
Rule
49.1. Filing and service of papers by conventional means.
49.2. Filing documents by electronic means.
49.3. Service of documents by electronic means.
50.1. Reserved for future purposes.
51.1. Reserved for future purposes.
52.1. Reserved for future purposes.
53.1. Photographing and reproducing court proceedings.
54.1. Reserved for future purposes.
55.1. Exhibits.
55.2. Sealed documents.
56.1. Court and clerks.
57.1. Attorneys.
57.2. Student practice rule.
57.3. Change of address.
57.4. Correspondence.
58.1. Magistrate judges.
59.1. Reserved for future purposes.
60.1. Reserved for future purposes.
61.1. Publicity in criminal matters.
100.1. Court libraries.
100.2. Jurisdictional agreements with other courts.

Index follows Rules.

Editor's Note. — On April 18, 2008, the United States District Court for the Eastern District of North Carolina posted proposed local alternative dispute resolution rules to supersede the current Rules 101.1, 101.2, and 101.3 of the Local Civil Rules, and proposed local civil and criminal attorney rules amendments to Rule 83.1 of the Local Civil Rules and Rule 57.1 of Local Criminal Rules. These proposed amendments may be viewed at the court's website: **www.nced.uscourts.gov.**

CIVIL RULES

Rule 1.1. Scope and citation of local rules.

These local rules of practice shall govern the conduct of the United States District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules. A judge or magistrate judge, for good cause and in his or her discretion, may alter these rules in any particular case. These rules shall be cited: These rules shall be cited: “Local Civil Rule ________, EDNC.”

Editor's note. — On December 1, 2000, the Court entered a standing order regarding the effect of recent Amendments to the Federal Rules of Civil Procedure on the Local Rules and practice in the Eastern district. In addition to making various amendatory changes, the Court provided as follows:

Applicability of Federal Rules of Civil Procedure

a. In all cases filed in this Court or removed to this Court on or after December 1, 2000, the Federal Rules of Civil Procedure, as amended, shall apply in full.

b. In actions filed in this Court or removed to this Court prior to December 1, 2000, F.R.Civ.P. 26(d) will not apply. Therefore, all parties may propound discovery at any time after an action has been filed.

c. In actions filed in this Court or removed to this Court prior to December 1, 2000 in which a Request for Discovery Plan has been issued by the Clerk of Court, the parties are not required to make the mandatory initial disclosures required under F.R.Civ.P. 26(a)(1). Moreover, the parties should follow the deadlines set forth in the Court's Request for Discovery Plan, not those set forth in Federal Rule of Civil Procedure 26. All other amended Federal Rules shall apply.

d. Except as ordered by the Court in a specific case, all other portions of the Federal Rules, as amended effective December 1, 2000, shall apply to civil actions filed or removed to this Court prior to December 1, 2000, including the provisions regarding scope of discover (F.R.Civ.P. 26(b)), limit on length of discovery (F.R.Civ.P. 30(d)), and sanctions for failure to disclose (F.R.Civ.P. 37(c)(1)).

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67, FRCP, and the adoption of Rules 72 to 76, FRCP, noting local rule changes to related rules, and suggesting further changes, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Rich Food Servs. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27791 (E.D.N.C. June 17, 2002).

Rule 2.1. Reserved for future purpose.

Rule 3.1. Subsequent litigation by parties proceeding in forma pauperis.

A plaintiff who has proceeded unsuccessfully *in forma pauperis* and had the costs of that litigation taxed against him must demonstrate that he has paid or made a reasonable effort to pay those costs prior to being authorized to proceed again *in forma pauperis*.

Rule 3.2. Denial of in forma pauperis applications.

In all civil actions in which the court denies a plaintiff's motion to proceed in forma pauperis, the plaintiff shall be allowed 30 days to pay the requisite filing fee. If the plaintiff fails to pay the filing fee, the clerk shall redesignate the action as a miscellaneous case and close the matter without further order from the court.

Rule 3.3. Disclosure Statements in *Pro Se* Litigation.

As part of making an appearance in every case, all *pro se* litigants (other than prisoners) shall file contemporaneously a disclosure statement in accordance with Fed. R. Civ. P. 7.1 and Local Civil Rule 7.3.

Rule 4.1. Reserved for future purpose.

Rule 5.1. Filing and service of papers by conventional means.

Unless otherwise specifically provided for, the original and one copy of all pleadings and other papers required to be filed or served shall be filed in the office of the clerk in Raleigh, Greenville or Wilmington regardless of the division to which the case is assigned. The original and three copies of all pleadings shall be filed in actions assigned to three judge panels. In all cases, whenever a pleading (subsequent to the complaint) or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in FED. R. CIV. P. 5(b).

Rule 5.2. Filing documents by electronic means.

Pursuant to Fed. R. Civ. P. 5(e), documents may be filed, signed and verified by electronic means to the extent and in the manner authorized by the court's Electronic Case Filing and Administrative Policies and Procedures Manual and the CM/CF Users Manual. A document filed by electronic means in compliance with this local rule constitutes a written document for the purposes of applying these Local Rules and the Federal Rules of Civil Procedure. The clerk's office will not accept any facsimile transmission unless ordered by the court.

Rule 5.3. Service of documents by electronic means.

Filed documents may be served by electronic means, including through the court's transmission facilities, or as otherwise provided and authorized by the court's Electronic Case Filing and Administrative Policies and Procedures Manual and the CM/ECF Users Manual. Transmission of the notice of electronic filing constitutes service of the filed document upon each attorney in the case who is registered as a filing user in accordance with the procedures established by the court. Any other attorney, party, or parties shall be served according to these Local Rules and the Federal Rules of Civil Procedure.

Rule 6.1. Motions for an extension of time to perform act.

All motions for an extension of time to perform an act required or allowed to be done within a specified time must show good cause, prior consultation with opposing counsel and the views of opposing counsel. The motion must be accompanied by a separate proposed order granting the motion.

Editor's note. — By amendment effective January 1, 1986, Rules 4.00 to 4.08 were renumbered as 4.01 to 4.09, respectively.

By amendment effective February 1, 1989, Rules 4.07 to 4.09 were renumbered as 4.08 to 4.10, respectively.

CASE NOTES

Time for Response. — The federal rules permit a court to set a time other than that provided in Fed. R. Civ. P., Rule 56(c) in which a party must respond to a motion for summary judgment, to forego any hearing on the motion, and to promulgate local rules to that effect. Byrd v. City of Fayetteville, 110 F.R.D. 71 (E.D.N.C. 1986), aff'd, 819 F.2d 1137 (4th Cir. 1987).

Failure to Provide Analysis or Caselaw. — Where defendant, in broad and conclusory fashion, sought specification, through a bill of particulars, of matters not set forth in the indictment which defendant alleged were essential to the preparation of his defense, but provided no hint of legal analysis to support his position and no citation to caselaw or other authority, the motion was filed in direct violation of Rule 4.04. United States v. King, 121 F.R.D. 277 (E.D.N.C. 1988).

Plaintiffs' failure to file a supporting memorandum to accompany any of their other motions as required by Eastern District Local Rule 4.04 justified denial of the motion. Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156 (E.D.N.C. 1989).

Response to Reply Struck. — Where plaintiff filed a memorandum in response to defendant's reply and defendant then filed a Motion to Strike this memorandum, as this rule does not authorize the filing of a response to a reply, plaintiff's memorandum in response to defendant's reply was struck pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Simmons v. Al Smith Buick Co., 841 F. Supp. 168 (E.D.N.C. 1993).

Applied in Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156 (E.D.N.C. 1989).

Quoted in Faircloth v. United States, 837 F. Supp. 123 (E.D.N.C. 1993).

Cited in Sterling Forest Assocs. v. Barnett-Range Corp., 643 F. Supp. 530 (E.D.N.C. 1986).

Rule 7.1. Motion practice.

(a) *Time for Filing.* Unless otherwise ordered by the court, all motions in civil cases, except those relating to the admissibility of evidence at trial, must be filed on or before 30 days following the conclusion of the period of discovery. If an extension of the original period of discovery is approved by the court, the time for filing motions is automatically extended to 30 days after the new date unless otherwise ordered by the court.

(b) *General Requirements.* All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Civil Procedure and in Local Rule 10.1.

(c) *Motions Relating to Discovery and Inspection.* No motions to compel discovery will be considered by the court unless the motion sets forth, by item, the specific question, interrogatory, etc. with respect to which the motion is filed, and any objection made along with the grounds supporting or in opposition to the objection. Counsel must also certify that there has been a good faith effort to resolve discovery disputes prior to the filing of any discovery motions.

(d) *Supporting Memoranda.* Except for motions which the clerk may grant as specified in Local Rule 77.2, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 7.2(a). Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

(e) *Responses to Motions.* Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 7.2(a) and may be accompanied by affidavits and other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 7.2(a) and, when appropriate, by affidavits and other supporting documents.

(1) *Non-Discovery Motions:* Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Civil Procedure.

(2) *Discovery Motions:* Responses and accompanying documents relating to discovery motions shall be filed within 10 days after service of the motion in question unless otherwise ordered by the court.

(f) *Replies.*

(1) *Non-Discovery Motions:* Replies to responses are discouraged. However, Except as provided in Local Rule7.1(f)(2), a party desiring to reply to matters initially raised in a response to a motion or in accompanying supporting documents shall file the reply within 10 days after service of the response, unless otherwise ordered by the court.

(2) *Discovery motions:* Replies are not permitted in discovery disputes. See Local Rule 26.1(d).

(g) *Subsequently Decided Authority.* A suggestion of subsequently decided controlling authority, without argument, may be filed at any time prior to the court's ruling and shall contain only the citation to the case relied upon if published or a copy of the opinion if the case is unpublished.

(h) *Affidavits.* Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties.However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(1) the facts relate solely to an uncontested matter; or

(2) the facts relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the facts; or

(3) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(4) the refusal to accept the affidavit would work a substantial hardship on the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party.

(i) *Hearings on Motions.* Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without hearing.

CASE NOTES

Failure to File Supporting Memoranda. — In an insurer's declaratory judgment suit, the insured's motion to change venue was denied; the insured failed to follow U.S. Dist. Ct., E.D. N.C., R. 7.1 by not supporting his motion with a memorandum detailing the legal reasons supporting his motion. Nationwide Mut. Ins. Co. v. McMahon, 365 F. Supp. 2d 671, 2005 U.S. Dist. LEXIS 6709 (E.D.N.C. 2005).

Motion to Compel Was Denied As Untimely Filed. — Defendants' motion to compel was denied because the motion was untimely filed after the deadline prescribed in former U.S. Dist. Ct., E.D. N.C., W. Div., Civ. R. 4.01. The court declined to exercise its discretion and allow the untimely motion, pursuant to Fed. R. Civ. P. 6(b)(2), because defendants failed to comply with the Fed. R. Civ. P. 37(a)(2)(A) good faith conferral requirement and no excusable neglect was shown. Rich Food Servs. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27791 (E.D.N.C. June 17, 2002).

Stated in Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996)

Cited in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985); Joyner v. Abbott Labs., 674 F. Supp. 185 (E.D.N.C. 1987); Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996); Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986); Sterling Forest Assocs. v. Barnett-Range Corp., 673 F. Supp. 1394 (E.D.N.C. 1987).

Rule 7.2. Supporting memoranda.

(a) *Form and Content.* A memorandum shall be in the form prescribed by Local Rule 10.1 and shall contain:

(1) a concise summary of the nature of the case;

(2) a concise statement of the facts that pertain to the matter before the court for ruling;

(3) the argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations in accordance with Local Rules 7.2(b), (c) and (d);

(4) copies of any decisions in cases cited as required by Local Rules 7.2(c) and (d); and

(5) where the supporting memorandum opposes a motion for summary judgment a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(b) *Citation of Published Decisions.* Published decisions cited should include parallel citations (except for U.S. Supreme Court cases), the year of the decision, and the court deciding the case. The following are illustrations:

(1) State Court Citation: *Smith v. Jones*, 238 N.C. 162, 77 S.E.2d 701 (1953).

(2) District Court Citation: *Smith v. Jones*, 141 F. Supp. 248 (E.D.N.C. 1956).

(3) Court of Appeals Citation: *Smith v. Jones*, 237 F.2d 597 (4th Cir. 1956).

(4) United States Supreme Court Citation: *Smith v. Jones*, 325 U.S. 196 (1956). United States Supreme Court cases should be cited only to the United States Reports except that if a petition for certiorari or an appeal was filed in the United States Supreme Court, the disposition of the case in that court should always be shown. For example: *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910(1957).

(c) *Citation of Decisions Not Appearing in Certain Published Reports.* Decisions published outside the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g. CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

(d) *Citation of Unpublished Decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: *United States v. John Doe*, 5:94-CV-50-F (E.D.N.C. January 7, 1994) and *United States v. Norman*, No. 74-2398 (4th Cir. June 27, 1975).

(e) *Length of Memoranda.* Except as otherwise provided by Local Rule 26.1(d), memoranda in support of or in opposition to a motion (other than a motion regarding discovery) shall not exceed 30 pages in length excluding the certificate of service page, without prior court approval. Memoranda in support of or in opposition to a discovery motion shall not exceed 10 pages in length, excluding the certificate of service page, without prior court approval. Reply memoranda (where allowed) shall not exceed 10 pages in length, excluding the certificate of service page, without prior court approval. These limitations apply to memoranda submitted in connection with an appeal in a bankruptcy proceeding.

CASE NOTES

Applied in United States v. One 1985 Mercedes Benz Auto., 716 F. Supp. 211 (E.D.N.C. 1989).

Rule 7.3. Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case whether or not they are covered by the terms of Fed. R. Civ. P. 7.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States or to state and local governments in cases in which the opposing party is proceeding without counsel.

(b) The statement shall set forth the information required by Fed. R. Civ. P. 7.1 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock.

(2) All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

(3) Whenever required by Fed. R. Civ. P. 7.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

(c) The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a party has no disclosures to make.

(d) The disclosure statement shall be filed when the party makes an initial appearance in the action. The parties are required to amend their disclosure statements when necessary to maintain their current accuracy.

Rule 8.1. Reserved for future purpose.

Rule 9.1. Reserved for future purpose.

Rule 10.1. Forms of pleadings, motions and documents.

All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(a) be double-spaced on single-sided, standard letter size (8½ x 11) paper, with all typed matter appearing in at least 11 point font size with a one inch margin on all sides;

(b) state the court and division in which the action is pending;

(c) bear, except for initial filing, the case number assigned by the clerk;

(d) contain the caption of the case;

(e) if applicable, state the title of the pleading, motion, discovery procedure or document and the federal statute or rule number under which the party is proceeding;

(f) contain the individual name, firm name, address, telephone number, fax number and State Bar identification, where applicable, of all attorneys who appear for the filing party, including an attorney making a special appearance pursuant to Local Rule 83.1(e);

(g) bear the date when signed by counsel;

(h) be signed by counsel as required by Local Rule 83.1(d). Local Rule 83.1(d) counsel may submit for filing a facsimile copy of the signature of out of state counsel on pleadings provided that a signature page with all original signatures is submitted to the court within two business days after the original filing;

(i) on all documents, the signature of parties and counsel shall be followed, on the line immediately below, by the typed or printed name in the exact form as the signature. In preparation of documents for signature by a judge or magistrate judge, a blank space shall be provided below the signature line in which the name may be typed or printed; and

(j) have each page numbered sequentially. The following forms are examples to be followed:

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. ____:________-CV-________(____)

JAMES T. SMITH,)
Plaintiff)
) OFFER OF JUDGMENT
vs.) FED .R. CIV. P. 68
)
AARON R. JONES et al.,)
Defendants)

(Closing)

This ______ day of January, 2002. ____________________

John B. Counselor
Attorney for Defendant
Abbot, Ball and Counselor
Attorneys at Law
200 Main Street
Post Office Box 50
Raleigh, North Carolina 27602
(919) 878-8787
FAX (919) 878-8000
State Bar No. ______________

Rule 10.2. Form of Exhibits to Motions.

Exhibits containing double-sided documents are not permitted and will not be considered by the court. Condensed deposition transcripts are discouraged.

Rule 10.3. [Implementing Requirements of the E-Government Act of 2002].

(Rescinded eff. December 1, 2007)
see Civ. R. 5.2

Rule 11.1. Frivolous or delaying motions.

Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion.

Rule 11.2. Sanctions.

If an attorney or any party fails to comply in good faith with any local rule of this court, the court in its discretion may impose sanctions.

Rule 11.3. Disclosure Statements.

(a) As part of making an appearance in every case, an attorney shall include the attorney's name and the name of the attorney's law firm. The attorney also shall file contemporaneously a client disclosure statement in accordance with Fed. R. Civ. P. 7.1 and Local Civil Rule 7.3.

(b) As part of making an appearance in every case, all pro se litigants (other than prisoners) shall file contemporaneously a disclosure statement in accordance with Fed. R. Civ. P. 7.1 and Local Civil Rule 7.3.

Rule 12.1. Reserved for future purpose.

Rule 13.1. Reserved for future purpose.

Rule 14.1. Reserved for future purpose.

Rule 15.1. Reserved for future purpose.

Rule 16.1. Final civil pre-trial conference.

(a) *Scheduling and Notice.* A final pre-trial conference shall be scheduled in every civil action after the time for discovery has expired. In most actions, the clerk shall give at least 25 days notice of such conference. In the court's discretion and upon request of any party or on the court's own initiative, a preliminary or "working" pre-trial conference may be scheduled.

(b) *Preparation by Counsel for Final Pre-Trial Conference.*

(1) At least twenty-five (25) days before the pretrial conference, all parties must provide to all other parties the pretrial disclosures required under Federal Rule of Civil Procedure 26(a)(3). Seventeen (17) days before the pretrial conference, a party may designate and serve any objections listed in Fed. R.Civ. P. 26(a)(3). The parties' Rule 26(a)(3) disclosures, and objections thereto, shall be incorporated into the final pretrial order, consistent with Local Rule 16.1(c). The pretrial order must be submitted to the court 5 business days prior to the pretrial conference.

(2) In preparing for the pretrial conference, the parties shall confer and prepare a final pretrial order. It shall be the duty of counsel for the plaintiff to arrange for this conference. Where video depositions are to be used, parties should endeavor to reach early agreement on editing; where agreement cannot be reached, required rulings by the court should be sought in sufficient time to allow for final edited versions of depositions to be used at trial.

(c) *Form of Pre-Trial Order.* The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by roman numerals, as indicated:

(1) *Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(2) *Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(3) *Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Local Rule 16.1(b). The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pre-trial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pre-trial order. When practicable, trial exhibits should carry the same number as in the depositions and references to exhibits in depositions should be changed to refer to the trial exhibit number. It is not necessary to designate exhibits that are to be used solely for impeachment or cross-examination.

(4) *Designation of Pleadings and Discovery Materials.* The designation by line and page of all portions of pleadings and discovery materials, including depositions, interrogatories and requests for admission that each party may offer at trial by reference to document volume, page number, and line. Objection by opposing counsel shall be noted by document volume, page number and line, and reasons for such objections shall be stated. It is not necessary to designate a deposition, any other discovery material, or any portion of a deposition, that is to be used solely for impeachment or cross-examination.

(5) *Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony.

(d) *Conduct of the Final Pre-Trial Conference.*

(1) *Purpose.* To resolve any disputes concerning the contents of the pre-trial order.

(2) *Preparation.* Counsel shall be fully prepared to present to the court all information and documentation necessary for completion of the pre-trial order. Failure to do so shall result in the sanctions provided by this local rule.

(3) *Sanctions.* Failure to comply with the provisions of Local Rule 16.1(d)(2) may result in the imposition of a monetary fine not to exceed $250.00 against the offending counsel and may result in any other sanction allowable by the Federal Rules of Civil Procedure against the parties or their counsel.

(4) Counsel for all parties shall be responsible for preparing the final pre-trial order and presenting it to the court properly signed by all counsel at a time designated by the court. Upon approval by the court, the original shall be filed with the clerk. Failure to provide a unified pre-trial order may result in sanctions being imposed against all parties to the action.

(e) *Sample Pre-Trial Order.* A pre-trial order in the following form shall be sufficient to comply with these rules:

JOHN DOE, by his guardian) No. 5:94-CV-125-F
ad litem, JANE DOE)
Plaintiff)
)
v.) PRE-TRIAL ORDER
)
XYZ CORPORATION)
Defendant)

Date of Conference: August 12, 1998

Appearances: John Y. Lawyer, Raleigh, North Carolina for plaintiff;
Sam X. Attorney, Fayetteville, North Carolina for defendant.

I. STIPULATIONS.

A. all parties are properly before the court;
B. the court has jurisdiction of the parties and of the subject matter;
C. all parties have been correctly designated;
D. there is no question as to misjoinder or nonjoinder of parties;
E. plaintiff, a minor, appears through his or her guardian;
F. Facts:
  1. Plaintiff is a citizen of Wake County, North Carolina.
  2. Defendant is a New York corporation, licensed to do business and doing business in the State of North Carolina.

G. Legal Issues:

May a nine-year old minor be guilty of contributory negligence?

H. Factual Issues:

1. Was plaintiff injured and damaged by the negligence of the defendant?
2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

II. CONTENTIONS.

A. Plaintiff

1. Facts:

(a) That Richard Roe was driving defendant's truck as defendant's agent.

(b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.

2. Factual Issues:

What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant

1. Facts:

That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.

2. Factual Issues:

Did plaintiff, by his own negligence, contribute to his injury and damage?

III. EXHIBITS.

A. Plaintiff

Number	Title	Objection
1	Patrol Report	Hearsay
2	Photo of Plaintiff	

B. Defendant

Number	Title	Objection
1	Photo of Scene	
2	Scale Model	

IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. Plaintiff

Document	Portion	Objection	Reason
Plaintiff's first set of interrogatories	Nos. 1, 8 and 9	No. 8	Privilege
Deposition of Richard Roe	Vol. 1, line 6, p. 1 thru line 5, p. 6	Line 6, p. 1 thru line 2, p. 7	Hearsay

B. Defendant

None

V. WITNESSES

A. Plaintiff

Name	Address	Proposed testimony
John Jones	615 Rains Street Raleigh, N.C.	Facts surrounding accident, extent of
Frank Flake	Selma, N.C.	Speed of defendant's vehicle, intoxication of driver
Joe Rock	Temple, AR.	

B. Defendant

All witnesses listed by plaintiff.

Name	Address	Proposed testimony
Sam Smith	4 Appian Way Rome, Italy	Facts surrounding the theft by driver of the vehicle

TRIAL TIME ESTIMATE: __________ days

JOHN Y. LAWYER
Counsel for Plaintiff

SAM X. ATTORNEY
Counsel for Defendant

APPROVED BY:

BILL JONES
U.S. MAGISTRATE JUDGE

______________________, 200__

Rule 17.1. Minors and incompetents as parties.

(a) *Representation.* Representation of minor and incompetent parties in a civil action shall be in accordance with FED. R. CIV. P. 17(c). Appointments of guardians *ad litem* by any state court shall satisfy the requirements of the Federal Rules of Civil Procedure unless the court finds that the interests of the parties so represented are not being adequately protected.

(b) *Settlement or Dismissal of Actions.* No civil action to which a minor or incompetent person is a party shall be compromised, settled, discontinued, or dismissed without an Order of Approval entered by the court. It shall be the responsibility of counsel for the minor or incompetent parties to prepare a proposed Order of Approval for submission to the court. The Order of Approval shall bear the written consent of (1) counsel for all the parties to the action, (2) the legal representative of minor or incompetent parties, and (3) in the case of minors, at least one of the natural parents or persons standing *in loco parentis.* Unless otherwise ordered by the court, the Order of Approval shall contain statements as to the following:

(1) that all parties are properly represented and are properly before the court; that no questions exist as to misjoinder or nonjoinder of parties; and that the court has jurisdiction over the subject matter and the parties;

(2) if the minor or incompetent parties are plaintiffs, a summary of contentions sufficient to show that the complaint states a claim upon which relief can be granted; if the minor or incompetent parties are defendants, a statement of contentions sufficient to show that no affirmative defenses could clearly be raised in bar of recovery;

(3) a summary of services rendered by counsel for the minor or incompetent parties, along with an opinion as to the fairness and reasonableness of the settlement, if any; and

(4) in cases involving claims for personal injuries asserted by minor or incompetent parties, an estimate of actual and foreseeable medical, hospital and related expenses and a statement by an examining physician setting forth the nature and extent of the plaintiff's injuries, extent of recovery and prognosis.

(c) *Approval of Counsel Fees and Payment of Judgments.* In its Order of Approval, the court shall approve or fix the amount of the fee to be paid to counsel for the minor or incompetent parties and make appropriate provision for the payment thereof. The Order of Approval shall also provide the manner in which judgments, if any, are to be paid and may make specific provisions for the payment of medical, hospital and similar expenses when allowed by applicable law.

(d) In compliance with the E-Government Act of 2002, and to promote electronic access to case files while also protecting personal privacy and other legitimate interest, all parties to any litigation in which minor is a party, with the exception of the paper administrative records in Social Security cases filed with the court, shall redact the minor child's name from all documents filed with the court. If the name of the minor must be included in a document, including the caption, only the initials of the child should be used.

Rule 18.1. Reserved for future purpose.

Rule 19.1. Reserved for future purpose.

Rule 20.1. Reserved for future purpose.

Rule 21.1. Reserved for future purpose.

Rule 22.1. Reserved for future purpose.

Rule 23.1. Reserved for future purpose.

Rule 24.1. Reserved for future purpose.

Rule 25.1. Reserved for future purpose.

Rule 26.1. Discovery.

(a) *Discovery Materials Not to Be Filed Unless Ordered or Needed.* Discovery materials, including but not limited to disclosures and objections required under FED. R. CIV. P. 26, depositions upon oral examination and interrogatories, requests for documents, notices to take a deposition, expert witness designations, expert witness reports, requests for admissions, and answers and responses thereto are not to be filed unless by order of the court or for use in the proceedings. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

(b) *Conducting Discovery.* In all civil actions, the parties shall schedule and conduct discovery in accordance with the order entered pursuant to FED. R. CIV. P.16. All discovery shall be propounded so as to allow the respondent sufficient time to answer prior to the time when discovery is scheduled to be completed. To shorten discovery time, it is expected that discovery procedures will proceed concurrently. After the time for completing discovery has expired, further discovery may proceed only by order of the court and may, in no event, interfere with the conduct of either the final pre-trial conference or the trial.

(c) *Numbering Discovery Procedures.* Each time a particular discovery procedure is used, it shall be sequentially numbered (e.g., “First Set,” “Second Set,” “First Request,” “Second Request,” etc.) so that it will be distinguishable from a prior procedure.

(d) *Discovery Disputes - Expedited Briefing Schedule.* Any motion relating to a discovery conflict shall be handled on an expedited basis:

(1) Memoranda in support or in opposition to a discovery motion shall not exceed ten (10) pages in length, excluding the certificate of service page, and shall comply with Local Rule 7.1(d).

(2) Responses and accompanying documents relating to discovery motions shall be filed within ten (10) days after service of the motion in question unless otherwise ordered by the court.

(3) Replies are not permitted in discovery disputes.

(4) In any instance in which oral argument is scheduled, counsel may be given the option of oral presentations by telephone in lieu of a live appearance.

(e) *Other Discovery Matters.*

(1) Through appropriate written discovery, a party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in an action or to indemnify or reimburse for payments made to satisfy the judgment. The discovery permitted shall include inspection and copying of such agreement pursuant to FED. R. CIV. P. 34. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subparagraph, an application for insurance shall not be treated as part of an insurance agreement.

(2) In accordance with FED. R. CIV. P. 16(b), this court will routinely issue an order for a discovery plan and will thereafter enter a scheduling order. The planning meeting

of counsel required by FED. R. CIV. P. 26(f) and the report of counsel contemplated by said rule are a mandatory part of the process of formulating a scheduling order. A report in accordance with Form 52 shall be sufficient to comply with FED. R. CIV. P. 26(f), although the parties may include greater detail or additional topics. If the parties cannot agree on a joint report, each party shall file a separate Rule 26(f) report setting forth its position on disputed matters. The parties may include in their report an agreement to mediate and a proposed time table for conducting that mediation.

Rule 27.1. Reserved for future purpose.

Rule 28.1. Reserved for future purpose.

Rule 29.1. Reserved for future purpose.

Rule 30.1. Deposition exhibits.

The parties are encouraged to mark all deposition exhibits consecutively during discovery without reference to the deposition taken or the party using the exhibit.

Rule 31.1. Reserved for future purpose.

Rule 32.1. Depositions for use at trial.

Depositions *de bene esse* may be taken outside of the period of discovery.

Rule 33.1. Form of interrogatories, responses and objections.

All interrogatories shall be served on opposing counsel. Counsel are encouraged to serve three copies of all interrogatories on counsel for the respondent and provide sufficient space following each question in which the respondent may state the response. If the space provided is not sufficient, additional pages shall be attached. An objection to an interrogatory shall be made by stating the objection and the reason therefore in the space provided for the response. Alternative methods of facilitating a response, such as requiring interrogatories on a diskette, may be agreed to by counsel. The requirement for use of cover sheets in all instances is eliminated.

Rule 34.1. Reserved for future purpose.

Rule 35.1. Reserved for future purpose.

Rule 36.1. Reserved for future purpose.

Rule 37.1. Reserved for future purpose.

Rule 38.1. Reserved for future purpose.

Rule 39.1. Attorney preparations for trial.

(a) *In General.* Five business days preceding the first day of the session at which a civil action is set for trial, counsel for all parties shall file with the clerk in all cases:

(1) A concise memorandum of authorities on all anticipated evidentiary questions and on all contested issues of law;

(2) Motions relating to the admissibility of evidence; however, no party shall be required to file a written response to a motion in limine which is filed after the pre-trial conference has taken place.

(b) *Exhibits.*

(1) All exhibits shall be pre-marked with stickers available at the clerk's office with the sequential numbers as listed in the pre-trial order. Each exhibit at trial shall contain the case number of the action on the exhibit sticker and a party designation where there are differing plaintiffs and defendants introducing exhibits.

(2) Copies of all exhibits, properly bound, shall be provided to the court at the beginning of the trial.

(3) The original exhibit shall bear a sticker. After receipt into evidence, it shall remain in the custody of the courtroom deputy, except when being used by a witness or viewed by the jury.

(4) Copies of all exhibits shall bear the photostatic image of the sticker or a typed or printed reproduction thereof.

(5) Counsel are encouraged to provide one or more copies of exhibits for use by the jury.

(6) Upon presentation of an exhibit to a witness, counsel shall announce to the court the exhibit number. The exhibit shall not be handed to opposing counsel. Should opposing counsel contend that a copy has not been provided or that the exhibit has been lost or misplaced, that shall be brought to the attention of the court.

Rule 39.2. Late developments in the case.

Counsel shall immediately inform the court, opposing counsel and counsel in the next succeeding two cases on the calendar of any settlement or of any developments of an emergency which may necessitate a motion for continuance.

CASE NOTES

Responsibility of Conferring. — The responsibility for arranging the attorney conference to prepare for final pre-trial rests with the plaintiff. However, it is incumbent upon counsel to confer and prepare for the conference. An attorney opposed only by a pro se litigant is not permitted to sit back blithely and not discharge the responsibility to confer simply because there is not an attorney on the other side. Harrell v. United States, 117 F.R.D. 86 (E.D.N.C. 1987).

Exchange of Witness Lists. — One of the most immediate tasks for responsible counsel in preparing for any case is to seek to interview those witnesses involved in the transactions which form the basis for the litigation. The courts clearly recognize the importance of this task by demanding, at a minimum, that counsel exchange witness lists well in advance of trial. United States v. Stroop, 121 F.R.D. 269 (E.D.N.C. 1988).

Abandonment of Cause of Action. — Separate cause of action for "emotional distress" in complaint seeking damages for wrongful death was not mentioned in the pretrial order and was deemed abandoned under subdivision (b) of this rule. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Cited in Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989).

Rule 39.3. Opening statements.

At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court and the jury the following:

(a) the substance of the claim, counterclaim, cross claim or defense; and

(b) what counsel contends the evidence will show. Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

Rule 39.4. Closing statements.

The court will set the times for closing argument after consultation with [the] parties. Unless otherwise ordered by the court, the party with the burden of proof shall open and close the arguments.

Rule 40.1. Court schedule and conduct of business.

(a) *Headquarters of the Clerk.* The headquarters of the clerk of court shall be in Raleigh.

(b) *Divisions of the District.* There shall be four divisions of the court. Headquarters of each division and the counties comprising each division are as follows:

Name of Division	*Headquarters*	*Counties*	
Northern Division	Elizabeth City	Bertie Camden Chowan Currituck Dare Gates	Hertford Northampton Pasquotank Perquimans Tyrrell Washington

Name of Division	*Headquarters*	*Counties*
Eastern Division	Greenville	Beaufort Carteret Craven Edgecombe Greene Halifax Hyde Jones Lenoir Martin Pamlico Pitt
Western Division	Raleigh	Cumberland Franklin Granville Harnett Johnston Nash Vance Wake Wayne Warren Wilson
Southern Division	Wilmington	Bladen Brunswick Columbus Duplin New Hanover Onslow Pender Robeson Sampson

(c) *Assignment of Cases to a Division.*

(1) *Civil Actions.* The clerk shall assign all civil actions to a division when the action is filed or removed. If one or more plaintiffs are residents of this District, the clerk shall assign the case to the division in which the first named such plaintiff resides. If no plaintiff resides in the District and one or more defendants reside in the District, the clerk shall assign the action to the division in which the first named such defendant resides. In the event no party resides in the District but the claim is alleged to have arisen in the District or to involve real property in the District, the clerk shall assign the action to the division in which such claim is alleged to have arisen or in which the real property is situated. In all other instances, a case shall be assigned to a division at the discretion of the clerk. In removed actions, the matter will be assigned to the division in which the state court is located from which the action is removed.

(c)(2) *Residence of Corporation.* For the purposes of this Local Rule, a corporate plaintiff shall be deemed to reside in the state in which it was incorporated and in the district and division in which it has its principal office; and, a corporate defendant shall be deemed to reside in the division in which the corporation is alleged (a) to be incorporated and have its principal office, or (b) to be licensed to do business or (c) to be doing business.

(c)(3) *United States as Plaintiff.* For the purposes of this Local Rule, in cases where the United States, its agencies or officers acting in an official capacity is the plaintiff, it shall be deemed that such plaintiff does not reside in this district.

Rule 40.2. Electronic Designation of Judges.

Any electronically generated designation of a district judge or magistrate judge does not mean that the judge so designated is assigned to the case.

Rule 41.1. Reserved for future purpose.

Rule 42.1. Reserved for future purpose.

Rule 43.1. Reserved for future purpose.

Rule 44.1. Reserved for future purpose.

Rule 45.1. Witnesses.

Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to such person which arise subsequent to the request for release. The court may, in its discretion and in the interest of justice, permit a party to call and examine a witness not listed in the final pre-trial order.

Rule 46.1. Reserved for future purpose.

Rule 47.1. Jurors.

(a) *Jury Lists.* When the jury for a session of the court is drawn, the clerk shall furnish a copy of the list to members of the bar of this court upon their request therefor. The list shall set out the name, address, occupation and employer of each juror and, where available, the name, address, occupation and employer of the spouse of each juror. The jurors and their families shall not be contacted, either directly or indirectly, in an effort to secure information concerning the background of any member of the jury panel. When the jurors are seated in the jury box, a chart or list shall be furnished by the clerk to the parties or their counsel, showing the name and seating assignment of each juror.

(b) *Examination of Jurors.* The court shall conduct the examination of prospective jurors. Five business days preceding the first day of the session at which a civil action is set for trial, counsel shall file a list of any *voir dire* questions counsel desires the court to ask the jury other than routine questions such as (1) the occupations and addresses of jurors and their spouses, (2) the identity and relation of jurors, the parties, counsel and witnesses and (3) the knowledge of the jurors concerning the case.

(c) *Contact with Trial Jurors.* Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall individually or through an investigator or any person acting for such attorney or party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass such a juror or member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

Rule 48.1. Taking verdicts and polling the jury.

The court may take the verdict of the jury in open court in the absence of any party or counsel. Unless the contrary affirmatively appears of record, it will be presumed that the parties were present or by their voluntary absence waived their presence. The jury will not be polled unless a party requests a poll at the time the verdict is taken or unless a poll is ordered by the court.

Rule 49.1. Reserved for future purpose.

Rule 50.1. Reserved for future purposes.

Rule 51.1. Requests for Jury Instructions.

Five business days preceding the first day of the session at which a civil action is set for trial, counsel shall file requests for jury instructions. Requests using *Federal Jury Practice and Instructions* (5th Ed.) by O'Malley, Grenig, and Lee, *5th Circuit Pattern Instructions,* and *North Carolina Pattern Instructions* shall include both the text of the proposed instruction as well as a citation reference to the proposed instruction. All other requests shall contain citations to supporting authorities.

Rule 52.1. Proposed Findings of Fact and Conclusions of Law.

In nonjury cases, counsel shall file proposed findings of fact and conclusions of law five business days preceding the session at which a civil action is set for trial.

Rule 53.1. Reserved for future purposes.

Rule 54.1. Application for costs.

All applications for costs must be made within 14 days after entry of judgment. Objections to applications for costs must be filed within 10 days after service of the application for costs.

Rule 54.2. Taxation of juror costs.

(a) *Settlement before Trial.* Whenever a civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, juror costs for one day shall be assessed equally against the parties and their counsel or otherwise assessed or relieved as directed by the court. Juror costs include attendance fees, per diem, mileage, and parking. No juror costs will be assessed if notice of settlement or other disposition of the case is given to the court one full business day prior to the scheduled trial date. In asbestos-related litigation, notice must be given to the court five full business days prior to the scheduled trial date.

(b) *Settlement before Verdict.* Except upon a showing of good cause, the court shall assess the juror costs equally against the parties and their counsel whenever a civil action proceeding as a jury trial is settled at trial in advance of the verdict. The judge may, in his or her discretion, direct that the juror costs be relieved or that they be assessed other than equally among the parties and their counsel.

Rule 55.1. Reserved for future purposes.

Rule 56.1. Reserved for future Purposes.

Rule 57.1. Reserved for future purposes.

Rule 58.1. Reserved for future purposes.

Rule 59.1. Reserved for future purposes.

Rule 60.1. Reserved for future purposes.

Rule 61.1. Reserved for future purposes.

Rule 62.1. Reserved for future Purposes.

Rule 63.1. Reserved for future purposes.

Rule 64.1. Seizure of person or property.

All acts and duties pertaining to the seizure of person or property as provided by the law of the State of North Carolina authorized to be done by a judge or the clerk of the state court may be done in like cases by a judge of this court or the clerk of this court, respectively.

Rule 65.1. Sureties.

(a) *Approval of Security.* The clerk or deputy clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the court, whether the security be property, or personal or corporate surety.

(b) *Security.* Except as otherwise provided by law, every recognizance, stipulation, bond, guaranty, or undertaking shall be with security that consists of either (1) cash or negotiable government bonds, or (2) one or more sureties, as provided by law or the applicable Federal Rule of Civil Procedure. A judge may enter pertinent orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

(c) *Use of Real Property as Security.* Whenever a surety seeks to justify assets by demonstrating ownership of real property, a judge or magistrate judge shall determine by satisfactory evidence that the property is of sufficient unencumbered value to protect the interests of the adverse party.

(d) *Prohibited Sureties.* Members of the bar, administrative officers and employees of this court, and the marshal and deputies and assistants thereto shall not act as surety in any matter, criminal or civil, pending in this court.

Rule 66.1. Reserved for future purposes.

Rule 67.1. Deposit of registry funds in interest bearing accounts.

A party seeking to have interest accrue on funds deposited into the court registry shall file a motion requesting deposit of the funds into an interest-bearing account. Upon appropriate order of the court directing the clerk to place registry funds into interest-bearing accounts, counsel shall confer with the clerk, within five days after receipt of the order, concerning the manner and place of investment. If counsel and the clerk do not agree, the clerk shall seek further direction from the court. No officer or employee of this court shall incur any liability for failure to invest or for improper investment unless counsel have complied with their obligations under this local rule.

Rule 68.1. Reserved for future purposes.

Rule 69.1. Reserved for future purposes.

Rule 70.1. Reserved for future purposes.

Rule 71.1. Reserved for future purposes.

Rule 72.1. Magistrate judges: Standards of performance.

In performing duties for the court, a magistrate judge shall conform to all applicable provisions of federal statutes and rules, to the local rules and procedures of this court, and to the requirements specified in any order of reference from a judge.

Rule 72.2. Magistrate judges: Assignments of matters.

(a) *Civil Cases.* Upon filing, all civil cases shall be assigned by the clerk to a magistrate judge for the conduct of such discovery and pre-trial conferences as are necessary and for the hearing and determination of all pre-trial procedural and discovery motions, in accordance with Local Rule 72.4(b). Where designated by a judge, the magistrate judge may conduct additional pre-trial conferences and hear motions and perform the duties set forth in Local Rules 72.4(c), 72.4(d) and 72.4(e). Where the parties consent to trial and disposition of a case by a certified magistrate judge under Local Rule 73.1, such case shall, with the approval of the judge to whom it was assigned at the time of filing, be reassigned to a certified magistrate judge for the conduct of all further proceedings and the entry of judgment.

(b) *General.* Nothing in these local rules shall preclude a judge from reserving any proceeding for conduct by a judge, rather than a magistrate judge. The judge, moreover, may by order modify the method of assigning proceedings to a magistrate judge as changing conditions may warrant.

Rule 72.3. Authority of magistrate judges.

(a) *Duties Under 28 U.S.C. § 636(a).* A magistrate judge is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(1) exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

(2) administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgments, affidavits, and depositions; and

(3) conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

(b) *Determination of Non-Dispositive Pre-Trial Matters — 28 U.S.C. § 636(b)(1)(A).* A magistrate judge may hear and determine any procedural or discovery motion or other pre-trial matter in a civil or criminal case, other than the motions which are specified in Local Civil Rule 72.3(c)(1).

(c) *Recommendations Regarding Case-Dispositive Motions — 28 U.S.C. § 636(b)(1)(B).*

(1) A magistrate judge may submit to a judge a report containing proposed findings of fact and recommendations for disposition by the judge of the following pre-trial motions in civil and criminal cases:

a. Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;

b. Motions for judgment on pleadings;
c. Motions for summary judgment;
d. Motions to dismiss or permit the maintenance of a class action;
e. Motions to dismiss for failure to state a claim upon which relief may be granted;
f. Motions to involuntarily dismiss an action;
g. Motions for review of default judgments;
h. Motions to dismiss or quash an indictment or information made by a defendant; and
i. Motions to suppress evidence in a criminal case.

(2) A magistrate judge may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this Local Rule 62.04.

(d) *Prisoner Cases Under 28 U.S.C. § 2254 and § 2255.* A magistrate judge may perform any or all of the duties imposed upon a judge by the rules governing proceedings in the United States district courts under 28 U.S.C. § 2254 and § 2255. In so doing, a magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for disposition of the petition by the judge. Any order disposing of the petition shall only be made by a judge.

(e) *Prisoner Cases Under 42 U.S.C. § 1983.* A magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

(f) *Special Master References.* A magistrate judge may be designated by a judge to serve as special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and FED. R. CIV. P. 53. Upon the consent of the parties, a magistrate judge may be designated by a judge to serve as special master in any civil case, notwithstanding the limitations of FED. R. CIV. P. 53(b).

(g) *Conduct of Trial and Disposition of Civil Cases Upon Consent of the Parties — 28 U.S.C. § 636(c).* Subject to the provisions of Local Rule 21.00, a magistrate judge may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or non-jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings, a magistrate judge may hear and determine any and all pre-trial and post-trial motions, including case-dispositive motions.

(h) *Other Duties.* A magistrate judge is also authorized to:

(1) exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges;

(2) conduct discovery conferences, pre-trial conferences, settlement conferences, omnibus hearings, and related pre-trial proceedings in civil and criminal cases;

(3) Conduct arraignments in criminal cases not triable by the magistrate judge and take not guilty pleas in such cases;

(4) receive grand jury returns in accordance with FED R. CRIM. P. (6)(f);

(5) accept waivers of indictment, pursuant to FED. R. CRIM. P. 7(b);

(6) conduct voir dire and select petit juries for the court;

(7) accept petit jury verdicts in civil cases in the absence of a judge;

(8) conduct necessary proceedings leading to the potential revocation of probation;

(9) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(10) order the exoneration or forfeiture of bonds;

(11) conduct proceedings for the collection of civil penalties of not more than $200.00 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(12) conduct examinations of judgment debtors in accordance with FED. R. CRIM. P. 69;

(13) conduct proceedings for initial commitment of narcotics addicts under Title III of the Narcotic Addict Rehabilitation Act;

(14) perform the functions specified in 18 U.S.C. § 4107, 4108 and 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein; and

(15) perform the duties specified by the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. §§ 3001 et seq.;

(16) perform any additional duty consistent with the Constitution and laws of the United States.

CASE NOTES

Cited in United States v. Premises Known as Lots 14, 15, 16, 19, 47, & 48, 682 F. Supp. 288 (E.D.N.C. 1987); American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 109 F.R.D. 263 (E.D.N.C. 1985).

Rule 72.4. Review and appeal.

(a) *Appeal of Non-Dispositive Matters — 28 U.S.C. § 636(b)(1)(A).* Any party may appeal from a magistrate judge's order determining a motion or matter under Local Rule 72.4(b) within 10 days after service of the magistrate judge's order, unless a different time is prescribed by the magistrate judge or a judge. Such party shall file with the clerk, and serve on the magistrate judge and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A judge shall consider the appeal and shall set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The judge may also reconsider *sua sponte* any matters determined by a magistrate judge under this local rule.

(b) *Review of Case-Dispositive Motions and Prisoner Litigation — 28 U.S.C. § 636(b)(1)(B).* Any party may object to a magistrate judge's proposed findings, recommendations or report under Local Rules 72.4(c), 72.4(d) or 72.4(e), within 10 days after being served with a copy thereof. Such party shall file with the clerk, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, needs to conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

(c) *Special Master Reports — 28 U.S.C. § 636(b)(2).* Any party may seek review of, or action on, a special master report filed by a magistrate judge in accordance with the provisions of FED. R. CIV. P. 53(e).

(d) *Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties — 28 U.S.C. § 636(c).*

(1) *Appeal to the Court of Appeals.* Upon the entry of judgment in any civil case disposed of by a magistrate judge on consent of the parties under authority of 28 U.S.C. § 636(c) and Local Rule 62.08, an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(2) *Appeal to a district judge.*

a. *Notice of appeal.* In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate judge to a district judge, rather than directly to the Court of Appeals. In such case the appeal shall be taken by filing a notice of appeal with and paying a $5.00 filing fee to the clerk within 30 days after entry of the magistrate judge's judgment but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate judge or a judge may extend the time for filing the notice of appeal for an additional 20 days. A request for such extension, however, shall be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate judge shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

b. *Service of the notice of appeal.* The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his or her last known address.

c. *Record on appeal.* The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate judge, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).

d. *Memoranda.* The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his or her memorandum within the time provided by this local rule, or any extension thereof, the court may dismiss the appeal.

e. *Disposition of the appeal by a judge.* The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate judge's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate judge's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate judge to judge the credibility of the witnesses.

(e) *Appeals from other Orders of a Magistrate Judge.* Appeals from any other decisions and orders of a magistrate judge not provided for in this Local Rule 72.4 should be taken as provided by governing statute, rule, or decisional law.

CASE NOTES

Cited in American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 109 F.R.D. 263 (E.D.N.C. 1985); Pac. AG Group v. H. Ghesquiere Farms, Inc., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 61862 (E.D.N.C. Aug. 21, 2007).

Rule 73.1. Consent of parties to civil trial jurisdiction of magistrate judges.

(a) Unless the judge to whom a civil action is assigned directs otherwise, the clerk shall routinely assign to a magistrate judge cases in which all parties consent to the exercise of civil trial jurisdiction pursuant to 28 U.S.C. § 636(c).

(b) Appeals from a judgment of a magistrate judge pursuant to 28 U.S.C. § 636(c)(4) shall lie to the judge to whom the case was originally assigned.

Rule 74.1. Reserved for future purposes.

Rule 75.1. Reserved for future purposes.

Rule 76.1. Reserved for future purposes.

Rule 77.1. Court in continuous session.

This court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

Rule 77.2. Orders and judgments.

The clerk or deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(a) Consent orders for substitution of attorneys.

(b) Orders enlarging time periods in civil actions authorized to be entered by the court by FED. R. CIV. P. 6(b).

(c) Orders extending for a reasonable amount of time the period within which an act must be performed under the local rules of this court.

(d) Consent order dismissing an action, except in bankruptcy proceedings and in cases to which FED. R. CIV. P. 23(c) and FED. R. CIV. P. 66 apply.

(e) Orders cancelling liability on bonds.

(f) Orders changing the time of opening and adjourning court in the absence of the judge.

(g) Judgments by default as provided for in FED. R. CIV. P. 55(a) and 55(b)(1).

(h) Orders authorizing service of process by a person other than a United States Marshal pursuant to FED. R. CIV. P. 4(c).

(i) Certification of law students and supervising attorneys pursuant to Local Rule 83.2.

(j) Any other motion, rule or order which may be granted of course or without notice.

(k) Pursuant to the provisions of 28 U.S.C. § 956, the clerk or a deputy clerk, when there is need to serve a complaint and attachment upon a vessel, or any other process incident to admiralty and maritime claims, either *in rem* or *in personam*, are empowered to grant and enter an order authorizing any sheriff or any deputy sheriff, or other suitable person, to serve all such process.

CASE NOTES

Stated in Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996)

Rule 78.1. Reserved for future purposes.

Rule 79.1. Exhibits.

The clerk shall be the custodian of all exhibits admitted into evidence. Upon 10 days notice by mail to counsel for all parties, the clerk may, within 30 days after the entry of final judgment, destroy or otherwise dispose of the exhibits.

Rule 79.2. Sealed documents.

(a) *Filing Sealed Documents.* Absent statutory authority, no cases or documents may be sealed without an order from the court. A party desiring to file material under seal must first file a motion seeking leave to file the information under seal, or have a court-approved protective order in place.

(b) *Proposed Sealed Documents.* All proposed, sealed material which accompanies a Motion to Seal shall be received by the clerk and temporarily sealed, pending a ruling on the motion to seal. The filing of a Motion to Seal documents will toll the time for filing the material. If the Motion to Seal is allowed, the sealed material shall be filed on the same date as the order allowing the filing under seal. If the motion to file the material under seal is denied, the movant will be given an option of retrieving the material or having it filed the same date as the order denying the filing under seal.

(c) *Docketing Sealed Documents.* When material is filed under seal, the docket will indicate generically the type of document filed under seal, but it will not contain a description that would disclose its identity.

(d) *Return of Sealed Materials.* After the action concludes and all appeals have been completed, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Upon 10 days notice by mail to counsel for all parties, and within 30 days after final disposition, the court may order the documents to be unsealed and they will thereafter be available for public inspection.

(e) *Form.* All under seal or potentially under seal documents shall be delivered to the clerk's office enclosed in a red envelope, marked with the case caption, case number, and a descriptive title of the document, unless such information is to be, or has been, among the information ordered sealed. Additionally, the following information will be prominently displayed:

SEALED PURSUANT TO THE PROTECTIVE ORDER ENTERED ON
____/____/200____

OR

PROPOSED SEALED MATERIAL: SUBMITTED PURSUANT
TO MOTION TO SEAL FILED ON ____/____/200____

Rule 80.1. Reserved for future purposes.

Rule 81.1. Civil rights actions by prisoners (42 U.S.C. § 1983).

All complaints on behalf of state prisoners seeking relief under 42 U.S.C. § 1983 and federal prisoners challenging conditions of confinement shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. An original and one copy of the complaint for the court and one copy of the complaint for each defendant named in the action shall be filed.

CASE NOTES

Cited in Owens-El v. United States Att'y Gen., 759 F.2d 349 (4th Cir. 1985).

Rule 81.2. Habeas corpus actions (28 U.S.C. section 2255 motions).

All petitions on behalf of prisoners seeking relief under 28 U.S.C. § 2255 shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. Such proceedings shall be governed by the rules promulgated by the United States Supreme Court.

Rule 81.3. Naturalization.

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, on Friday of the first week of any regular session of court at which naturalization hearings are set, beginning at 11:00 A.M., unless otherwise ordered by the court. The court may at other times, in its discretion, for good cause shown, and upon reasonable prior notice by the applicant to the Immigration and Naturalization Service, consider and act upon petitions for naturalization by members of the armed services, seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Rule 82.1. Reserved for future purposes.

Rule 83.1. Attorneys.

(a) *Roll of attorneys.* The bar of this court consists of those heretofore admitted and those hereafter admitted as prescribed by this Local Civil Rule 83.1.

(b) *Eligibility.* A member in good standing of the bar of the Supreme Court of North Carolina is eligible for admission to the bar of this court.

(c) *Procedure for Admission.* Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(1) Is a member in good standing of the bar of the Supreme Court of North Carolina; and,

(2) Has studied the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a district judge, bankruptcy judge, or magistrate judge of this court or of the United States District Court for the Middle District or Western District of North Carolina upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate judge and the applicant shall file the application, accompanied by a fee of $180.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $180.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client, either before a magistrate or district judge, by telephone conference or in person, until the applicant has taken the oath.

(3) Current law clerks to judges of this Court as well as to magistrate judges and bankruptcy judges within this District shall be admitted to the bar of this Court without payment of an admission fee.

(d) *Representation by Local Counsel Who Must Sign All Pleadings.* Litigants in civil and criminal actions, except governmental agencies and parties appearing pro se, must be represented by at least one member of the bar of this court who shall sign each pleading, motion, discovery procedure or other document filed in this court, including his or her state bar number and fax number in the signature block on all pleadings. If an attorney appears solely to bring the litigant in compliance with this local rule, he shall in each instance designate himself "LR 83.1 Counsel." In signing the pleading, motion, discovery request or other document, counsel certifies that he is an authorized representative for communication with the court about the litigation, and the document conforms to the practice and procedure of this court. However, counsel does not make the certification required by Rule 11 of the Federal Rules of Civil Procedure. Nevertheless, the requirements of Rule 11 must be complied with by out-of-state counsel. Signatures in the following form shall be sufficient to comply with this local rule. Local Civil Rule 83.1 Local Counsel must include state bar number and fax number in the signature block on all pleadings:

____
Jane M. Jones
Attorney for Defendant
Jones, Jones and Jones
P.O. Box 500
New York, NY 10050
Jane.jones@email.address.com
(212) 555-1212
State Bar No.

____
John B. Counselor
Attorney for Defendant
Abbott, Ball and Counselor
P.O. Box 50
Raleigh, NC 27602
John.B.Counselor@email.address.com
(919) 878-8787
Fax (919) 878-8000
State Bar No.
LR 57.1 Counsel

(e) *Appearances by Attorneys Not Admitted in the District.* Any person who is a member in good standing of the bar of a United States District Court and the bar of the highest court of another state or the District of Columbia shall be permitted to appear in a particular matter in association with Local Civil Rule 83.1 local counsel. Pursuant to this local rule, counsel shall enter a notice of appearance without the necessity of filing a motion to appear pro hac vice. The appearance of such a person in a particular matter shall confer jurisdiction upon this court for any alleged misconduct of that person or for any other purpose arising in the course of or in the preparation of such matter.

(f) *Pleadings, Service, and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear.* Pleadings and other documents filed in a case where an attorney appears who is not admitted to the bar of this court shall contain the individual name firm name address and phone number of both the attorney making a special appearance under this local rule and the associated local counsel. As part of making an appearance in every case an attorney also shall file contemporaneously a client disclosure statement in accordance with Fed. R. Civ. P. 7.1 and Local Civil Rule 7.3. The service of all pleadings and notices as required shall be sufficient if served only upon the associated local counsel. Local counsel shall attend all court proceedings unless excused by the court.

(g) *Withdrawal of Appearance.* No attorney or law firm whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record except with leave of the court. However, if an attorney within the same firm replaces counsel for a party, the new attorney may file a notice of substitution of counsel and the court will substitute the attorneys without order of the court.

(h) *Courtroom Decorum.* Counsel shall conduct themselves with dignity and propriety. Counsel shall rise when addressing the court, and all statements to the court shall be made from a counsel table or from behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

(i) *Questioning of Witnesses.* Only one attorney for each party may question a particular witness unless the court allows otherwise. Counsel shall remain seated while questioning witnesses.

(j) *Professional Standards.* The ethical standard governing the practice of law in this court are the Revised Rules of Professional Conduct, now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court. Counsel are directed to advise the clerk within ten days of disciplinary action taken against them resulting in suspension or disbarment. The disciplinary procedures of this court shall be on file with the clerk and furnished to counsel upon request.

(k) *Admission of Attorneys Previously Admitted to the United States District Courts for the Middle or Western Districts of North Carolina.* Attorneys already admitted to the bar of either the United States District Court for the Middle District of North Carolina or the United States District Court for the Western District of North Carolina may be admitted to the bar of this court upon tendering the application and fees required by Local Civil Rule 83.1(c), together with a copy of the order admitting the attorney to practice in one of the other districts, without the necessity of taking the oath that is otherwise required and without obtaining the character certification by two members of the bar of this court.

CASE NOTES

Stated in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996)

Cited in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985).

Rule 83.2. Student practice rule.

(a) *Compliance with Rule.* Students may participate as counsel in civil and criminal cases in this court subject to their compliance with all of the requirements of this Local Rule 83.2.

(b) *Eligibility.* An eligible student must:

(1) be duly enrolled in a law school;

(2) have completed at least three semesters of legal studies;

(3) have knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the Code of Professional Responsibility, and the Local Rules of this court;

(4) be supervised by a supervising attorney as defined in Local Rule 83.2(c);

(5) be certified by the Dean of the Law School where the student is enrolled, or the Dean's designee, as being of good character, sufficient legal ability, and adequately trained to fulfill the responsibilities of a legal intern to both the client and the court;

(6) be certified by the court to practice pursuant to this Local Rule 83.2; and,

(7) decline personal compensation for his or her legal services from a client or any other source.

(c) *Supervising Attorney.* A supervisor must:

(1) either (1) have faculty or adjunct faculty status at a law school at which a portion of the supervisor's duties includes supervision of students in a clinical program; or (2) be a member of the bar of this court for at least two years, who in the determination of the court, is competent to carry out the role of supervising attorney;

(2) be admitted to practice in this court;

(3) be certified by the court as a student supervisor;

(4) be present with the student at all times in court, and at other proceedings in which testimony is taken;

(5) co-sign all pleadings or other documents filed with the court;

(6) assume full personal and professional responsibility for a student's guidance and any work undertaken and for the quality of the student's work, and to be available for consultation with represented clients;

(7) assist and counsel the student in activities mentioned in Local Rule 83.2(e), and review such activities with the student, all to the extent required for proper practical training of the student and the protection of the client; and

(8) supplement oral or written work of the student as necessary to insure proper representation of the client.

(d) *Certification of Student and Supervisor.*

(1) *Student.* The court's certification of a student to practice under this Local Rule 83.2 shall be filed with the clerk and shall remain in effect for 18 months or until the student graduates from law school, whichever is earlier. Certification to appear generally or in a particular case may be withdrawn by the court at any time, in the discretion of the court, and without any showing of cause.

(2) *Supervising Attorney.* Certification of the supervising attorney shall be filed with the clerk, and shall remain in effect indefinitely unless withdrawn by the court, in its discretion, and without any showing of cause.

(e) *Activities.* A certified student may under the personal supervision of his or her supervisor:

(1) represent any client including federal, state or local governmental bodies, if the client on whose behalf the certified student is appearing has consented in writing to that appearance and the supervising lawyer has given written approval of that appearance;

(2) represent a client in any criminal, civil or administrative matter; however, the court retains the authority to limit a student's participation in any individual case;

(3) in connection with matters in this court, engage in other activities on behalf of the client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student shall make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers which are filed shall be read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities; and

(4) prior to oral participation by a certified student in a hearing or trial, the supervising attorney shall provide the court with a written statement of the scope of participation anticipated on the part of the certified student.

Rule 83.3. Change of address.

All attorneys and *pro se* parties must notify the court in writing within 10 days of any change of address. Failure to notify the court in a timely manner of an address change may result in dismissal of the action or the imposition of such other relief that the court deems just and proper.

CASE NOTES

Cited in Great Am. Ins. Co. v. Nye, 64 Bankr. 759 (Bankr. E.D.N.C. 1986).

Rule 83.4. Release of information to news media.

(a) *Court Personnel.* All court personnel, including but not limited to, the marshal and deputy marshals and office personnel, the clerk and deputy clerks and office personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrate judges' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public.

(b) *Copies of Public Records.* The members of the news media and others may obtain copies of all public records from the clerk upon payment of copying fees as prescribed by the Judicial Conference of the United States.

Rule 83.5. Correspondence.

Correspondence addressed to the court shall indicate that copies have been transmitted to all other parties and failure to transmit the same to all other parties may result in sanctions by the court. Such correspondence shall not become a part of the record in the case.

Rule 83.6. Photographing and reproducing court proceedings.

The taking of photographs, broadcasting or recording of proceedings in any form in the courtroom, court offices or in the corridors immediately adjacent thereto, during judicial proceedings or during any recess of the court is prohibited except as set forth below. The taking of photographs, broadcasting or recording of ceremonial proceedings, such as naturalization proceedings, the administration of oaths of office to officers of the court, presentation of portraits and other ceremonial occasions may be allowed with the permission of the presiding judge and under the supervision and control of the court.

Rule 100.1. Court libraries.

The clerk shall maintain the court libraries in the district. Use of the facilities is limited to judicial officers, court staff and members of the bar of this court. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court.

Rule 100.2. Jurisdictional agreements with other courts.

The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of such agreements shall be furnished to counsel upon request.

Rule 100.3. Civil contempt.

(a) *Rights of Contemnor.* In all cases of civil contempt, the contemnor shall have due notice of the contempt charges, opportunity to reply to the charges and notice of the date and place of hearing in open court from which the public shall not be excluded.

(b) *Summary Contempt Proceedings.* In contempt proceedings where the court may act summarily, the contemnor shall have the right to defend against the charges and to offer evidence in the form of affidavits. The movant shall have the right to offer similar evidence.

(c) *Plenary Contempt Proceedings.* In contempt proceedings where the court may not act summarily, the presentation of evidence is governed by Rule 1101 of the Federal Rules of Evidence. In no case of civil contempt, however, shall the parties be entitled to trial by jury, but rather the district judge before whom the matter is tried shall find the facts and enter a judgment or order in accordance with the provisions of the Federal Rules of Civil Procedure applicable to non-jury cases.

Rule 100.4. Standing orders.

(a) *Issuance.* Standing orders shall be issued by the chief judge.

(b) *Subject Matter.* Standing orders are used to address matters of court business, including court policies and administrative matters, not adequately addressed by orders in individual cases, but not appropriate for inclusion in the local rules because of improbability of recurrence, level of importance, degree of interest to the bar or public, or other reasons.

(c) *Form.* Each standing order shall bear a heading identifying it as such and specifying the subject matter to which it relates. Standing orders shall be given such additional identifiers, including docket numbers, as the clerk determines are appropriate to facilitate orderly storage of and access to such orders.

(d) *Posting and Retention.* Standing orders shall be posted for review by the public and court personnel and, when appropriate, archived in such manner as the chief judge directs in consultation with the clerk.

(e) *Annual Review.* The local rules committee shall review the court's standing orders each year to determine whether any should be converted into local rules, amended, or vacated. The committee shall report the results of its review, including any recommendations, to the chief judge.

ALTERNATIVE DISPUTE RESOLUTION

Rule 101. Alternative Dispute Resolution (ADR).

(a) *Purpose of ADR Rules.* These rules (Local ADR Rules 101-101.3) implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. In the case of binding summary trial, these rules also provide, by agreement, an alternative means of obtaining a final determination on the merits. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these rules. The rules are not intended to force settlement upon any party. The rules shall be construed to secure the just, speedy, and inexpensive resolution of controversies while preserving the right of all parties to a conventional trial where the parties have not agreed that the outcome of the ADR procedure will be the final determination in the case. The rules are subject to and do not limit the plenary, discretionary authority of the presiding judge over all aspects of alternative dispute resolution procedures in cases before the judge, including whether to use any alternative dispute resolution procedure, the type of procedure used, and the sequence, timing, and other requirements governing any procedure used. The presiding judge may vary from the provisions of these rules in his or her discretion.

(b) *Specific ADR Procedures.* These rules provide expressly for mediated settlement conferences (Local ADR Rules 101.1-101.1f), court-hosted settlement conferences (Local ADR Rule 101.2), and summary trials, both jury and non-jury (Local ADR Rules 101.3-101.3b). Express provision for these procedures is not intended to exclude the use of other alternative dispute resolution procedures, as appropriate, that may be suggested by the parties or the court. In all cases, the rules provide the parties the opportunity to present to the court their respective positions, if they choose to do so, regarding the type of alternative dispute resolution procedures to be used and the sequence and timing of such procedures. Absent contrary order, in cases selected for mediation, the rules mandate mediation during the discovery period and, if settlement is not achieved, permit a court-hosted settlement conference after discovery and the ruling on any motions for summary judgment. Summary trial, whether jury or non-jury or binding or non-binding, may be used in lieu of or in addition to other alternative dispute resolution procedures, as appropriate. In determining the type of alternative dispute resolution procedure to be used, and the sequence and timing of such procedures, due consideration will be given to the preferences of the parties, the nature of the case, judicial efficiency, and other considerations relevant under the circumstances presented. The court shall determine in its discretion the type of alternative dispute resolution procedure to be used, if any, and the sequence, timing, and other requirements governing any procedures used, giving such consideration as it deems appropriate to the preferences of the parties, the nature of the case, judicial efficiency, and other considerations it deems relevant under the circumstances presented.

Rule 101.1. Mediated Settlement Conferences.

Local ADR Rules 101.1-101.1f govern reference of selected civil actions for mediated settlement conferences. Their purpose is to provide for an informal process conducted by a mediator with the objective of helping the parties reach a mutually acceptable settlement of their dispute.

Rule 101.1a. Selection of Cases for Mediated Settlement Conferences.

(a) *Mediated Settlement Conferences During Discovery.* . In selected civil cases (see section (b) for a description of cases automatically selected for mediation) there shall be conducted a mediated settlement conference in accordance with Local ADR Rules 101.1a-f. The conference may be set for any time during the discovery period, as agreed by the parties. In appropriate cases, the parties may wish to schedule the mediation early in the discovery period, after a first round of depositions or other discovery. In other cases, the parties may choose to set the conference near the end of the discovery period after all, or substantially all, discovery is complete.

(b) *Automatic Selection by these Rules.* Several categories of civil cases are automatically selected for mediated settlement conferences, without specific order by the court. These categories include, according to the nature of suit designations made in opening the case in CM/ECF or as listed within the court forms appearing at www.nced.uscourts.gov,(1) contract [categories 110-140 and 160- 196, specifically excluding 150-153], (2) tort [all categories, 310-385], (3) civil rights [all categories, 440-446], (4) labor [all categories, 710-791], (5) property rights [all categories, 820-840], (6) antitrust [category 410], (7) banks and banking [category 430], (8) securitieso mmodities/exchange [category 850], (9) environmental matters [category 893], (10) consumer credit [category 480], and (11) cable/sat TV [category 490]. The parties to these actions shall discuss mediation plans at the Fed. R. Civ. P. 26(f) meeting of the parties and report such plans in their Rule 26(f) Report in preparation for the entry of an initial pretrial order. Cases wherein the United States is a party or any party appears pro se are not included within this automatic selection for mediation.

(c) *Discretionary Selection by the Court.* In its discretion, the court may order a mediated settlement conference in any action not automatically selected under section (b), above. After entry of such an order, the parties shall have 20 days to file a statement identifying an agreed-upon mediator.

(d) *Stipulated Selection by the Parties.* In any case where selection for a mediated settlement conference is not automatic under section (b) of this rule, the parties may file a stipulation for mediation. In such stipulation, the parties may state any agreements they have reached regarding the identity of the mediator, the timing of the conference, and any modification of the procedures described by these rules.

(e) *Exemption from Mediation and Use of Other ADR Proceedings.* Any party, or parties jointly, may file a motion for exemption from mediation. Such a motion will be granted or denied in the court's discretion. A general assertion that a case is not likely to settle or that settlement possibilities are remote may not in the court's discretion adequately justify exemption. If the moving party or parties seek another form of alternative dispute resolution in lieu of mediation, such as summary trial or court-hosted settlement conference, the motion for exemption shall include a request for such a proceeding.

Rule 101.1b. Mediators.

(a) *Court Certification.*

(1) The clerk shall maintain and make available on the court's website a list of court-certified mediators who meet the requirements for certification under subsection (2). The list shall identify areas of subject matter expertise of each mediator according

to the categories identified in Local ADR Rule 101.1a(b) and include the curriculum vitae submitted by the mediator to the court.

(2) Attorneys who agree to serve under these rules, have been certified as mediators by the North Carolina Dispute Resolution Commission, and who have at least 8 years of civil trial practice or membership on the faculty of an accredited law school may be appointed to the court's list of certified mediators. Further, attorneys who were on the court's list of certified mediators as of November 1, 2007 shall remain on the list. A person seeking appointment to the list shall submit to the clerk a curriculum vitae and such other information as is necessary to show his or her compliance with the requirements for appointment.

(3) Appointment to the list does not guarantee any mediator that he or she will be appointed to serve in any case before the court.

(4) A certified mediator shall notify the clerk within 30 days of any change in address or other contact information previously provided to the clerk and shall notify the clerk promptly if he or she no longer wishes to remain on the court's list of certified mediators.

(b) *Compensation of Mediators.* A mediator appointed under these rules shall be compensated and reimbursed as provided in this section, unless the parties and the mediator agree to different terms. The mediator shall be compensated by the parties at the hourly rate set by the clerk. The parties shall make payment directly to the mediator at the termination of the mediated settlement conference, whether or not the case is settled. The mediator shall be compensated for up to 2 hours of preparation time, the time expended in the conference, and a reasonable amount of time lost and costs incurred due to untimely action by a party or person required to attend that results in postponement of the conference. The only compensable expense of the mediator is travel mileage at the ordinary government rate. The mediator's fee and travel expense shall be paid in one equal share by the plaintiff (or plaintiffs), one equal share by the defendant (or defendants), and one equal share by any third party (or parties), unless, as indicated, otherwise agreed by all parties or ordered by the court in the interest of fairness.

(c) *Compensation of Mediators when a Party is Unable to Pay.* If a party contends it is unable to pay its share of the mediator's fee, that party shall, before the conference, file a motion with the court to be relieved of the obligation to pay. The motion shall be accompanied by an affidavit of financial standing. The mediated settlement conference should proceed without payment by the moving party, and the court will rule on the motion upon completion of the case. The court will take into consideration the outcome of the case, whether by settlement or judgment, and may relieve the party of its obligation to pay the mediator if payment would cause a substantial financial hardship. If the party is relieved of its obligation, the mediator shall remain uncompensated as to that portion of his or her fee, a circumstance that reflects the mediator's duty of pro bono service.

Rule 101.1c. Selection of the Mediator.

(a) *Selection by Agreement.* The parties are encouraged to select their own mediator by agreement. If, within 20 days of the initial pretrial order, the parties file with the clerk a statement identifying an agreed-upon mediator, such statement shall be effective to select the mediator. The parties shall certify in the statement that the mediator has agreed to his or her selection and shall serve a copy of the statement on the mediator at the time it is filed. Notwithstanding the requirements for appointment to the court's list of certified mediators in Local ADR Rule 101.1b(a)(2), the parties may select an agreed-upon mediator who is not on the clerk's list of certified mediators and is not certified by the North Carolina Dispute Resolution Commission. An agreed-upon mediator who is not on the clerk's list of certified mediators must, prior to service, agree to be bound by all provisions of these rules, including submission to the jurisdiction of this court for disciplinary purposes, and, if not certified by the North Carolina Dispute Resolution Commission, to be bound by the North Carolina Standards of Professional Conduct for Mediators. Such a mediator shall be deemed to have given the required agreement by undertaking any action as mediator in the case to which he or she has been assigned.

(b) *Selection by the Clerk.* If no timely statement pursuant to section (a) of this rule is filed, the clerk shall appoint a mediator from the certified list. The appointment is within the discretion of the clerk, who may consider subject matter expertise in making the appointment. The clerk shall give notice of the appointment to the mediator and the parties.

(c) *Disqualification.* On motion made to the court not later than 20 days before a scheduled mediated settlement conference, a mediator may be disqualified by the court for bias or prejudice as provided in 28 U.S.C. §144. Further, a mediator shall disqualify himself or herself if the mediator could be required to do so under 28 U.S.C. §455 if he or she were a justice, judge, or magistrate judge or under the North Carolina Standards of Professional Conduct for Mediators.

(d) *Copies of Pleadings.* On request of the mediator, the clerk shall furnish to the mediator a copy of the complaint, answer, and any third-party pleadings in the action.

Rule 101.1d. Procedures for Mediated Settlement Conferences.

(a) *Time Period for the Mediated Settlement Conference.* The mediated settlement conference shall be held during the discovery period unless the court specifically orders otherwise.

(b) *Scheduling the Mediated Settlement Conference.* The mediated settlement conference shall ordinarily be held in the office of the mediator, but may be held at any other place agreed to by the parties and the mediator. Because of space limitations, the federal courthouses are not available for mediated settlement conferences. After conferring with the attorneys for the parties regarding scheduling matters, the mediator shall determine the place and time of the conference (within the period established by these rules), and give notice to the parties. The mediator may postpone the conference by agreement of all parties and persons required to attend and the mediator, but only to a date within the period for the conference established by these rules.

(c) *Submission of Position Papers to Mediator.* No later than 5 business days before the scheduled date of the mediated settlement conference, any party may submit a confidential position paper to the mediator. The position paper and any exhibits shall be subject to such limits on length, if any, as the mediator imposes. Position papers are confidential, shall be held so by the mediator, and need not be served on other parties. The purpose of these submissions is to help the mediator become familiar with the assertions of the parties, and the parties may agree to the submission of additional information if they believe the information will facilitate the mediated settlement conference.

(d) *Duties of Parties, Representatives, and Attorneys.*

(1) The following persons shall be physically present at the entire mediated settlement conference:

(i) Individual parties; an officer, manager, or director of a corporate or entity party, such representative to have full authority to negotiate on behalf of the entity and to approve or, when permitted pursuant to subsection (2) hereof, to recommend a settlement;

(ii) At least one attorney of record for each represented party; and

(iii) A representative of the insurance carrier for any party against whom a claim is made. The representative must have full authority to settle the claim and must be a person other than the carrier's outside counsel.

(2) Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(i) By agreement of all parties and persons required to attend and the mediator; or

(ii) By order of the court, upon motion of a party and notice to the all parties and persons required to attend and the mediator.

(3) Upon reaching a settlement agreement at a mediated settlement conference, the parties shall reduce the agreement to writing and prepare a stipulation of dismissal or consent judgment for presentation to the court within two weeks after completion of the conference unless a different deadline is agreed to by the parties or established by the court.

(e) *Authority of the Mediator.* The mediator is authorized by these rules to exercise control over the mediated settlement conference and to direct all proceedings therein. The mediator is specifically authorized to meet or consult privately with any party or their counsel before, during, or after the conference. The mediator may report in writing to the court, with copies to the parties, any conduct of any party that may be in violation of these rules for mediated settlement conferences.

(f) *Duties of the Mediator.* At the beginning of the mediated settlement conference, the mediator shall describe the following matters to the parties:

(1) The process of mediation,

(2) The differences between mediation and other forms of conflict resolution,

(3) The costs of the mediated settlement conference,

(4) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement,

(5) The circumstances under which the mediator may meet alone with either of the parties or any other person,

(6) The conditions under which communications with the mediator will be held in confidence during the conference,

(7) The inadmissibility of negotiating statements and offers at trial,

(8) The fact that the court will not permit parties in other litigations to conduct discovery regarding the mediation in this case,

(9) The duties and responsibilities of the mediator and the parties, and

(10) The fact that any agreement reached will be reached by mutual consent of the parties.

The mediator may recess or suspend the conference at any time and set a schedule for reconvening it within the period for the conference established by these rules. It is the duty of the mediator to determine if an impasse has been reached or mediation should for any reason be terminated. The mediator shall then inform the parties that mediation is terminated.

(g) *Agreement to Modify Mediation Procedures.* . By agreement filed with the court, the parties, with the consent of the mediator, may modify the mediation procedures described in these rules, except that the parties may not alter time limitations set by these rules or order of the court.

(h) *Sanctions for Failure to Appear and Misconduct.* If a person fails to attend a mediated settlement conference without good cause or engages in misconduct during or otherwise in connection with a mediated settlement conference, the court may impose on that person (and any associated party) any sanction authorized by Fed. R. Civ. P. 37(b) and any other lawful sanction, including, but not limited to, the imposing of the cost of attorney's fees, mediator's fees, and expenses of persons incurred in attending the conference.

(i) *Immunity.* A mediator appointed by the court pursuant to these rules shall have judicial immunity in the same manner and to the same extent as a judge of this court, except that the mediator may be disciplined (1) by the court, after being provided an opportunity to be heard, for violation of these rules or the North Carolina Standards of Professional Conduct for Mediators and (2) by the State Bar or any agency established to enforce standards of conduct for mediators.

(j) *Inadmissibility of Negotiations.* .

(1) Evidence of statements made and conduct occurring in a mediated settlement conference, whether attributable to a party, the mediator, or a neutral observer present at the conference (e.g., mediator candidate, interpreter, person studying dispute resolution), shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(i) In proceedings for sanctions under these rules;

(ii) In proceedings to enforce or rescind a settlement of the action; or

(iii) In disciplinary proceedings before the court, the North Carolina State Bar, or any agency established to enforce standards of conduct for mediators.

(2) No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference.

(3) No mediator or neutral observer present at a mediated settlement conference shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under these rules, and disciplinary proceedings before this court, the State Bar, or an agency established to enforce standards of conduct for mediators.

Rule 101.1e. Completion of the Mediated Settlement Conference.

When the mediated settlement conference is completed, the mediator shall within 7 days after completion submit to the clerk a report of the status of the case, on a form supplied by the clerk. If the case is resolved, it is the duty of the parties to file a stipulation of dismissal or consent judgment. If the case is not resolved, it proceeds without further order of the court in accordance with the local rules of the court.

Rule 101.1f. Evaluation of the Mediation Program.

The mediation program established by these rules will be periodically reviewed by the court. For purposes of evaluation of the program, the mediator, the attorneys, and the litigants may be requested to complete confidential evaluation reports at the completion of the mediation. These reports shall be kept confidential by the clerk and shall be maintained in a file separate and apart from the case file. The clerk shall compile information from the evaluation reports to assist the court in determining the effectiveness of the mediation program.

Rule 101.2. Court-Hosted Settlement Conferences.

(a) *Selection of Cases for Court-Hosted Settlement Conference.* . The court, upon its own initiative or at the request of any party, may order a settlement conference, conducted by a district judge, magistrate judge, bankruptcy judge, or other federal judicial officer, at a time and place to be fixed by the court. Upon request by all parties to an action, the court shall order a court-hosted settlement conference.

(b) *Time Period for the Court-Hosted Settlement Conference.* The court-hosted settlement conference shall be held after the discovery period and the ruling resolving any motions for summary judgment unless the court specifically orders otherwise.

(c) *Presiding Judicial Official.* . A judicial officer other than the judge assigned to the case will ordinarily preside at a court-hosted settlement conference.

(d) *Attendance at the Court-Hosted Settlement Conference.*

(1) The following persons shall be physically present at the entire court-hosted settlement conference:

(i) Individual parties; an officer, manager, or director of a corporate or entity party, such representative to have full authority to negotiate on behalf of the entity and to approve or, when permitted pursuant to subsection (2) hereof, to recommend a settlement;

(ii) At least one attorney of record for each represented party; and

(iii) A representative of the insurance carrier for any party against whom a claim is made. The representative must have full authority to settle the claim and must be a person other than the carrier's outside counsel.

(2) Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance, by order of the judicial officer presiding over the conference, upon motion of a party and notice to all the parties and persons required to attend.

(e) *Conduct of the Court-Hosted Settlement Conference.* The parties, representatives, and attorneys are encouraged to be completely candid with the judicial officer presiding over the conference so that he or she may properly guide settlement discussions. The judicial officer presiding over the conference may make such other and additional requirements of the parties and conduct the proceedings as he or she deems proper to expedite settlement of the case. The judicial officer presiding over the conference will not discuss the substance of the conference with anyone, including the judge to whom the case is assigned, and may excuse the parties or the attorneys from the conference any time. During the settlement conference, and, as appropriate, before and after the conference, the judicial officer presiding over it also may confer ex parte with any parties, representatives or attorneys, meet jointly or individually with the parties and/or representatives without the presence of counsel, and elect to have the parties and/or representatives meet alone without the presence of the judicial officer or counsel, all with the specific understanding that any conversation relative to settlement will not constitute an admission and will not be used in any form in the litigation or in the event of trial.

Rule 101.3. Summary Trials.

Summary trial is an ADR procedure consisting of a streamlined trial of a case. The outcome of the summary trial may be non-binding or, if the parties agree, binding. These rules provide for a summary trial before a jury (Local ADR Rule 101.3a) or the bench (Local ADR Rule 101.3b). The procedure used at the summary trial may be adjusted to meet the needs of the particular case. Therefore, while these rules set forth detailed procedures for summary jury trials, the judge presiding over the trial may modify or disregard any of these procedures, and, in consultation with counsel, fashion alternatives deemed better suited to the case. Similarly, the procedures for summary jury trial may serve as a guide to the procedures for a summary bench trial. Summary trial may be used in lieu of other alternative dispute resolution procedures or in addition to them, such as an alternative to impassing a mediation.

Rule 101.3a. Summary Jury Trials.

(a) *Eligible Cases.* The assigned judge may, after consultation with counsel, refer for summary jury trial any civil case in which jury trial has been properly demanded. Either or both parties may move the court to order summary jury trial; however, the court will not require a party to participate against its will.

(b) *Selection of Cases.* Cases selected for non-binding summary jury trial should be those in which counsel feel that a non-binding verdict by the jury could be helpful in a subsequent settlement negotiation. Since an investment of time by counsel and by the court is necessary for the procedure, summary jury trial should ordinarily be used only in those cases that would take more than 7 trial days to try.

(c) *Procedural Consideration.* Summary jury trial is a flexible ADR process. The procedures to be followed should be determined by the assigned judge in advance of the scheduled summary jury trial date, in light of the circumstances of the case and after consultation with counsel. The following matters should be considered by the assigned judge and counsel in structuring a summary jury trial.

(1) *Presiding Judge.* Either a district judge or a magistrate judge may preside over a summary jury trial, provided that a magistrate judge may preside over a binding summary jury trial only with the consent of all the parties. During a non-binding summary jury trial, the presiding judge will ordinarily participate in on-going settlement negotiations and may have ex-parte conferences with each side. For this reason, normally a judge other than the trial judge will be selected to preside over a non-binding summary jury trial.

(2) *Submission of Written Materials.* Counsel must submit proposed jury voir dire questions, jury instructions, and briefs on any novel issues of law within three (3) working days before the date set for the summary jury trial. In addition, counsel may also choose to submit other items, such as a statement of the case, stipulations, and exhibit lists.

(3) *Attendance.* Non-binding summary jury trials are effective in promoting settlement because, among other reasons, they give parties their 'day in court' (meeting a need to voice their position in a public forum), and because they allow parties to see the merits of their opponent's position. It is therefore critical that the parties and all other persons or entities involved in the settlement decision attend a non-binding summary jury trial. This includes all individual parties and representatives of corporations and other parties and insurers vested with full settlement authority. Since absence of any decision maker makes the process less likely to proceed, this attendance requirement can be waived only by order of the court.

(4) *Size of Jury Panel.* The jury shall consist of 6 to 12 members.

(5) *Voir dire.* Each counsel may exercise a maximum of two peremptory challenges. There will be no alternate jurors. Counsel will be assisted in the exercise of challenges by a brief voir dire examination to be conducted by the court.

(6) *Transcript or Recording.* Upon consent of the parties, counsel may arrange for the proceedings to be recorded by a court reporter at his or her own expense. However, no transcript of the proceedings will be admitted in evidence at any subsequent trial unless the evidence would be otherwise admissible under the Federal Rules of Evidence.

(7) *Conference Between Counsel.* Prior to trial, counsel are to confer with regard to the use of physical exhibits, including documents and reports, and reach such

agreement as is possible. Prior to the day of the summary jury trial, the court will hear all matters in dispute and make appropriate rulings.

(8) *Timing.* The summary jury trial should take no more than one-and-one-half (1) days from jury selection to jury deliberation. In consultation with counsel before the summary jury trial, the court shall establish a scheme of time allotment for presentations by counsel.

(9) *Case Presentations.* The attorney presentations shall be organized in the manner of a typical trial, except that no witness testimony will be allowed, absent the court's permission. First, the plaintiff shall present an opening statement, followed immediately by defendant's opening statement. Next, plaintiff and defendant shall present their cases-in-chief by informing the jury in more detail than the opening statement who the witnesses are and what their testimony will be. Finally, the plaintiff and then defendant will make closing arguments to the jury. Plaintiff may present a final rebuttal if his or her presentation time limit has not expired. The parties are free to divide their allotted time among the three trial segments as they see fit.

(10) *Manner of Presentation.* All evidence shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence, and sworn statements of potential witnesses; however, no witness' testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavits of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness' proposed testimony by the witness. Demonstrative evidence, such as videotapes, charts, diagrams, and models may be used unless the court finds, on objection, that this evidence is neither admissible nor accurately reflects evidence which is admissible.

(11) *Objections.* Formal objections are discouraged. Nevertheless, in the event counsel makes a representation not supported by admissible evidence, an objection will be entertained. If such an objection is sustained, the jury will be instructed appropriately.

(12) *Jury Instructions.* Jury instructions will be given in an abbreviated form, adapted to reflect the nature of the proceeding. The jury will be instructed to return a unanimous verdict, if possible. Barring unanimity, the jury may be instructed to submit a statement of each juror's findings.

(13) *Jury Deliberations.* Jury deliberations should be limited in time.

(14) *Settlement Negotiations.* While the summary jury in non-binding summary trials is deliberating, the presiding judge should direct the parties to meet and explore settlement possibilities. The judge may participate in this process.

(15) *Continuances.* The proceedings may not be continued or delayed other than for short recesses at the discretion of the court.

(16) *Finality of Determination.* Although ordinarily non-binding in nature, counsel may stipulate among themselves that a consensus verdict by the summary jury will be a final determination on the merits of the case and judgment may be entered thereon by the court. In addition, counsel may stipulate to any other use of the verdict that will aid in resolution of the case. For example, the parties should consider a bracketed settlement with specific minimum and maximum settlement amounts and being bound by the summary jury's verdict within the brackets.

(17) *Trial.* If a non-binding summary jury trial does not result in settlement of the case, it should proceed to trial on the scheduled date.

(18) *Limitation on Admission of Evidence.* The assigned judge shall not admit at a subsequent trial any evidence that there has been a non-binding summary jury trial, the nature or amount of any verdict, or any other matter concerning the conduct of the summary jury trial or negotiations related to it, unless:

(a) The evidence would otherwise be admissible under the Federal Rules of Evidence; or

(b) The parties have otherwise stipulated.

Rule 101.3b. Summary Non-Jury Trials.

The assigned judge may, after consultation with counsel, refer any civil case for summary non-jury trial. Either or both parties may move the court to order summary non-jury trial; however, the court will not require a party to participate against its will. The decision resulting from a non-jury summary trial may be non-binding or, upon consent of the parties, a final determination on the merits upon which judgment shall be entered. The procedure for a summary non-jury trial shall be directed by the court on a case-by-case basis after consultation with counsel. The procedures for summary jury trials may be used, as appropriate, as a guide for procedures in summary bench trials.

ADMIRALTY AND MARITIME CLAIMS

Rule 200.00. Title and scope.

These rules are entitled Admiralty Rules and may be cited as "Local Admiralty Rules" or "LAR". They apply to the maritime and admiralty proceedings as defined in Supplemental Rule A of the Federal Rules of Civil Procedure. The Local Rules of the United States District Court for the Eastern District of North Carolina apply to all civil cases, including admiralty and maritime proceedings, but if a local rule is inconsistent with an admiralty rule, the admiralty rule shall control. As used in these LAR, "court" means a U. S. District Judge or a U. S. District Magistrate Judge.

Rule 201.00. Process.

(a) *Order authorizing the clerk to issue process of arrest, attachment or garnishment.*

Except in actions by the United States for forfeitures, before the clerk will issue a summons and process of arrest, attachment or garnishment to any party, including intervenors, under Supplemental Rules B and C, the pleadings, the affidavit required by Rule B, and accompanying supporting papers must be reviewed by the court. The clerk may refer a motion under this provision to any magistrate judge or judge of the court who is reasonably available, regardless of the judge to whom the action is assigned. The motion may be heard and the decision thereon communicated to the clerk telephonically. If the court finds the conditions set forth in Rules B or C appear to exist, as appropriate, the court shall authorize the clerk to issue process. Supplemental process or alias process may thereafter be issued by the clerk upon application without further order of the court.

(1) *Order.*

Upon approving the application for arrest, attachment or garnishment, the court will issue an order to the clerk to issue such process. The proposed form of order authorizing the issuance of such process and the proposed process itself shall be submitted to the court or the clerk before the court's review.

(2) *Exigent circumstances.*

If the plaintiff or his attorney certifies by affidavit submitted to the clerk that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant of arrest or process of attachment and garnishment. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for arrest of the vessel or other property without requiring a certification of exigent circumstances.

(b) *Return of process — Supplemental Rules C and D.*

Unless otherwise ordered by the court, all process from this court within the scope of Supplemental Rules C and D, Fed. R. Civ. P., shall be returnable by claim on or before 10 days after execution of the process and by answer within twenty days following filing of claim or, in the event the property is not released within 10 days after execution of process, by filing a claim and serving answer within 20 days of publication as required by Rule C(4).

(c) *Return of process — Supplemental Rule B and F and other Rule 9(h) actions.*

Unless otherwise ordered by the court, all process form this court within the contemplation of Supplemental Rules B and F, FED. R. CIV. P., shall be in conformity therewith. Unless otherwise ordered by the court, all process in Rule 9(h), FED. R. CIV. P. actions (other than process contemplated by Rules B, C, D and F) shall be returnable on or before 20 days following service.

(d) *Registry of vessel information.*

Whenever a vessel is to be served, the party seeking service shall inform the Marshal of the registry of the vessel to be served, provided, however, failure to so inform the

Marshal shall not be cause for the Marshal to refuse to serve the said vessel or in any way invalidate service of process.

Rule 202.00. Issuance of process.

(a) *Intangible property.*

(1) *Issuance and effect of summons.* The summons issued pursuant to Supplemental Rule C(3) shall direct the person having control of the funds or other intangible property to show cause no later than 10 days after service why the funds or other property should not be delivered to the court to abide the judgment. The court, for good cause shown, may shorten or lengthen the time. Service of the summons has the effect of an arrest of the property and brings it within the control of the court.

(2) *Payment to marshal.* The person who is served may deliver or pay over to the Marshal the property or funds proceeded against, or a part thereof, sufficient to satisfy the claim. If such payment is made, the person served is excused from any duty to show cause.

(3) *Manner of showing cause.* The claimant of the property may show cause why the property should not be delivered to the court by serving and filing a claim as provided in Supplemental Rule C(6) within the time allowed to show cause, and by serving and filing an answer to the complaint within 20 days thereafter.

(4) *Effect of failure to show cause.* If a claim is not filed within the time stated in the summons, or an answer is not filed within the time allowed under this Rule, the person who was served shall deliver or pay to the Marshal the property or funds proceeded against, or a part thereof, sufficient to satisfy plaintiff's claim.

(b) *Seizure of property already in custody of an officer of the United States.* In addition to the requirements of Supplemental Rule (C)(3), where property in the custody of an officer or employee of the United States is to be arrested or attached, the Marshal shall deliver a copy of the complaint and warrant for arrest, or summons and process of attachment, to such officer or employee or, if the officer or employee is not found within the district, then to the custodian of the property within the district. The Marshal shall notify such officer, employee or custodian not to relinquish such property from custody until ordered to do so by the court.

(c) *Use of state procedures.* When the plaintiff invokes a state procedure to attach or garnish property under Federal Rule 4(n), the process of attachment and garnishment shall so state.

(d) *"Not within the district" defined.* A defendant is considered to be "not found within the district" if, in an action in personam, service upon the defendant cannot be effected in person or upon an authorized officer or agent within the State of North Carolina or if the only effective service is through the Secretary of State, the North Carolina Long Arm Statute, or through any method of substituted service.

Rule 203.00. Post arrest procedure.

(a) Whenever property is arrested, attached or garnished, any person claiming an interest in the property shall be entitled to a prompt hearing before the court on notice to the party bringing the arrest, attachment or garnishment and to all other parties who have appeared in the action. The hearing shall be noticed and scheduled as is a hearing on a request for temporary restraining order. At the hearing, the party that obtained the arrest, attachment or garnishment shall show cause why the arrest, attachment or garnishment order should not be vacated forthwith or other appropriate relief granted.

(b) If the arrest, attachment or garnishment was obtained under a certification of exigent circumstances, the party obtaining the arrest, attachment or garnishment shall have the burden to show that exigent circumstances existed.

(c) This Rule shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to action by the United States for forfeitures.

Rule 204.00. Publication.

(a) Publication required by Supplemental Rule (C)(4), FED. R. CIV. P. shall be made once, without further court order, in any one of the following newspapers:

Northern Division. Virginian Pilot, Norfolk, Virginia, The News and Observer, Raleigh, North Carolina

Southern Division. Wilmington Morning Star, Wilmington, North Carolina

All Other Divisions. The News and Observer, Raleigh, North Carolina

(b) If the property arrested is not released within 10 days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within seventeen days after execution of process.

(c) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any federal statute:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
______________ Division
In Admiralty
No. ______________

Caption of Case

NOTICE: The United States Marshal, Eastern District of North Carolina, has on (date) arrested the (Vessel and appurtenances) (Property) in the above causes, civil and maritime for (nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.) amounting to ($ (and nature of unliquidated items)). Any person who has not been previously served with process and who is entitled to possession or who claims an interest in the (Vessel or Property), must file a claim and serve an answer on or before (date 20 days after publication), otherwise, default maybe entered and condemnation ordered.

DATED at (city of publication), (state), (month, day and year of publication).

(Name)
(Address)
(Telephone Number)
(N.C. Bar Number)
(Attorney(s)) for
(Plaintiff)(Intervenor)

(d) Plaintiff or intervenor will cause to be furnished to the Marshal, at the time process issues in Supplemental Rules B, C and D., FED. R. CIV. P. actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such Marshal, together with self-addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The Marshal will promptly cause same to be completed and mailed after execution of process.

(e) Plaintiff shall effect publication required by Supplemental Rule F(4), FED. R. CIV. P. without further court order, in any one of the following newspapers:

Northern Division. Virginian Pilot, Norfolk, Virginia, The News and Observer, Raleigh, North Carolina

Southern Division. Wilmington Morning Star, Wilmington, North Carolina

All Other Divisions. The News and Observer, Raleigh, North Carolina

(f) Whenever publication is required, the person or party causing the publication shall file with the clerk, no later than 30 days after the date of publication, sworn proof of publication by a person duly authorized by the newspaper to execute affidavits of legal notices, together with a copy of the publication, or reproduction thereof.

Rule 205.00. Stipulations for costs and security.

(a) *Seamen.* Seamen suing as provided in 28 U.S.C. § 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

In all actions *in rem* brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. § 1916, the Marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate judge of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the Marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the Marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of the same on the vessel.

(b) *Increase or decrease in security.* At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(c) *Deposit required before seizure.* Any party, including any intervenor, who seeks arrest, attachment or garnishment of property in an action governed by Supplemental Rule E and Federal Rule 4(e) shall deposit with the Marshal the sum estimated by the Marshal to be sufficient to pay the fees and expenses of arresting, attaching, or garnishing and keeping the property for at least 10 days, or such lesser amount as the Marshal deems sufficient. The Marshal is not required to execute process of arrest, attachment or garnishment until such deposit is made.

(d) *Additional deposits required after seizure.* Any party who has caused the Marshal to arrest, attach or garnish property shall advance additional sums from time to time as required by the Marshal to pay the fees and expenses of the Marshal until the property is released or disposed of as provided in Supplemental Rule E.

(e) *Sanction for failure to make deposit.* Any party who fails to make a deposit when required by the Marshal may be subject to sanctions including the release of the vessel.

(f) In complying with the provisions of Supplemental Rule F(1) concerning security for costs, if plaintiff elects to post cash, that sum shall be $250.00; if the plaintiff elects to post a bond, the amount of the bond shall be $250.00; if the plaintiff elects to post a bond, the amount of the bond shall be $250.00 plus interest at the rate of 6% per annum from the date of the security.

Rule 206.00. Stipulations and undertakings.

(a) Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed on behalf of the stipulator or obligor by his/her/its agent or counsel. Stipulations for costs with corporate surety need not be signed or executed by the party, but may be signed on his/her/its behalf by his/her/its agent or counsel, and shall be sufficient in any event if executed only by the surety approved by the court.

(b) If, before or after commencement of suit, the arresting, attaching or garnishing party accepts any written undertaking to respond on behalf of the vessel or other property sued in return for foregoing its arrest or for stipulating to the release of such vessel or other property, the undertaking shall be filed, shall become the res in place of the vessel or other property sued and shall be deemed the subject referred to when any pleading, order or judgment in the action refers to the vessel or other property. The preceding shall apply to any such undertaking, subject to its own terms, whether or not it has been approved by a judge or the clerk.

Rule 207.00. Pleadings and parties.

(a) Every complaint filed as FED. R. CIV. P. 9(h) action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(b) In actions under Supplemental Rule B, C or D, FED. R. CIV. P. the business telephone number and address of the plaintiff's counsel or the plaintiff, if plaintiff appears *pro se,* shall be included.

(c) Every complaint in Supplemental Rules B and C, FED. R. CIV. P. actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amounts of unliquidated claims, including attorneys fees. The defendant or claimant may post bond pursuant to Supplemental Rule E(5) based on such allegations.

(d) In cases of salvage, the complaint shall also state to the extent known or estimated the value of the hull, cargo, freight and other property salvaged, the amount claimed, the names of the principal salvers, and that the suit is instituted in their behalf and in the behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known salvers and all persons believed entitled to share in the salvage, and also any agreement of consortship available and known to exist among them or any of them, including a copy of any such agreement.

Rule 208.00. Verification of pleadings and answers to interrogatories.

Every complaint and claim in Supplemental Rules B, C and D, FED. R. CIV. P. actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint, claim or answers to interrogatories may be made by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of his or her knowledge, information and belief, declare that the document affirmed is true to the best of his or her knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he or she is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered.

Rule 209.00. Intervention.

(a) *Presentation of Claim.* When a vessel or other property has been arrested, attached or garnished, and is in the hands of the marshal or custodian substituted therefor, anyone seeking to enforce a claim against the vessel or property shall present the claim by filing an intervening complaint, and not by filing an original complaint, unless otherwise ordered by the court. The clerk shall promptly deliver a conformed copy of the complaint in intervention and the intervenor's warrant of arrest or process of attachment or garnishment to the marshal, who shall deliver the same to the vessel and custodian of the property. Intervenors shall thereafter be subject to the rights and obligations of a party originally arresting, attaching or garnishing the vessel or property unless otherwise herein provided, and the vessel or property shall stand arrested, attached or garnished by the intervenor. An intervenor shall not be required to advance a security deposit to the marshal.

(b) *Intervention When Sale Has Been Scheduled.* No party may intervene without first obtaining leave of court if intervention is sought less than 15 days prior to the date for which a sale of the vessel or property has been set by the court.

(c) *Compliance with Rules.* An Intervenor must comply with the Supplemental Rules for Certain Admiralty and Maritime Claims, the Federal Rules of Civil Procedure and these Local Rules in accomplishing and perfecting the arrest, attachment or garnishment unless otherwise provided in this Local Rule 89.00 or by order of the court.

(d) *Sharing of Marshal's Fees and Expenses.* At any time after the filing of a complaint in intervention, any party to the action or the Marshal may move the court for an order directing that the intervenor pay a fair share, as determined by the court, of the Marshal's fees and expenses incurred and to be incurred for the arrest, attachment, garnishment, keeping, maintenance and security of the vessel or other property. A hearing on such motion may be held upon three days notice.

(e) *Intervenors' Obligations Upon Vacation of the Arrest, Attachment or Garnishment.* If an original arrest, attachment or garnishment is vacated, an intervenor who has delivered conformed copies of his or her complaint in intervention to the Marshal shall bear responsibility for the Marshal's fees and expenses and shall deposit the sum required by the Marshal for fees and expenses within 48 hours after receiving written notice from the Marshal requiring such deposit. Such notice may be given as soon as the Marshal learns that the original arrest, attachment or garnishment is to be vacated. If more than one complaint in intervention has been delivered to the Marshal, the intervenors shall step into the position of the originally arresting, attaching or garnishing party as provided herein in order of the delivery of their complaints in intervention to the Marshal.

(f) *Service and Responsive Pleadings.* Upon the filing of a complaint in intervention, the intervenor, in addition to any other service required by statute, the Federal Rules of Civil Procedure, these Local Rules or order of the court, shall serve a copy of (1) the complaint in intervention, (2) the order authorizing arrest, attachment or garnishment, and (3) the warrant, writ and/or summons on all parties who have appeared in the action pursuant to FED. R. CIV. P. 5. Within 20 days of such service, each party to the action shall serve an answer, motion or other responsive pleading to the complaint in intervention consistent with FED. R. CIV. P. 12, and the intervenor shall serve an answer, motion or other responsive pleading to the complaints and claims previously filed in the action.

Rule 210.00. Default in action in rem.

(a) *Notice required.* A party seeking a default judgment in an action in rem must show that due notice of the action and arrest of the property has been given:

(1) By publication, as required in LAR 84;

(2) By service on the master or other person having custody of the property;

(3) By service on every other person who has not appeared in the action and is known to have an interest in the property; and

(4) By service in accordance with the Foreign Sovereign Immunities Act, if the property is subject to that Act.

(b) *Persons with recorded interests.*

(1) If the defendant property is a vessel documented under the laws of the United States, a party seeking default judgment must obtain a current certificate of ownership from the United States Coast Guard and attempt to serve persons named in the certificate who appear to have an interest in the property.

(2) If the defendant property is a vessel numbered as provided in the Federal Boat Safety Act, a party seeking default judgment must obtain information from the authority issuing the number and attempt to serve persons named in the records of the issuing authority who appear to have an interest in the property.

(3) If the defendant property is of such character that there exists a governmental registry of recorded property interests or security interests in the property, a party seeking default judgment must attempt to notify all persons named in the records of each such registry who appear to have an interest in the property.

(c) *Manner of giving notice.* A required notice, other than by publication, of the action and arrest of the property shall be given by delivery under Federal Rule 5(b).

Rule 211.00. Entry of default.

After the time for filing an answer has expired, the plaintiff may request an entry of default under Federal Rule 55(a). Default will be entered upon showing that:

(a) Notice has been given as required in LAR 90.00; and

(b) No claim has been served or filed within the prescribed time or no answer has been served or filed within the prescribed time.

The plaintiff may move for judgment under Federal Rule 55(b) at any time after default has been entered.

Rule 212.00. Custody of property.

(a) *Safekeeping of property when seized.* When a vessel, cargo or other property is seized, the Marshal shall take custody and arrange for adequate and necessary security for its safekeeping which may include, in the Marshal's discretion, the placing of keepers on or near the vessel, or the appointment of a facility or person as custodian of the property in lieu of the Marshal. When a vessel with crew aboard is seized, the removal of such crew shall fall within the discretion of the United States Marshal.

(b) *Cargo handling, repairs and movement of the vessel.* Upon arrest or attachment of the vessel, no cargo handling, repairs or movement of the vessel may be made without a court order except in an emergency situation in the discretion of the Marshal. Written notice shall be given to the Marshal and to all parties who have appeared prior to the application for such order, and the certificate of service of such notice shall be filed with the clerk before application is made to the court. For good cause shown, the court may direct the Marshal to allow the conduct of cargo handling, repairs, movement of the vessel or other operations on a vessel under arrest or attachment. Neither the United States nor the Marshal shall be liable for the consequence of the undertaking or continuation of any such activities during the arrest or attachment.

(c) *Motion for change in arrangements.* Prior to or after a vessel, cargo or property has been taken into custody by the Marshal, any party then appearing may move the court to dispense with keepers or to remove or place the vessel, cargo or other property at a specified facility, to designate a substitute custodian, or for similar relief. Notice of the motion shall be given to the Marshal and to all parties who have appeared.

(d) *Insurance.* The Marshal may order insurance to protect the Marshal, his or her deputies, keepers and substitute custodians from liability assumed in arresting and holding the vessel, cargo or other property and performing whatever services are undertaken to protect the vessel, cargo or other property and maintain the court's custody. The party applying for arrest of the vessel, cargo or other property shall reimburse the Marshal for premiums paid for the insurance. The party applying for removal of the vessel, cargo or other property to another location, for designation of a substitute custodian, or for other relief that will require an additional premium shall reimburse the Marshal therefor. The premiums charged for the liability insurance are taxable as administrative costs while the vessel, cargo or other property is *in custodia legis.*

(e) A person who furnishes supplies or services to a vessel, cargo, or other property in custody of the court who has not been paid and claims the right to payment as an expense of administration shall file a verified claim with the court at any time before the vessel, cargo, or other property is released or sold. The supplier must serve copies of the claim pursuant to FED. R. CIV. P. 5(b), on the U.S. Marshal, substitute custodian (if one has been appointed), and all parties of record. The court may consider the claims individually or schedule a single hearing for all claims.

Rule 213.00. Appraisal.

(a) *Order for appraisal.* An order for appraisal of property so that security may be given or altered will be entered by the clerk at the written request of any interested party. If the parties do not agree in writing on the selection of the appraiser, the court will appoint the appraiser.

(b) *Appraiser's oath.* The appraiser shall be sworn to the faithful and impartial discharge of duties before any federal or state officer authorized by law to administer oaths, and a copy of the oath shall be filed with the clerk.

(c) *Appraisal.* The appraiser shall give one day's notice of the time and place of making the appraisal to the parties who have appeared in the action. The appraiser shall file the appraisal in writing with the clerk as soon as it is completed and shall serve it on all parties.

(d) *Cost of appraisal.* Absent stipulation of the parties or order of the court to the contrary, the appraiser shall be paid by the party requesting the appraisal. Appraiser's fees shall thereafter be taxed as the court orders.

Rule 214.00. Sale of property.

(a) *Publication of notice of sale.* Unless otherwise ordered upon a showing of urgency, impracticality or other good cause, or as provided by law, notice of the sale of property shall be published daily, at least twice, the first publication to be a least one calendar week prior to date of sale and the second publication to be a least three calendar days prior to the date of sale, unless otherwise ordered by the court.

(b) *Place of sale.* The place of sale will occur at the Federal Courthouse in the division in which the property is located unless the court otherwise directs.

(c) *Payment of bid.* The person whose bid is accepted shall immediately pay the Marshal either the full purchase price if the bid is no more than $500 or a deposit of $500 or ten percent of the bid, whichever is greater, if the bid exceeds $500. The bidder shall pay the balance of the purchase price within three court days following the sale. If an objection to the sale is filed within that time, the bidder is excused from paying the balance of the purchase price until three court days after the sale is confirmed. Payments to the Marshal shall be in cash, certified check or cashier's check. The court may specify different terms in any order of sale.

(d) *Penalty for late payment of balance.* A successful bidder who fails to pay the balance of the bid within the time allowed under these rules or a different time specified by the court shall also pay the Marshal the costs of keeping the property from the date payment of the balance was due to the date the bidder pays the balance and takes delivery of the property. Unless otherwise ordered by the court, the Marshal shall refuse to release the property until this additional charge is paid.

(e) *Penalty for default in payment of balance.* A successful bidder who fails to pay the balance of the bid within the time allowed is in default and the court may at any time thereafter order a sale to the second highest bidder or order a new sale as appropriate. Any sum deposited by the bidder in default shall be forfeited and applied to pay any additional costs incurred by the Marshal by reason of the forfeiture and default, including costs incident to resale. The balance of the deposit, if any, shall be retained in the registry subject to further order of the court, and the court shall be given written notice of its existence whenever the registry deposits are reviewed.

(f) *Report of sale by the Marshal.* At the conclusion of the sale, the Marshal shall forthwith file a written report with the court of the fact of sale, the date thereof, the price obtained, the name and address of the successful bidder, and any other pertinent information.

(g) *Time and procedure for objection to sale.* An interested person may object to the sale by filing a written objection with the clerk within three court days following the sale, serving the objection on all parties, the successful bidder and the Marshal, and depositing a sum with the Marshal that is sufficient to pay the expense of keeping the property for at least seven days. Payment to the Marshal shall be in cash, certified check, or cashier's check. The written objection must be endorsed by the Marshal with an acknowledgement of receipt of the deposit prior to filing with the clerk.

(h) *Confirmation of sale without motion.* A sale shall stand confirmed as of course without any affirmative action by the court unless (1) written objection is filed with the court within the time allowed under these rules, or (2) the purchaser is in default for failure to pay the balance due to the Marshal. The purchaser in a sale so confirmed as of course shall present a form of order reflecting the confirmation of the sale for entry by the clerk on the fourth court day following the sale. The Marshal shall transfer title to the purchaser upon presentation of such order by the clerk.

(i) *Confirmation of the sale on motion.* If an objection has been filed or if the successful bidder is in default, the Marshal, the objector, the successful bidder, or a party may move the court for relief. The motion will be heard summarily by the court. The person seeking a hearing on such motion shall apply to the court for an order fixing the date and time of the hearing and directing the manner of giving notice and shall give written notice of the motion to the Marshal, all parties, the successful bidder and the objector. The court may confirm the sale, order a new sale, or grant such other relief as justice requires.

(j) *Disposition of deposits.*

(1) *Objection sustained.* If an objection is sustained, sums deposited by the successful bidder will be returned to the bidder forthwith. The sum deposited by the objector will be applied to pay the fees and expenses incurred by the Marshal in keeping the property until it is resold, and any balance remaining shall be returned to the objector. The objector will be reimbursed for the expense of keeping the property from the proceeds of a subsequent sale.

(2) *Objection overruled.* If the objection is overruled, the sum deposited by the objector will be applied to pay the expense of keeping the property from the day the objection was filed until the day the sale is confirmed, and any balance remaining will be returned to the objector forthwith.

(k) *Title to property.* Failure of a party to give the required notice of the action and arrest of the vessel, cargo or other property or required notice of the sale may afford grounds for objecting to the sale but does not affect the title of a bona fide purchaser of the property without notice of the failure.

Rule 215.00. Release of seizures — Custodial cost — General bonds.

(a) Property seized by the Marshal may be released as follows:

(1) By the Marshal upon the receipt of security by the Marshal, accompanied by the endorsed express authorization for release signed by the party or counsel for the party as provided by Supplemental Rule E(5)(c), FED. R. CIV. P. if all costs and charges of the court and its officers shall have first been paid. Monies received as part of any cash stipulation shall be delivered by the Marshal to the clerk for deposit in the registry of the court.

(2) In action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at ten percent per annum thereon from the date claimed to be due to a date 24 months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.

(3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.

(4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.

(5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(b) The Marshal shall not deliver any property so released until costs and charges of the Marshal shall first have been paid.

(c) In any general bond as provided for by Supplemental Rule E(5)(b), FED. R. CIV. P. the vessel will be identified by name, nationality, dimension, official number or registration number, hailing port and port of documentation, to the extent applicable. The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail. Execution of process against the vessel so stayed under Supplemental Rule E(5)(b), FED. R. CIV. P. shall be endorsed to the Marshal as stayed pursuant to the rule. Such process shall be served by the Marshal together with a copy of the complaint on the master or other person in whose charge or custody the vessel is found and the Marshal shall make his or her return thereof. If no master or other person in charge of custody is found aboard the vessel, the Marshal shall so make his or her return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day thirty days from the date of the Marshal's attempt. The clerk will maintain a current list of vessels subject to a general bond and file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5)(b), FED. R. CIV. P.

Rule 216.00. Taxation of costs.

If costs shall be awarded to either or any party, then the reasonable premium or expenses paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case. In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case.

Rule 217.00. Stay of execution or of release of property after judgment or dismissal.

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until 10 days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said ten-day period, a further stay shall exist for a period not to exceed 30 days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same.

Rule 218.00. Possessory actions — Short day return.

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference.

Rule 219.00. Claims after sale — How limited.

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, shall not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered.

Rule 220.00. Alternative dispute resolution.

In all actions governed by these Local Admiralty Rules, all parties are encouraged to consider early judicial intervention and at least one alternative dispute resolution procedure provided for in the Local Rules 30.00 - 32.00 or another form of alternative dispute resolution approved by the court. The alternative dispute resolution procedure shall be identified in the Discovery Plan and should be completed no later than 90 days after the entry of the Scheduling Order.

PATENT RULES

Rule 301.1. Title.

These are the Local Rules of Practice for Patent Cases before the United States District Court for the Eastern District of North Carolina. They should be cited as "Local Patent Rule ______, EDNC."

Rule 301.2. Purpose, Scope and Construction.

(a) These rules are intended to supplement the Local Civil rules of this District to facilitate the speedy, fair and efficient resolution of patent disputes.

(b) These rules apply to all civil actions filed in or transferred to this Court which allege infringement of a utility patent in a complaint, counterclaim, cross-claim or third party claim, or which seek a declaratory judgment that a utility patent is not infringed, is invalid or is unenforceable.

(c) The Court may accelerate, extend, eliminate, or modify the obligations or deadlines set forth in these Local Patent Rules based on the circumstances of any particular case, including, without limitation, the complexity of the case or the number of patents, claims, products, or parties involved. If any motion filed prior to the Claim Construction Hearing provided for in Local Patent Rule 304.6 raises claim construction issues, the Court may, for good cause shown, defer the motion until after completion of the disclosures, filings, or ruling following the Claim Construction Hearing. The Local Civil Rules of this Court shall also apply to these actions, except to the extent that they are inconsistent with these Local Patent Rules.

Rule 301.3. Effective Date.

These Local Patent Rules shall take effect on September 17th, 2007 and shall apply to any case filed or transferred to this Court thereafter. Relevant provisions of these rules may be applied to any pending case by the Court, on its own motion or on motion by any party.

Rule 302.1. Governing procedure.

(a) *Initial Rule 26(f) Scheduling Conference ("Initial Scheduling Conference").* When the parties confer with each other pursuant to Fed. R. Civ. P. 26(f), in addition to the matters covered by Fed. R. Civ. P. 26, the parties must discuss and address in the Discovery Plan filed pursuant to Fed. R. Civ. P. 26(f) and Local Civil Rule 26.1(e)(2):

(1) Proposed modification of the deadlines provided for in the Patent Local Rules, and the effect of any such modification on the date and time of the Claim Construction Hearing, if any;

(2) Whether the Court will hear live testimony at the Claim Construction Hearing;

(3) The need for and any specific limits on discovery relating to claim construction, including depositions of witnesses, including expert witnesses; and

(4) The order of presentation at the Claim Construction Hearing.

(b) *Further Scheduling Conferences.* To the extent that some or all of the matters provided for in Local Patent Rule 302.1(a)(1)-(4) are not resolved or decided at the

Initial Scheduling Conference, the parties shall propose dates for further Scheduling Conferences at which such matters shall be decided.

Rule 302.2. Confidentiality.

(a) If any document or information produced under these Local Patent Rules is deemed confidential by the producing party and if the Court has not entered a protective order or otherwise ruled on the confidentiality of the document or information, then until a protective order is issued by the Court, the document shall be marked "confidential" or with some other confidential designation (such as "Confidential - Outside Attorneys Eyes Only") by the disclosing party and disclosure of the confidential document or information shall be limited to each party's outside attorney(s) of record and the employees of such outside attorney(s). If a party is not represented by an outside attorney, disclosure of the confidential document or information shall be limited to one designated "in house" attorney, whose identity and job functions shall be disclosed to the producing party five (5) court days prior to any such disclosure, in order to permit any motion for protective order or other relief regarding such disclosure. The person(s) to whom disclosure of a confidential document or information is made under this Local Patent Rule shall keep it confidential and use it only for purposes of litigating the case, unless and until the Court issues a ruling to the contrary.

(b) If a party wishes to file with the Court any document or information that has been designated as confidential pursuant to subsection (a) and as to which the Court has not ruled, that party must comply with the provisions of Local Civil Rule 79.2 by filing a motion to seal the document. If the party proffering the document or information designated as confidential does not agree it is entitled to be sealed, then the party shall so state in its motion to seal and the party that made the 'confidential' designation shall be entitled, in its responsive brief, to explain its position. The provisions of Local Civil Rule 79.2 shall thereafter determine the status and handling of the material with respect to such filing.

Rule 302.3. Certification of Initial Disclosures.

All statements, disclosures, or charts filed or served in accordance with these Local Patent Rules must be dated and signed by counsel of record. Counsel's signature shall constitute a certification that to the best of his or her knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the information contained in the statement, disclosure, or chart is complete and correct at the time it is made.

Rule 302.4. Admissibility of disclosures.

Statements, disclosures, or charts governed by these Local Patent Rules are admissible to the extent permitted by the Federal Rules of Evidence or Federal Rules of Civil Procedure. However, the statements or disclosures provided for in Local Patent Rules 304.1 and 304.2 are not admissible for any purpose other than in connection with motions seeking an extension or modification of the time periods within which actions contemplated by these Local Patent Rules must be taken.

Rule 302.5. Relationship to Federal Rules of Civil Procedure.

Except as provided in this paragraph or as otherwise ordered, it shall not be a legitimate ground for objecting to an opposing party's discovery request (e.g., interrogatory, document request, request for admission, deposition question) or declining to provide information otherwise required to be disclosed pursuant to Fed. R. Civ. P. 26(a)(1) that the discovery request or disclosure requirement is premature in light of, or otherwise conflicts with, these Local Patent Rules. A party may object, however, to responding to the following categories of discovery requests (or decline to provide information in its initial disclosures under Fed. R. Civ. P. 26(a)(1)) on the ground that they are premature in light of the timetable provided in the Local Patent Rules:

(a) Requests seeking to elicit a party's claim construction position;

(b) Requests seeking to elicit from the patent claimant a comparison of the asserted claims and the accused apparatus, product, device, process, method, act, or other instrumentality;

(c) Requests seeking to elicit from an accused infringer a comparison of the asserted claims and the prior art; and

(d) Requests seeking to elicit from an accused infringer the identification of any opinions of counsel, and related documents, that it intends to rely upon as a defense to an allegation of willful infringement.

Where a party properly objects to a discovery request (or declines to provide information in its initial disclosures under Fed. R. Civ. P. 26(a)(1)) as set forth above, that party shall provide the requested information on the date on which it is required to provide the requested information to an opposing party under these Local Patent Rules, unless there exists another legitimate ground for objection.

Rule 303.1. Disclosure of asserted claims and preliminary infringement contentions.

Not later than thirty (30) days after the Initial Scheduling Conference, a party claiming patent infringement must serve on all parties a "Disclosure of Asserted Claims and Preliminary Infringement Contentions." Separately for each opposing party, the "Disclosure of Asserted Claims and Preliminary Infringement Contentions" shall contain the following information:

(a) Each claim of each patent in suit that is allegedly infringed by each opposing party;

(b) Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality ("Accused Instrumentality") of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;

(c) A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including for each element that such party contends is governed by the sixth paragraph of 35 U.S.C. § 112, the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;

(d) Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality;

(e) For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and

(f) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.

Rule 303.2. Document production accompanying disclosure.

With the "Disclosure of Asserted Claims and Preliminary Infringement Contentions," the party claiming patent infringement must produce to each opposing party or make available for inspection and copying:

(a) Documents (e.g., contracts, purchase orders, invoices, advertisements, marketing materials, offer letters, beta site testing agreements, and third party or joint development agreements) sufficient to evidence each discussion with, disclosure to, or other manner of providing to a third party, or sale of or offer to sell, the claimed invention prior to the date of application for the patent in suit. A party's production of a document as required herein shall not constitute an admission that such document evidences or is prior art under 35 U.S.C. § 102;

(b) All documents evidencing the conception, reduction to practice, design, and development of each claimed invention, which were created on or before the date of application for the patent in suit or the priority date identified pursuant to Local Patent Rule 303.1(e), whichever is earlier; and

(c) A copy of the file history for each patent in suit.

The producing party shall separately identify by production number which documents correspond to each category.

Rule 303.3. Preliminary non-infringement and invalidity contentions.

Not later than forty-five (45) days after service upon it of the "Disclosure of Asserted Claims and Preliminary Infringement Contentions," each party opposing a claim of patent infringement, shall serve on all parties its "Preliminary Non-Infringement and Invalidity Contentions."

(a) Non-Infringement Contentions shall contain a chart, responsive to the chart required by Local Patent Rule 303.1(c), that states as to each identified element in each asserted claim, whether such element is present literally or under the doctrine of equivalents in each Accused Instrumentality, and, if not, the reason for such denial and the relevant distinctions.

(b) Invalidity Contentions must contain the following information:

(1) The identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious. Each prior art patent shall be identified by its number, country of origin,and date of issue. Each prior art publication must be identified by its title, date of publication, and where feasible, author and publisher. Prior art under 35 U.S.C. § 102(b) shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s);

(2) Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items of prior art makes a claim obvious, each such combination, and the motivation to combine such items, must be identified;

(3) A chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found, including for each element that such party contends is governed by the sixty paragraph of 35 U.S.C. § 112, the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and

(4) Any grounds of invalidity based on any applicable provision of 35 U.S.C. § 112.

Rule 303.4. Document production accompanying Preliminary Non-Infringement and Invalidity Contentions.

With the "Preliminary Non-Infringement and Invalidity Contentions," the party opposing a claim of patent infringement must produce or make available for inspection and copying:

(a) Source code, specifications, schematics, flow charts, artwork, formulas, or other documentation sufficient to show the operation of any aspects or elements of an Accused Instrumentality identified by the patent claimant in its Local Patent Rule 303.1(c) chart; and

(b) A copy of each item of prior art identified pursuant to Local Patent Rule 303.3(b)(1) that does not appear in the file history of the patent(s) at issue. To the extent any such item is not in English, an English translation of the portion(s) relied upon must be produced.

Rule 303.5. Disclosure requirement in patent cases for declaratory judgment.

(a) *Invalidity contentions if no claim of infringement.* In all cases in which a party files a complaint or other pleading seeking a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable, Local Patent Rule 303.1 and 303.2 shall not apply unless and until a claim for patent infringement is made by a party. If the defendant does not assert a claim for patent infringement in its answer to the complaint, no later than ten (10) days after the defendant serves its answer, or ten (10) days after the Initial Scheduling Conference, whichever is later, the party seeking a declaratory judgment must serve upon each opposing party its Preliminary Invalidity Contentions that conform to Local Patent Rule 303.3 and produce or make available for inspection and copying the documents described in Local Patent Rule 303.4. The parties shall meet and confer within ten (10) days of the service of the Preliminary

Invalidity Contentions for the purpose of determining the date on which the plaintiff will file its Final Invalidity Contentions which shall be no later than fifty (50) days after service by the Court of its Claim Construction Ruling.

(b) *Applications of rules when no specified triggering event.* If the filings or actions in a case do not trigger the application of these Patent Local Rules under the terms set forth herein, the parties shall, as soon as such circumstances become known, meet and confer for the purpose of agreeing on the application of these Patent Local Rules to the case.

(c) *Inapplicability of Rule.* This Local Patent Rule 303.5 shall not apply to cases in which a request for a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable is filed in response to a complaint for infringement of the same patent.

Rule 303.6. Final contentions.

Each party's "Preliminary Infringement Contentions" and "Preliminary Non-Infringement and Invalidity Contentions" shall be deemed to be that party's final contentions, except as set forth below.

(a) If a party claiming patent infringement believes in good faith that (1) the Court's Claim construction Ruling or (2) the documents produced pursuant to Local Patent Rule 303.4 so requires, not later than thirty (30) days after service by the Court of its Claim Construction ruling, that party may serve "Final Infringement Contentions" without leave of court that amend its "Preliminary Infringement Contentions" with respect to the information required by Local patent Rule 303.1(c) and (d).

(b) Not later than fifty (50) days after service by the Court of its Claim Construction Ruling,each party opposing a claim of patent infringement may serve "Final Non-Infringement and invalidity Contentions" without leave of court that amend its "Preliminary Non-Infringement and invalidity Contentions" with respect to the information required by Local Patent Rule 303.3 if:

(1) a party claiming patent infringement has served "Final Infringement Contentions" pursuant to Local Patent Rule 303.6(a), or

(2) the party opposing a claim of patent infringement believes in good faith that the Court's claim Construction Ruling so requires.

Rule 303.7. Amendment to contentions.

Amendment or modification of the Preliminary or Final Infringement Contentions or the Preliminary or Final Non-Infringement and Invalidity Contentions, other than as expressly permitted in Local Patent Rule 303.6, may be made only as expressly permitted by Local Rule 303.6, or within thirty (30) days of the discovery of new information relevant to the issues of infringement, noninfringement, or invalidity. Otherwise, amendment or modification shall be made only by order of the Court, which shall be entered only upon a showing of good cause.

Rule 303.8. Willfulness; discovery of opinions of counsel.

(a) The substance of any advice of counsel tendered in defense to a charge of willful infringement, and any other information which might be deemed to be within the scope of a waiver attendant to disclosure of such advice, shall not be discoverable until the earlier of:

(1) five (5) days after a ruling on summary judgment indicating a triable issue of fact to which willfulness would be relevant; or

(2) thirty (30) days prior to the close of fact discovery under the discovery track to which the case is assigned.

(b) On the day such willfulness information becomes discoverable, the party relying on such advice shall produce the following:

(1) a copy of all written opinions to be relied on by the party opposing the claim of infringement;

(2) a copy of all materials or information related to the opinion that were provided to the attorney in the course of preparation of each such opinion;

(3) a copy of all written attorney-work-product related to each such opinion that (i) was developed in the course of preparation of the opinion and (ii) was disclosed to the client;

(4) identification of the date, sender and recipient (but not necessarily the substance) of all written and oral communications between the party opposing the claim of infringement and the attorney or law firm rendering any opinions to be relied on, which communications discuss the same subject matter as such opinion;

(5) any other opinion(s) that discuss the same subject matter as such opinion and that were provided to the party opposing the claim of infringement by any other attorney or law firm,whether or not the party relied on such additional opinions; and

(6) identification of the date, sender and recipient (but not necessarily the substance) of all \written and oral communications between the party opposing the claim of infringement and the attorney or law firm rendering such opinions that were not relied on, which communications discuss the same subject matter as such opinion.

(c) After such willfulness information becomes discoverable, a party claiming willful infringement shall be entitled (subject to any limitations, including limitations on numbers of depositions, otherwise imposed by the Scheduling Order) to take the deposition of any attorneys rendering the advice relied on and any persons who received such advice, including but not limited to any person who claims to have relied on such advice.

(d) A party opposing a claim of patent infringement who does not comply with the requirements of this Local Patent Rule 303.8 shall not be permitted to rely on an opinion of counsel as part of a defense to willful infringement absent a stipulation of all affected parties or by order of the Court, which shall be entered only upon a showing of good cause.

Rule 304.1. Exchange of proposed terms and claim elements for construction.

(a) Not later than fifteen (15) days after service of the "Preliminary Non-Infringement and Invalidity Contentions" pursuant to Local Patent Rule 303.3, each party shall simultaneously exchange a list of claim terms, phrases, or clauses which that party contends should be construed by the Court, and identify any claim element which that party contends should be governed by the sixty paragraph of 35 U.S.C. § 112.

(b) The parties shall thereafter meet and confer for the purposes of finalizing this list, narrowing or resolving differences, and facilitating the ultimate preparation of a Joint Claim Construction Statement.

Rule 304.2. Exchange of preliminary claim constructions and extrinsic evidence.

(a) Not later than twenty (20) days after the exchange of "Proposed Terms and Claim Elements for Construction" pursuant to Local Patent Rule 304.1, the parties shall simultaneously exchange a preliminary proposed construction of each claim term, phrase, or clause which the parties collectively have identified for claim construction purposes. Each such "Preliminary Claim Construction" shall also, for each element which any party contends is governed by the sixth paragraph of 35 U.S.C. § 112, identify the structure(s), act(s), or material(s) corresponding to that element.

(b) At the same time the parties exchange their respective "Preliminary Claim Constructions," they shall each also provide a preliminary identification of extrinsic evidence, including without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses they contend support their respective claim constructions. The parties shall identify each such item of extrinsic evidence by production number or produce a copy of any such item not previously produced. With respect to any such witness, percipient or expert, the parties shall also provide a brief description of the substance of that witness' proposed testimony.

(c) The parties shall thereafter meet and confer for the purposes of narrowing the issues and finalizing preparation of a Joint Claim Construction Statement.

Rule 304.3. Joint Claim Construction Statement.

Not later than sixty (60) days after service of the "Preliminary Non-Infringement and Invalidity Contentions," the parties shall complete and file a Joint Claim Construction Statement, which shall contain the following information:

(a) The construction of those claim terms, phrases, or clauses on which the parties agree.

(b) Each party's proposed construction of each disputed claim term, phrase, or clause,together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction of the claim or to oppose any other party's proposed construction of the claim, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses.

(c) The anticipated length of time necessary for the Claim Construction Hearing.

(d) Whether any party proposes to call one or more witnesses, including experts, at the Claim construction Hearing, the identity of each such witness, and for each expert, a summary of each opinion to be offered in sufficient detail to permit a meaningful deposition of that expert.

No other Rule 26 report or disclosure shall be required for testimony directed solely towards claim construction.

Rule 304.4. Completion of claim construction discovery.

Not later than thirty (30) days after service and filing of the Joint Claim Construction Statement, the parties shall complete all discovery relating to claim construction, including any depositions with respect to claim construction of any witnesses, including experts, identified in the Joint Claim Construction Statement.

Rule 304.5. Claim construction briefs.

(a) Not later than forty-five (45) days after serving and filing the Joint Claim Construction Statement, each party shall serve and file and opening brief and any evidence supporting its claim construction.

(b) Not later than twenty (20) days after service upon it of an opening brief, each party shall serve and file its responsive brief and supporting evidence.

(c) Prior to the Claim Construction Hearing, the Court may issue an order stating whether it will receive extrinsic evidence, and if so, the particular evidence that it will exclude and that it will receive, and any other matter the Court deems appropriate concerning the conduct of the hearing.

Rule 304.6. Claim Construction Hearing.

Subject to the convenience of the Court's calendar, the Court shall conduct a Claim Construction Hearing to the extent the Court believe a hearing is necessary for construction of the claims at issue.

Rule 305.1. Disclosure of experts and expert reports.

(a) For issues other than claim construction to which expert testimony shall be directed, expert witness disclosures and depositions shall be governed by this rule.

(b) No later than thirty (30) days after (1) the normal close of discovery pursuant to the discovery track to which the case was assigned, or (2) the close of discovery after claim construction, whichever is later, each party shall make its initial expert witness disclosures required by Rule 26 on the issues on which each bears the burden of proof;

(c) No later than thirty (30) days after the first round of disclosures, each party shall make its initial expert witness disclosures required by Rule 26 on the issues on which the opposing party bears the burden of proof;

(d) No later than ten (10) days after the second round of disclosures, each party shall make any rebuttal expert witness disclosures permitted by Rule 26.

Rule 305.2. Depositions of experts.

Depositions of expert witnesses disclosed under this Rule shall commence within seven (7) days of the deadline service of rebuttal reports and shall be completed within thirty (30) days after commencement of the deposition period.

CRIMINAL RULES

Rule 1.1. Scope and citation of local rules.

These local rules of practice shall govern the conduct of the United States District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules. A judge or magistrate judge, for good cause and in his or her discretion, may alter these rules in any particular case. These rules shall be cited: These rules shall be cited: "Local Criminal Rule ________, EDNC."

Editor's note. — On December 1, 2000, the Court entered a standing order regarding the effect of recent Amendments to the Federal Rules of Civil Procedure on the Local Rules and practice in the Eastern district. In addition to making various amendatory changes, the Court provided as follows:

Applicability of Federal Rules of Civil Procedure

a. In all cases filed in this Court or removed to this Court on or after December 1, 2000, the Federal Rules of Civil Procedure, as amended, shall apply in full.

b. In actions filed in this Court or removed to this Court prior to December 1, 2000, F.R.Civ.P. 26(d) will not apply. Therefore, all parties may propound discovery at any time after an action has been filed.

c. In actions filed in this Court or removed to this Court prior to December 1, 2000 in which a Request for Discovery Plan has been issued by the Clerk of Court, the parties are not required to make the mandatory initial disclosures required under F.R.Civ.P. 26(a)(1). Moreover, the parties should follow the deadlines set forth in the Court's Request for Discovery Plan, not those set forth in Federal Rule of Civil Procedure 26. All other amended Federal Rules shall apply.

d. Except as ordered by the Court in a specific case, all other portions of the Federal Rules, as amended effective December 1, 2000, shall apply to civil actions filed or removed to this Court prior to December 1, 2000, including the provisions regarding scope of discover (F.R.Civ.P. 26(b)), limit on length of discovery (F.R.Civ.P. 30(d)), and sanctions for failure to disclose (F.R.Civ.P. 37(c)(1)).

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67, FRCP, and the adoption of Rules 72 to 76, FRCP, noting local rule changes to related rules, and suggesting further changes, see 20 Wake Forest L. Rev. 819 (1984).

Rule 2.1. Reserved for future purpose.

Rule 3.1. Reserved for future purposes.

Rule 4.1. Reserved for future purposes.

Rule 5.1. Assignment of magistrate judges — Criminal cases.

(a) *Misdemeanor cases.* Upon the filing of an information, complaint or violation notice, or the return of an indictment, all misdemeanor cases shall be assigned by the clerk to a magistrate judge, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrate Judges.

(b) *Felony cases.* Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk to a magistrate judge for the conduct of an arraignment and such pre-trial conferences as are necessary, and for the hearing and determination of all pre-trial procedural and discovery motions.

CASE NOTES

Cited in United States v. Fordham, 674 F. Supp. 196 (E.D.N.C. 1987).

Rule 5.2. Electronic Designation of Judges.

Any electronically generated designation of a district judge or magistrate judge does not mean that the judge so designated is assigned to the case.

Rule 6.1. Reserved for future purposes.

Rule 7.1. Reserved for future purposes.

Rule 8.1. Reserved for future purpose.

Rule 9.1. Reserved for future purpose.

Rule 10.1. Arraignment.

When a district judge conducts the arraignment, the United States Attorney or an Assistant U.S. Attorney shall be present. If the arraignment is conducted by magistrate judges under the provision of FED. R. CRIM. P.19(B)(4) the presence of the U.S. Attorney at arraignment is not mandatory, and in the absence of the U.S. Attorney, the magistrate judge shall conduct the arraignment in accordance with FED. R. CRIM. P.10.

Rule 10.2. Appearance bonds.

In the event a deed of trust is used to secure an appearance bond for a defendant, the grantor of the deed of trust is responsible for preparing and supplying the clerk with documentation necessary to cancel the deed of trust within fifteen (15) days of the date that the conditions of the appearance bond and deed of trust are satisfied. Grantor shall also be responsible for recording any documentation necessary to cancel the deed of trust and for payment of any costs associated with such cancellation. Failure of the Grantor to comply with these requirements shall relieve the clerk of any responsibility to cancel the deed of trust.

Rule 11.1. Reserved for future purposes.

Rule 12.1. Time period for filing pre-trial motions in criminal cases.

All pre-trial motions, including but not limited to motions to suppress and motions under Rules 7, 12, 14, 16, and 41 of the Federal Rules of Criminal Procedure shall be filed no later then thirty (30) days after indictment or initial appearance, whichever comes later. Responses shall be filed within ten (10) days after the service of such motions. Untimely motions maybe summarily disregarded.

CASE NOTES

Stated in United States v. A-A-A Elec. Co., 607 F. Supp. 266 (E.D.N.C. 1985)

Rule 12.2. Further discovery and inspection.

In the event that either party thereafter moves to compel compliance with Local Rule 16.1(a) or for additional discovery or inspection, such motion shall be filed within the time period set by Local Rule 12.1. The motion shall contain:

(a) the statement that the prescribed conference was held;
(b) the date of said conference;
(c) the names of all counsel participating in the conference; and
(d) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion and the reasons given for the same.

Rule 12.3. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.

(a) All corporate defendants in a criminal case whether or not they are covered by the terms of Fed. R. Crim. P. 12.4, shall file a corporate affiliate/financial interest disclosure statement.

(b) The statement shall set forth the information required by Fed. R. Crim. P. 12.4 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock.

(2) All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

(3) Whenever required by Fed. R. Crim. P. 12.4 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

(c) The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a party has no disclosures to make.

(d) The disclosure statement shall be filed when the party makes an initial appearance in the action. The parties are required to amend their disclosure statements when necessary to maintain their current accuracy.

Rule 13.1. Reserved for future purpose.

Rule 14.1. Reserved for future purpose.

Rule 15.1. Reserved for future purpose.

Rule 16.1. Motions relating to discovery and inspection.

(a) *In General.* A discovery motion in a criminal action (FED. R. CRIM. P.16) shall state that a request for discovery and inspection was made and denied. Counsel must also certify that there has been a good faith effort to resolve discovery disputes prior to the filing of any discovery motions.

(b) *Criminal Pre-Trial Conference.* Within twenty (20) days after indictment or initial appearance, whichever comes later, the United States Attorney shall arrange and conduct a pre-trial conference with counsel for the defendant. At the pretrial conference and upon the request of counsel for the defendant, the Government shall permit counsel for the defendant to inspect and copy all discoverable evidence under Rule 16 of the Federal Rules of Criminal Procedure. Additionally, the Government shall provide the right to inspect, copy or photograph any exculpatory evidence.

At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(1) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(2) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(5) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(6) to inspect, copy or photograph any exculpatory evidence.

(c) *Discovery From Defendant.* After discovery has been provided by the Government, and upon request of the Government, counsel for the defendant shall permit the Government to inspect any copy all discoverable evidence under Rule 16(b) of the Federal Rules of Criminal Procedure.

(d) *Exchange of Discovery by Mail.* The United States Attorney and counsel for the defendant, in lieu of the conference, may agree to the exchange of discovery material by mail.

(e) *Duty of Disclosure.* Any duty of disclosure and discovery set forth in Local Rule 16.1 is a continuing one and the United States Attorney and counsel for the defendant shall produce voluntarily any additional relevant information gained by either of them.

CASE NOTES

This rule adds to the government's disclosure obligations under Rule 16, Fed. R. Crim. P., and requires the scheduling of a pre-trial conference at which Rule 16 materials should be given to a defendant. United States v. King, 121 F.R.D. 277 (E.D.N.C. 1988).

Rule 17.1. Time of issuance of subpoenas in criminal cases.

Subpoenas for witnesses in criminal cases shall be delivered to the Marshal or other person qualified to make service at least seven (7) days prior to the Monday of the week in which the case is set for trial. The failure of the Marshal or other qualified person to serve a subpoena not delivered within this time period shall not constitute sufficient cause for a continuance.

Rule 17.2. Reserved for future purposes.

Rule 18.1. Reserved for future purpose.

Rule 19.1. Reserved for future purpose.

Rule 20.1. Reserved for future purpose.

Rule 21.1. Reserved for future purpose.

Rule 22.1. Reserved for future purpose.

Rule 23.1. Reserved for future purpose.

Rule 24.1. Attorney preparations for criminal trial.

(a) Unless the parties have previously entered into and executed a written plea agreement, counsel for each party shall file with the clerk and the assigned judge, on or before the Thursday preceding the first day of the session at which the criminal action is set for trial:

(1) *Voir dire* questions as required by Local Rule 24.2;

(2) requests for jury instructions.

(b) Before jury selection begins, all parties shall file with the court a list of all witnesses each party, in good faith, reasonably anticipates will be called in its evidence-in-chief.

Rule 24.2. Jurors.

(a) *Jury Lists.* When the jury for a session of the court is drawn, the clerk shall furnish a copy of the list to members of the bar of this court upon their request therefor. The list shall set out the name, address, occupation and employer of each juror and, where available, the name, address, occupation and employer of the spouse of each juror. The jurors and their families shall not be contacted, either directly or indirectly, in an effort to secure information concerning the background of any member of the jury panel. When the jurors are seated in the jury box, a chart or list shall be furnished by the clerk to the parties or their counsel, showing the name and seating assignment of each juror.

(b) *Examination of Jurors.* The court shall conduct the examination of prospective jurors. Five (5) days preceding the first day of the session at which an action is set for trial, counsel shall file a list of *voir dire* questions counsel desires the court to ask the jury other than routine questions such as (1) the occupations and addresses of jurors and their spouses, (2) the identity and relation of jurors, the parties, counsel and witnesses and (3) the knowledge of the jurors concerning the case.

(c) *Contact with Trial Jurors.* Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall individually or through an investigator or any person acting for such attorney or party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass such a juror or member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

Rule 25.1. Reserved for future purpose.

Rule 26.1. Reserved for future purposes.

Rule 27.1. Reserved for future purpose.

Rule 28.1. Reserved for future purpose.

Rule 29.1. Reserved for future purpose.

Rule 30.1. Requests for jury instructions.

On or before the Thursday preceding the first day of the session at which the criminal action is set for trial, counsel shall file requests for jury instructions. Requests using *Federal Jury Practice and Instructions* (5th Ed.) by O'Malley, Grenig, and Lee, *5th Circuit Pattern Instructions*, and *North Carolina Pattern Instructions* shall include both the text of the proposed instruction as well as a citation reference to the proposed instruction. All other requests shall contain citations to supporting authorities.

Rule 31.1. Taking verdicts and polling the jury.

The court may take the verdict of the jury in open court. Unless a defendant has fled or has been removed from the courtroom for misconduct, he/she must be in the courtroom when the verdict is announced. Unless the contrary affirmatively appears of record, it will be presumed that the parties were present or by their voluntary absence waived their presence. The jury will not be polled unless a party requests a poll at the time the verdict is taken or unless a poll is ordered by the court.

Rule 32.1. Petition for disclosure of presentence or probation records.

No confidential records of this court maintained by the probation office, including presentence and probation supervision records, shall be sought by any applicant except by written petition to this court establishing with particularity the need for specific information in the records. Whenever a probation officer is served with a subpoena or other judicial process seeking the production or disclosure of presentence and probation records and reports, the probation officer shall petition the Chief Judge of this court in writing for instructions with respect to responding to such process. In no event shall production or disclosure be made except pursuant to an order by a judge unless specifically authorized by procedures outlined in Local Rule 32.2(l).

CASE NOTES

Deposition Testimony Not Admissible. — In an action by a foreign company against a corporation, the deposition testimony of two of the corporation's former employees was not admissible under Fed. R. Evid. 807 because: (1) the company failed to present any exceptional circumstances warranting the admission of the deposition testimony in lieu of the employees' live testimony at trial; (2) the testimony might not have been as complete as it would have been had the depositions been noticed as de bene esse depositions pursuant to E.D.N.C., R. 32.1; and (3) the deposition testimony was not more probative than any other evidence which the company could procure through reasonable efforts. Bouygues Telecom, S.A. v. Tekelec, 473 F. Supp. 2d 692, 2007 U.S. Dist. LEXIS 10864 (E.D.N.C. Feb. 8, 2007).

Rule 32.2. Procedures implementing sentencing guidelines.

(a) *Scheduling of Sentencing.* Sentencing proceedings shall be scheduled by the court at the time of adjudication of guilt not earlier than sixty (60) days following the adjudication of guilt.

(b) *Time for Completion of Presentence Report.* No later than thirty-five (35) days prior to sentencing, the probation officer shall complete and disclose the presentence investigation report to the defendant, counsel for the defendant, and counsel for the government.

(c) *Time for Filing Objections to Presentence Report.* Within fourteen (14) days thereafter, counsel shall communicate, in writing, to the probation officer objections to any material information, sentencing classifications, guideline ranges, and policy statements contained in or omitted from the report. A copy shall be served on opposing counsel. The court may conduct a show cause hearing and/or disallow objections in any case where such objections are not timely filed.

(d) *Procedure for Resolving Objections to Presentence Report.* After receiving objections from counsel, the probation officer shall conduct such further investigation as may be necessary. Counsel shall jointly confer with the probation officer to discuss and attempt to resolve contested issues. Thereafter, the probation officer shall make such revisions to the presentence investigation report as the probation officer deems appropriate. Unresolved contested issues, including the written position as filed by counsel and the opinion of the probation officer, shall be contained in an addendum to the Presentencing Investigation Report. If an objection by any party affects the guideline computation, the probation officer must attach a copy of that party's objection to the final pre-sentence report.

(e) *Time for Filing Revised Presentence Report.* The revised presentence investigation report and addendum shall be delivered to the judge, the defendant, and counsel not later than seven days prior to the sentencing hearing. The probation officer's sentencing recommendation shall be disclosed only to the judge.

(f) *Expedited Procedures Where Defendant Detained.* If it appears that a defendant may be detained pending trial and sentencing for a period of time exceeding the sentence likely to be imposed under the guidelines, the court, upon motion of counsel for defendant at the time of adjudication of guilt, may direct the probation office to expedite the sentencing timetable.

(g) *Court Acceptance of Presentence Report.* The revised presentence investigation report may be accepted by the court as accurate except as to matters set forth in the addendum which shall be resolved as provided in Section 6A1.3 of the *United States Sentencing Commission Guidelines Manual* (November 1995).

(h) *Service of Presentence Report.* The presentence investigation report shall be deemed to have been disclosed when a copy is physically delivered or three days after a copy is mailed. Such dates shall be certified on the report by the probation officer.

(i) *Procedure at Sentencing.* Before final judgment is entered in a case, the court shall disclose to the defendant, defense counsel, and the attorney for the government, the court's tentative findings of fact and interpretation of applicable guidelines and shall afford the parties an opportunity to object to said tentative findings of fact and interpretation of the guidelines.

(j) *Receipt of Presentence Report Under Seal.* The final presentence investigation report, addendum, and probation officer's recommendation shall be received by the clerk under seal for inclusion in the record and shall be otherwise disclosed only upon order. Defendants and counsel may retain their copies. In the event of post-sentencing proceedings, including appeal, habeas corpus application, or motion for modification or revocation of probation or supervised release, counsel of record may, upon request, be provided a copy of the presentence report by the probation office.

(k) *Role of Defense Counsel in Presentence Investigation.* Upon adjudication of guilt, the probation officer will initiate the presentence investigative process. Counsel for the defendant shall advise the probation officer attending court whether or not the defendant will submit to an interview with the officer and whether or not counsel desires to be present at the interview. Counsel, if attending, and the defendant shall make themselves available for the interview on the day of adjudication with the U. S. Marshal's Service providing, in custody cases, an appropriate location sufficient for accommodating a private interview at the court site or in the immediate vicinity thereof. If extraordinary circumstances prohibit conducting the interview on the day of adjudication, the probation officer will make arrangements to interview the defendant on a mutually agreeable date.

(l) *Disclosure of Presentence Report to Expert Witnesses and Agents.* Counsel may provide a copy of the presentence report to expert witnesses and agents. Counsel are responsible for recovering the report at or prior to sentencing. In the case of a juvenile no information, including the presentence report, may be released except pursuant to a court order.

Rule 33.1. Reserved for future purposes.

Rule 34.1. Reserved for future purpose.

Rule 35.1. Reserved for future purpose.

Rule 36.1. Reserved for future purpose.

Rule 37.1. Reserved for future purpose.

Rule 38.1. Reserved for future purpose.

Rule 39.1. Reserved for future purposes.

Rule 40.1. Reserved for future purposes.

Rule 41.1. Reserved for future purpose.

Rule 42.1. Reserved for future purpose.

Rule 43.1. Waiver of appearance in misdemeanors cases FED. R. CRIM. P. 43(c)(2).

A defendant in misdemeanor cases may execute a written waiver of appearance which contains the following statements:

(a) the designation of counsel to appear in behalf of the defendant and the granting to such counsel of full authority to enter on behalf of the defendant a plea of guilty, not guilty, or nolo contendere to the offense charged, or to a lesser offense or offenses in lieu thereof;

(b) a consent to trial by the magistrate judge; and, a waiver of: (1) the right to be tried and sentenced by a district judge, (2) the right to a jury trial, (3) the right to testify in person, and (4) the right to face his or her accusers;

(c) an agreement to be bound by the decisions of the court as in any other case of adjudication and the entry of judgment subject to the right of appeal as in any other case; and,

(d) the circumstances which justify the approval of the written waiver of appearance by the court. The waiver of appearance must (1) be in writing, (2) be signed by the defendant and his or her counsel, (3) be consented to by the United States Attorney or an Assistant United States Attorney and (4) be approved by the court.

Rule 44.1. Appearance of counsel in criminal cases.

(a) *Obligation to Notify the Court.* A defendant who does not apply for representation at government expense, or who is deemed ineligible after application, must inform the court of the identity of retained counsel within ten (10) days of his or her first appearance before a judicial officer in this district. Retention of counsel outside this period will not constitute grounds for a continuance of pre-trial proceedings or trial unless the defendant demonstrates due diligence in attempting to retain counsel.

(b) *Notice of Appearance.* Counsel representing a defendant in a criminal action shall file a Notice of Appearance with the clerk and serve the U. S. Attorney and other counsel with a copy. The Notice of Appearance should contain the attorney's name and the name of the attorney's law firm, phone number and state bar number. The attorney also shall file contemporaneously a client disclosure statement in accordance with Fed. R. Crim. P. 12.4 and Local Criminal Rule 12.3.

Rule 44.2. Disclosure Statements in *Pro Se* Litigation.

As part of making an appearance in every case, all *pro se* litigants (other than prisoners) shall file contemporaneously a disclosure statement in accordance with Fed. R. Crim. P. 12.4 and Local Crim. Rule 12.3.

Rule 45.1. Reserved for future purposes.

Rule 46.1. Reserved for future purpose.

Rule 47.1. Motion practice.

(a) *General Requirements.* All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Procedure and in Local Rule 47.3. Time for the filing of pre-trial motions in criminal cases is governed by Local Rule 12.1.

(b) *Supporting Memoranda.* Except for motions which the clerk may grant as specified in Local Rule 77.2, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 47.2(a). Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

(c) *Response to Motions.* Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 47.2(a) and may be accompanied by affidavits and other supporting documents.When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 47.2(a) and, when appropriate, by affidavits and other supporting documents.Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Procedure.

(d) *Subsequently Decided Authority.* A suggestion of subsequently decided controlling authority, without argument, may be filed at any time prior to the court's ruling and shall contain only the citation to the case relied upon if published or a copy of the opinion if the case is unpublished.

(e) *Affidavits.* Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties. However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(1) the facts relate solely to an uncontested matter; or

(2) the facts relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the facts; or

(3) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(4) the refusal to accept the affidavit would work a substantial hardship on the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party.

(f) *Hearings on Motions.* Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without hearing.

(g) *Frivolous or Delaying Motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion.

(h) *Motions for An Extension of Time to Perform An Act.* All motions for an extension of time to perform an act required or allowed to be done within a specified time must show good cause, prior consultation with opposing counsel and the views of opposing counsel. The motion must be accompanied by a separate proposed order granting the motion.

Editor's note. — By amendment effective January 1, 1986, Rules 4.00 to 4.08 were renumbered as 4.01 to 4.09, respectively.

By amendment effective February 1, 1989, Rules 4.07 to 4.09 were renumbered as 4.08 to 4.10, respectively.

Legal Periodicals. — For article, "Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?," see 66 N.C.L. Rev. 509 (1988).

CASE NOTES

Time for Response. — The federal rules permit a court to set a time other than that provided in Fed. R. Civ. P., Rule 56(c) in which a party must respond to a motion for summary judgment, to forego any hearing on the motion, and to promulgate local rules to that effect. Byrd v. City of Fayetteville, 110 F.R.D. 71 (E.D.N.C. 1986), aff'd, 819 F.2d 1137 (4th Cir. 1987).

Failure to Provide Analysis or Caselaw. — Where defendant, in broad and conclusory fashion, sought specification, through a bill of particulars, of matters not set forth in the indictment which defendant alleged were essential to the preparation of his defense, but provided no hint of legal analysis to support his position and no citation to caselaw or other authority, the motion was filed in direct violation of Rule 4.04. United States v. King, 121 F.R.D. 277 (E.D.N.C. 1988).

Plaintiffs' failure to file a supporting memorandum to accompany any of their other motions as required by Eastern District Local Rule 4.04 justified denial of the motion. Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156 (E.D.N.C. 1989).

Response to Reply Struck. — Where plaintiff filed a memorandum in response to defendant's reply and defendant then filed a Motion to Strike this memorandum, as this rule does not authorize the filing of a response to a reply, plaintiff's memorandum in response to defendant's reply was struck pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Simmons v. Al Smith Buick Co., 841 F. Supp. 168 (E.D.N.C. 1993).

Applied in Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156 (E.D.N.C. 1989).

Quoted in Faircloth v. United States, 837 F. Supp. 123 (E.D.N.C. 1993).

Stated in Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996)

Cited in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985); Joyner v. Abbott Labs., 674 F. Supp. 185 (E.D.N.C. 1987); Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996); Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986); Sterling Forest Assocs. v. Barnett-Range Corp., 673 F. Supp. 1394 (E.D.N.C. 1987).

Rule 47.2. Supporting memoranda.

(a) *Form and Content.* A memorandum shall be in the form prescribed by Local Rule 47.3 and shall contain:

(1) a concise summary of the nature of the case;

(2) a concise statement of the facts that pertain to the matter before the court for ruling;

(3) the argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations in accordance with Local Rules 47.2(b), (c) and (d);

(4) copies of any decisions in cases cited as required by Local Rules 47.2(c) and (d).

(b) *Citation of Published Decisions.* Published decisions cited should include parallel citations (except for U.S. Supreme Court cases), the year of the decision, and the court deciding the case. The following are illustrations:

(1) State Court Citation: *Rawls v. Smith*, 238 N.C. 162, 77 S.E.2d 701 (1953).

(2) District Court Citation: *Smith v. Jones*, 141 F. Supp. 248 (E.D.N.C. 1956).

(3) Court of Appeals Citation: *Smith v. Jones*, 237 F.2d 597 (4th Cir. 1956).

(4) United States Supreme Court Citation: *Smith v. Jones*, 325 U.S. 196 (1956). United States Supreme Court cases should be cited only to the United States Reports except that if a petition for certiorari or an appeal was filed in the United States Supreme Court, the disposition of the case in that court should always be shown. For example: *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910 (1957).

(c) *Citation of Decisions Not Appearing in Certain Published Reports.* Decisions published outside the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g. CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

(d) *Citation of Unpublished Decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: *United States v. John Doe*, 5:94-CR-50-1-F (E.D.N.C. January 7, 1994) and *United States v. Norman*, No. 74-2398 (4th Cir. June 27, 1975).

(e) *Length of Memoranda.* Except as otherwise provided by these local rules, memoranda in support of or in opposition to a motion shall not exceed thirty (30) pages in length, without prior court approval.

CASE NOTES

Applied in United States v. One 1985 Mercedes Benz Auto., 716 F. Supp. 211 (E.D.N.C. 1989).

Rule 47.3. Forms of pleadings, motions and documents.

All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(a) be double-spaced on single-sided, standard letter size (8½ x 11) paper, with all typed matter appearing in at least 11 point font size with a one inch margin on all sides;

(b) state the court and division in which the action is pending;

(c) bear, except for initial filing, the case number assigned by the clerk;

(d) contain the caption of the case;

(e) if applicable, state the title of the pleading, motion, discovery procedure or document and the federal statute or rule number under which the party is proceeding;

(f) contain the individual name, firm name, address, telephone number, fax number and State Bar identification, where applicable, of all attorneys who appear for the filing party, including an attorney making a special appearance pursuant to Local Rule 83.1(e);

(g) bear the date when signed by counsel;

(h) be signed by counsel as required by Local Rule 83.1(d)/Local Rule 83.1(d) counsel may submit for filing a facsimile copy of the signature of out of state counsel on pleadings provided that a signature page with all original signatures is submitted to the court within two business days after the original filing;

(i) on all documents, the signature of parties and counsel shall be followed, on the line immediately below, by the typed or printed name in the exact form as the signature. In preparation of documents for signature by a judge or magistrate judge, a blank space shall be provided below the signature line in which the name may be typed or printed; and

(j) have each page numbered sequentially. The following forms are examples to be followed:

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. ____:________-________-____

UNITED STATES OF AMERICA)
)
) MOTION TO TRANSFER PROCEEDING
vs.) FED .R .CRIM. P.21(A)
)
AARON R. JONES)
Defendant.)

(Closing)

This ________ day of January, 200__.

John B. Counselor
Attorney for Defendant
Abbot, Ball and Counselor
Attorneys at Law
200 Main Street
Post Office Box 50
Raleigh, North Carolina 27602
(919) 878-8787
FAX (919) 878-8000
State Bar No. ____________

Rule 47.4. Form of exhibits to motions.

Exhibits containing double-sided documents are not permitted and will not be considered by the court. Condensed deposition transcripts are discouraged.

Rule 47.5. [Implementing Requirements of the E-Government Act of 2002].

(Rescinded eff. December 1, 2007)
see Civ. R. 5.2

Rule 48.1. Reserved for future purposes.

Rule 49.1. Filing and service of papers by conventional means.

Unless otherwise specifically provided for, the original and one copy of all pleadings and other papers required to be filed or served shall be filed with the clerk in the office of the clerk in Raleigh, Greenville or Wilmington regardless of the division to which the case is assigned. In all cases, whenever a pleading or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in FED. R. CRIM. P. 49.

Rule 49.2. Filing documents by electronic means.

Pursuant to Fed. R. Crim. P. 49(b), documents may be filed, signed and verified by electronic means to the extent and in the manner authorized by the court's Electronic Case Filing and Administrative Policies and Procedures Manual and the CM/ECF Users Manual. A document filed by electronic means in compliance with this local rule constitutes a written document for the purposes of applying these Local Rules and the Federal Rules of Criminal Procedure. The clerk's office will not accept any facsimile transmission unless ordered by the court.

Rule 49.3. Service of documents by electronic means.

Filed documents may be served by electronic means, including through the court's transmission facilities, or as otherwise provided and authorized by the court's Electronic Case Filing and Administrative Policies and Procedures Manual and the CM/ECF Users Manual. Transmission of the notice of electronic filing constitutes service of the filed document upon each attorney in the case who is registered as a filing user in accordance with the procedures established by the court. Any other attorney, party, or parties shall be served according to these Local Rules and the Federal Rules of Criminal Procedure.

Rule 50.1. Reserved for future purposes.

Rule 51.1. Reserved for future purposes.

Rule 52.1. Reserved for future purposes.

Rule 53.1. Photographing and reproducing court proceedings.

The taking of photographs, broadcasting or recording of proceedings in any form in the courtroom, court offices or in the corridors immediately adjacent thereto, during judicial proceedings or during any recess of the court is prohibited except as set forth below. The taking of photographs, broadcasting or recording of ceremonial proceedings, such as naturalization proceedings, the administration of oaths of office to officers of the court, presentation of portraits and other ceremonial occasions may be allowed with the permission of the presiding judge and under the supervision and control of the court.

Rule 54.1. Reserved for future purposes.

Rule 55.1. Exhibits.

The clerk shall be the custodian of all exhibits admitted into evidence. Upon ten days notice by mail to counsel for all parties, the clerk may, within thirty (30) days after the entry of final judgment, destroy or otherwise dispose of the exhibits.

Rule 55.2. Sealed documents.

(a) *Filing Sealed Documents.* Absent statutory authority, no cases or documents may be sealed without an order from the court. A party desiring to file material under seal must first file a motion seeking leave to file the information under seal, or have a court-approved protective order in place.

(b) *Proposed Sealed Documents.* All proposed, sealed material which accompanies a Motion to Seal shall be received by the clerk and temporarily sealed, pending a ruling on the motion to seal. The filing of a Motion to Seal documents will toll the time for filing the material. If the Motion to Seal is allowed, the sealed material shall be filed on the same date as the order allowing the filing under seal. If the motion to file the material under seal is denied, the movant will be given an option of retrieving the material or having it filed the same date as the order denying the filing under seal.

(c) *Docketing Sealed Documents.* When material is filed under seal, the docket will indicate generically the type of document filed under seal, but it will not contain a description that would disclose its identity.

(d) *Return of Sealed Materials.* After the action concludes and all appeals have been completed, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Upon 10 days notice by mail to counsel for all parties, and within 30 days after final disposition, the court may order the documents to be unsealed and they will thereafter be available for public inspection.

(e) *Form.* All under seal or potentially under seal documents shall be delivered to the clerk's office enclosed in a red envelope, marked with the case caption, case number, and a descriptive title of the document, unless such information is to be, or has been, among the information ordered sealed. Additionally, the following information will be prominently displayed:

SEALED PURSUANT TO THE PROTECTIVE ORDER ENTERED ON
____/____/200__

OR

PROPOSED SEALED MATERIAL: SUBMITTED PURSUANT
TO MOTION TO SEAL FILED ON____/____/200__

Rule 56.1. Court and clerks.

(a) *Court in Continuous Session.* This court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

(b) *Assignment of Cases to a Division.* The clerk shall assign all criminal indictments to a division when an indictment is filed or transferred. If the indictment alleges the crime occurred within the District, the clerk shall assign the action to the division in which the crime is alleged to have occurred. In cases where it is not alleged that the crime occurred in the District or in cases in which it is unclear in which division the alleged crime occurred, the clerk shall assign the indictment to the division in which the first named defendant, who resides within this District, resides. In all other instances, an indictment shall be assigned to a division in the discretion of the clerk.

(c) *Orders and Judgments.* The clerk or deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(1) Consent orders for substitution of attorneys.

(2) Orders extending for a reasonable amount of time the period within which an act must be perform under the local rules of this court.

(3) Orders canceling liability on bonds.

(4) Orders changing the time of opening and adjourning court in the absences of the judge.

(5) Certification of law students and supervising attorneys pursuant to Local Rule 83.2.

(6) Any other motion, rule or order which may be granted of course or without notice.

CASE NOTES

Stated in Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996)

Rule 57.1. Attorneys.

(a) *Roll of Attorneys.* The bar of this court consists of those heretofore admitted and those hereafter admitted as prescribed by this Local Criminal Rule 57.1.

(b) *Eligibility.* A member in good standing of the bar of the Supreme Court of North Carolina is eligible for admission to the bar of this court.

(c) *Procedure for Admission.* Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(1) Is a member in good standing of the bar of the Supreme Court of North Carolina; and

(2) Has studied the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a district judge, bankruptcy judge, or magistrate judge of this court or of the United States District Court for the Middle District or Western District of North Carolina upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate judge and the applicant shall file the application, accompanied by a fee of $180.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $180.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client, either before a magistrate or district judge, by telephone conference or in person, until the applicant has taken the oath.

(3) Current law clerks to judges of this Court as well as to magistrate judges and bankruptcy judges within this District shall be admitted to the bar of this Court without payment of an admission fee.

(d) *Representation by Local Counsel Who Must Sign All Pleadings.* Litigants in civil and criminal actions, except governmental agencies and parties appearing pro se, must be represented by at least one member of the bar of this court who shall sign each pleading, motion, discovery procedure or other document filed in this court, including his or her state bar number and fax number in the signature block on all pleadings. If an attorney appears solely to bring the litigant in compliance with this local rule, he shall in each instance designate himself "LR 57.1 Counsel." In signing the pleading, motion, discovery request or other document, counsel certifies that he is an authorized representative for communication with the court about the litigation, and the document conforms to the practice and procedure of this court. However, counsel does not make the certification required by Rule 11 of the Federal Rules of Civil Procedure. Nevertheless, the requirements of Rule 11 must be complied with by out-of-state counsel. Signatures in the following form shall be sufficient to comply with this local rule. Local Criminal Rule 57.1 Local Counsel must include state bar number and fax number in the signature block on all pleadings:

____
Jane M. Jones
Attorney for Defendant
Jones, Jones and Jones
P.O. Box 500
New York, NY 10050
Jane.jones@email.address.com
(212) 555-1212
State Bar No.

____
John B. Counselor
Attorney for Defendant
Abbott, Ball and Counselor
P.O. Box 50
Raleigh, NC 27602
John.B.Counselor@email.address.com
(919) 878-8787
Fax (919) 878-8000
State Bar No.
LR 57.1 Counsel

(e) *Appearances by Attorneys Not Admitted in the District.* Any person who is a member in good standing of the bar of a United States District Court and the bar of the highest court of another state or the District of Columbia shall be permitted to appear in a particular matter in association with Local Criminal Rule 57.1 local counsel. Pursuant to this local rule, counsel shall enter a notice of appearance without the necessity of filing a motion to appear pro hac vice. The appearance of such a person in a particular matter shall confer jurisdiction upon this court for any alleged misconduct of that person or for any other purpose arising in the course of or in the preparation of such matter.

(f) *Pleadings, Service, and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear.* Pleadings and other documents filed in a case where an attorney appears who is not admitted to the bar of this court shall contain the individual name, firm name, address and phone number of both the attorney making a special appearance under this local rule and the associated local counsel. As part of making an appearance in every case, an attorney also shall file contemporaneously a client disclosure statement in accordance with Fed. R. Crim. P. 12.4 and Local Criminal Rule 12.3. The service of all pleadings and notices as required shall be sufficient if served only upon the associated local counsel. Local counsel shall attend all court proceedings unless excused by the court.

(g) *Withdrawal of Appearance.* No attorney or law firm whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record except with leave of the court. However, if an attorney within the same firm replaces counsel for a party, the new attorney may file a notice of substitution of counsel and the court will substitute the attorneys without order of the court.

(h) *Courtroom Decorum.* Counsel shall conduct themselves with dignity and propriety. Counsel shall rise when addressing the court, and all statements to the court shall be made from a counsel table or from behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

(i) *Questioning of Witnesses.* Only one attorney for each party may question a particular witness unless the court allows otherwise. Counsel shall remain seated while questioning witnesses.

(j) *Professional Standards.* The ethical standard governing the practice of law in this court are the Revised Rules of Professional Conduct, now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court. Counsel are directed to advise the clerk within ten days of disciplinary action taken against them resulting in suspension or disbarment. The disciplinary procedures of this court shall be on file with the clerk and furnished to counsel upon request.

(k) *Admission of Attorneys Previously Admitted to the United States District Courts for the Middle or Western Districts of North Carolina.* Attorneys already admitted to the bar of either the United States District Court for the Middle District of North Carolina or the United States District Court for the Western District of North Carolina may be admitted to the bar of this court upon tendering the application and fees required by Local Criminal Rule 57.1(c), together with a copy of the order admitting the attorney to practice in one of the other districts, without the necessity of taking the oath that is otherwise required and without obtaining the character certification by two members of the bar of this court.

Rule 57.2. Student practice rule.

(a) *Compliance with Rule.* Students may participate as counsel in civil and criminal cases in this court subject to their compliance with all of the requirements of this Local Rule 57.2.

(b) *Eligibility.* An eligible student must:

(1) be duly enrolled in a law school;

(2) have completed at least three semesters of legal studies;

(3) have knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the Code of Professional Responsibility, and the Local Rules of this court;

(4) be supervised by a supervising attorney as defined in Local Rule 57.2(c);

(5) be certified by the Dean of the Law School where the student is enrolled, or the Dean's designee, as being of good character, sufficient legal ability, and adequately trained to fulfill the responsibilities of a legal intern to both the client and the court;

(6) be certified by the court to practice pursuant to this Local Rule 57.2; and,

(7) decline personal compensation for his or her legal services from a client or any other source.

(c) *Supervising Attorney.* A supervisor must:

(1) either (1) have faculty or adjunct faculty status at a law school at which a portion of the supervisor's duties includes supervision of students in a clinical program; or (2) be a member of the bar of this court for at least two years, who in the determination of the court, is competent to carry out the role of supervising attorney;

(2) be admitted to practice in this court;

(3) be certified by the court as a student supervisor;

(4) be present with the student at all times in court, and at other proceedings in which testimony is taken;

(5) co-sign all pleadings or other documents filed with the court;

(6) assume full personal and professional responsibility for a student's guidance and any work undertaken and for the quality of the student's work, and to be available for consultation with represented clients;

(7) assist and counsel the student in activities mentioned in Local Rule 57.2(e), and review such activities with the student, all to the extent required for proper practical training of the student and the protection of the client; and

(8) supplement oral or written work of the student as necessary to insure proper representation of the client.

(d) *Certification of Student and Supervisor.*

(1) *Student.* The court's certification of a student to practice under this Local Rule 57.2 shall be filed with the clerk and shall remain in effect for 18 months or until the student graduates from law school, whichever is earlier. Certification to appear generally or in a particular case may be withdrawn by the court at any time, in the discretion of the court, and without any showing of cause.

(2) *Supervising Attorney.* Certification of the supervising attorney shall be filed with the clerk, and shall remain in effect indefinitely unless withdrawn by the court, in its discretion, and without any showing of cause.

(e) *Activities.* A certified student may under the personal supervision of his or her supervisor:

(1) represent any client including federal, state or local governmental bodies, if the client on whose behalf the certified student is appearing has consented in writing to that appearance and the supervising lawyer has given written approval of that appearance;

(2) represent a client in any criminal, civil or administrative matter; however, the court retains the authority to limit a student's participation in any individual case;

(3) in connection with matters in this court, engage in other activities on behalf of the client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student shall make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including

depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers which are filed shall be read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities; and

(4) prior to oral participation by a certified student in a hearing or trial, the supervising attorney shall provide the court with a written statement of the scope of participation anticipated on the part of the certified student.

Rule 57.3. Change of address.

All attorneys and *pro se* parties must notify the court in writing within 10 days of any change of address. Failure to notify the court in a timely manner of an address change may result in dismissal of the action or the imposition of such other relief that the court deems just and proper.

CASE NOTES

Cited in Great Am. Ins. Co. v. Nye, 64 Bankr. 759 (Bankr. E.D.N.C. 1986).

Rule 57.4. Correspondence.

Correspondence addressed to the court shall indicate that copies have been transmitted to all other parties and failure to transmit the same to all other parties may result in sanctions by the court. Such correspondence shall not become a part of the record in the case.

Rule 58.1. Magistrate judges.

(a) *Disposition of Misdemeanor Cases — 18 U.S.C. § 3401.* A magistrate judge may:

(1) try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

(2) direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

(3) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

(b) *Appeal from Judgments in Misdemeanor Cases — 18 U.S.C. § 3402.* A defendant may appeal a judgment of conviction by a magistrate judge in a misdemeanor case by filing a notice of appeal and paying a $5.00 filing fee within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States Attorney. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals.

Rule 59.1. Reserved for future purposes.

Rule 60.1. Reserved for future purposes.

Rule 61.1. Publicity in criminal matters.

(a) *In General.* All court personnel, including but not limited to, the marshal and deputy marshals and office personnel, the clerk and deputy clerks and office personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrate judges' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public.

(b) *Statements by One Participating in or Associated with An Investigation.* An attorney participating in or associated with the investigation of a criminal matter shall not make or participate in making any extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) information contained in a public record;

(2) that the investigation is in progress;

(3) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;

(4) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; and

(5) a warning to the public of any dangers.

(c) *Statements After Filing Complaint, Information, or Indictment, Issuance of Warrant or Arrest.* An attorney or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication that relates to:

(1) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused;

(2) the possibility of a plea of guilty to the offense charged or to a lesser offense;

(3) the existence or contents of any confession, admission, or statement given by the accused or the refusal or failure of the accused to make a statement;

(4) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examination or tests;

(5) the identity, testimony, or credibility of a prospective witness; or

(6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(d) *Statements That Can Be Made.* This local rule does not preclude an attorney during such period from announcing:

(1) the name, age, residence, occupation, and family status of the accused;

(2) if the accused has not been apprehended, any information necessary to aid in apprehension of the accused or to warn the public of any dangers the accused may present;

(3) a request for assistance in obtaining evidence;

(4) the identity of the victim of the crime;

(5) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;

(6) the identity of investigating and arresting officers or agencies and the length of the investigation;

(7) at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement;

(8) the nature, substance, or text of the charge;

(9) quotations from or references to public records of the court in the case;

(10) the scheduling or result of any step in the judicial proceedings; or

(11) that the accused denies the charges made against him.

(e) *Statements During Jury Selection or Trial.* During the selection of a jury or the trial of a criminal matter, an attorney or a law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making any extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that the attorney may quote from or refer without comment to public records of the court in the case.

(f) *Statements After Trial, Disposition Without Trial, or Sentencing.* After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, an attorney or a law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the sentence.

(g) *Statements of Staff and Employees.* An attorney shall exercise reasonable care to prevent employees and associates from making an extra-judicial statement that the attorney would be prohibited from making under this Local Rule 45.00 and 61.1.

Rule 100.1. Court libraries.

The clerk shall maintain the court libraries in the district. Use of the facilities is limited to judicial officers, court staff and members of the bar of this court. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court.

Rule 100.2. Jurisdictional agreements with other courts.

The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of such agreements shall be furnished to counsel upon request.

CROSS-REFERENCE TABLE
RENUMBERED LOCAL RULES

FORMER LOCAL RULE	NEW LOCAL RULE
1.00	Civil Rule 1.1; Criminal Rule 1.1
2.00	Civil Rule 83.1; Criminal Rule 57.1
2.01	Civil Rule 83.1(a); Criminal Rule 57.1(a)
2.02	Civil Rule 83.1(b); Criminal Rule 57.1(b)
2.03	Civil Rule 83.1(c); Criminal Rule 57.1(c)
2.04	Civil Rule 83.1(d); Criminal Rule 57.1(d)
2.05	Civil Rule 83.1(e); Criminal Rule 57.1(e)
2.06	Civil Rule 83.1(f); Criminal Rule 57.1(f)
2.07	Civil Rule 83.1(g); Criminal Rule 57.1(g)
2.08	Civil Rule 83.1(h); Criminal Rule 57.1(h)
2.09	Civil Rule 83.1(i); Criminal Rule 57.1(i)
2.10	Civil Rule 83.1(j); Criminal Rule 57.1(j)
2.11	Civil Rule 83.1(k); Criminal Rule 57.1(k)
3.00	
3.01	Civil Rule 40.1(a)
3.02	Civil Rule 40.1(b)
3.03	Civil Rule 40.1(c); Criminal Rule 56.1(b)
3.04	Civil Rule 77.1; Criminal Rule 56.1(a)
3.05	Civil Rule 83.5; Criminal Rule 57.4
3.06	Civil Rule 10.1; Criminal Rule 47.3
3.07	Civil Rule 5.1; Criminal Rule 49.1
3.08	Civil Rule 26.1(a)
3.09	Civil Rule 83.3; Criminal Rule 57.3
4.00	Civil Rule 7.1

FORMER LOCAL RULE	NEW LOCAL RULE
4.01	Civil Rule 7.1(a); Criminal Rule 47.1
4.02	Civil Rule 7.1(b); Criminal Rule 47.1(a)
4.03	Civil Rule 7.1(c); Criminal Rule 16.1(a)
4.04	Civil Rule 7.1(d); Criminal Rule 47.1(b)
4.05	Civil Rule 7.1(e); Criminal Rule 47.1(c)
4.06	Civil Rule 7.1(f)
4.07	Civil Rule 7.1(g); Criminal Rule 47.1(d)
4.08	Civil Rule 7.1(h); Criminal Rule 47.1(e)
4.09	Civil Rule 7.1(i); Criminal Rule 47.1(f)
4.10	Civil Rule 11.1; Criminal Rule 47.1(g)
4.11	Civil Rule 6.1; Criminal Rule 47.1(h)
5.00	Civil Rule 7.2; Criminal Rule 47.2
5.01	Civil Rule 7.2(a); Criminal Rule 47.2(a)
5.02	Civil Rule 7.2(b); Criminal Rule 47.2(b)
5.03	Civil Rule 7.2(c); Criminal Rule 47.2(c)
5.04	Civil Rule 7.2(d); Criminal Rule 47.2(d)
5.05	Civil Rule 7.2(e); Criminal Rule 47.2(e)
6.00	Civil Rule 47.1; Criminal Rule 24.2
6.01	Civil Rule 47.1(a); Criminal Rule 24.2(a)
6.02	Civil Rule 47.1(b); Criminal Rule 24.2(b)
6.03	Civil Rule 47.1(c); Criminal Rule 24.2(c)
7.00	Civil Rule 83.4; Criminal Rule 61.1
7.01	Civil Rule 83.4(a): Criminal Rule 61.1
7.02	Civil Rule83.4(b)
7.03	
8.00	Civil Rule 83.6: Criminal Rule 53.1

FORMER LOCAL RULE	NEW LOCAL RULE
9.00	
9.01	Civil Rule 65.1(a)
9.02	Civil Rule 64.1
9.03	Civil Rule 77.2; Criminal Rule 56.1(c)
9.04	Civil Rule 79.1; Criminal Rule 55.1
9.05	Civil Rule 67.1
9.06	Civil Rule 100.1; Criminal Rule 100.1
9.07	Civil Rule 100.2; Criminal Rule 100.2
9.08	Civil Rule 79.2; Criminal Rule 55.2
10.00	Civil Rule 65.1; Criminal Rule 10.2
10.01	Civil Rule 65.1(b)
10.02	Civil Rule 65.1(c)
10.03	Civil Rule 65.1(d)
10.04	Criminal Rule 10.2
11.00	Civil Rule 81.1
12.00	Civil Rule 81.2
13.00	Civil Rule 83.2; Criminal Rule 57.2
13.01	Civil Rule 83.2(a); Criminal Rule 57.2(a)
13.02	Civil Rule 83.2(b); Criminal Rule 57.2(b)
13.03	Civil Rule 83.2(c); Criminal Rule 57.2(c)
13.04	Civil Rule 83.2(d); Criminal Rule 57.2(d)
13.05	Civil Rule 83.2(e); Criminal Rule 57.2(e)
14.00	Civil Rule 81.3
15.00	Civil Rule 11.2
16.00	Civil Rule 54.2
16.01	Civil Rule 54.2(a)

FORMER LOCAL RULE	NEW LOCAL RULE
16.02	Civil Rule 54.2(b)
20.00	Civil Rule 17.1
20.01	Civil Rule 17.1(a)
20.02	Civil Rule 17.1(b)
20.03	Civil Rule 17.1(c)
21.00	Civil Rule 73.1
22.00	Civil Rule 3.1
23.00	
23.01	Civil Rule 26.1(b)
23.02	Civil Rule 26.1(c)
23.03	Civil Rule 33.1
23.04	Civil Rule 32.1
23.05	Civil Rule 30.1
23.06	Civil Rule 26.1(d)
23.07	Civil Rule 26.1(e)
24.00	Civil Rule 16.1
24.01	Civil Rule 16.1(a)
24.02	Civil Rule 16.1(b)
24.03	Civil Rule 16.1(c)
24.04	Civil Rule 16.1(d)
24.05	Civil Rule 16.l(e)
25.00	
25.01	Civil Rule 39.1(a)
25.02	Civil Rule 51.1; Criminal Rule 30.1
25.03	Civil Rule 52.1
25.04	Civil Rule 39.2

FORMER LOCAL RULE	NEW LOCAL RULE
26.00	
26.01	Civil Rule 39.3
26.02	Civil Rule 45.1
26.03	Civil Rule 39.1(b)
26.04	Civil Rule 39.4
26.05	Civil Rule 48.1; Criminal Rule 31.1
27.00	Civil Rule 100.3
27.01	Civil Rule 100.3(a)
27.02	Civil Rule 100.3(b)
27.03	Civil Rule 100.3(c)
28.00	Civil Rule 54.1
29.00	
30.00	Civil Rule 53.1
31.00	Civil Rule 101.2
31.01	Civil Rule 101.2(a)
31.02	Civil Rule 101.2(b)
31.03	Civil Rule 101.2(c)
31.04	Civil Rule 101.2(d)
32.00	Civil Rule 101.3
32.01	Civil Rule 101.3(a)
32.02	Civil Rule 101.3(b)
32.03	Civil Rule 101.3(c)
32.04	Civil Rule 101.3(d)
32.05	Civil Rule 101.3(e)
32.06	Civil Rule 101.3(f)
32.07	Civil Rule 101.3(g)

FORMER LOCAL RULE	NEW LOCAL RULE
32.08	Civil Rule 101.3(h)
32.09	Civil Rule 101.3(i)
32.10	Civil Rule 101.3(j)
32.11	Civil Rule 101.3(k)
41.00	Criminal Rule 43.1
42.00	Criminal Rule 10.1
43.00	Criminal Rule 16.1
43.01	Criminal Rule 16.1(b)
43.02	Criminal Rule 16.1(c)
43.03	Criminal Rule 16.1(d)
43.04	Criminal Rule 12.2
43.05	Criminal Rule 16.1(e)
44.00	Criminal Rule 12.1
45.00	Criminal Rule 61.1
45.01	Criminal Rule 61.1(b)
45.02	Criminal Rule 61.1(c)
45.03	Criminal Rule 61.1(d)
45.04	Criminal Rule 61.1(e)
45.05	Criminal Rule 61.1(f)
45.06	Criminal Rule 61.1(g)
46.00	Criminal Rule 32.1
47.00	Criminal Rule 17.1
48.00	Criminal Rule 44.1
48.01	Criminal Rule 44.1(a)
48.02	Criminal Rule 44.2(b)
49.00	Criminal Rule 24.1

FORMER LOCAL RULE	NEW LOCAL RULE
50.00	Criminal Rule 32.2
50.01	Criminal Rule 32.2(a)
50.02	Criminal Rule 32.2(b)
50.03	Criminal Rule 32.2(c)
50.04	Criminal Rule 32.2(d)
50.05	Criminal Rule 32.2(e)
50.06	Criminal Rule 32.2(f)
50.07	Criminal Rule 32.2(g)
50.08	Criminal Rule 32.2(h)
50.09	Criminal Rule 32.2(i)
50.10	Criminal Rule 32.2(j)
50.11	Criminal Rule 32.2(k)
60.00	Civil Rule 72.1
61.00	Civil Rule 72.2
61.01	Criminal Rule 5.1
61.02	Civil Rule 72.2(a)
61.03	Civil Rule 72.2(b)
62.00	Civil Rule 72.3
62.01	Civil Rule 72.3(a)
62.02	Criminal Rule 58.1(a)
62.03	Civil Rule 72.3(b)
62.04	Civil Rule 72.3(c)
62.05	Civil Rule 72.3(d)
62.06	Civil Rule 72.3(e)
62.07	Civil Rule 72.3(f)
62.08	Civil Rule 72.3(g)

FORMER LOCAL RULE	NEW LOCAL RULE
62.09	Civil Rule 72.3(h)
63.00	Civil Rule 72.4
63.01	Civil Rule 72.4(a)
63.02	Civil Rule 72.4(b)
63.03	Civil Rule 72.4(c)
63.04	Criminal Rule 58.1(b)
63.05	Civil Rule 72.4(d)
63.06	Civil Rule 72.4(e)
80.00	Rule 200.00
81.00	Rule 201.00
82.00	Rule 202.00
83.00	Rule 203.00
84.00	Rule 204.00
85.00	Rule 205.00
86.00	Rule 206.00
87.00	Rule 207.00
88.00	Rule 208.00
89.00	Rule 209.00
90.00	Rule 210.00
91.00	Rule 211.00
92.00	Rule 212.00
93.00	Rule 213.00
94.00	Rule 214.00
95.00	Rule 215.00
96.00	Rule 216.00
97.00	Rule 217.00

FORMER LOCAL RULE	NEW LOCAL RULE
98.00	Rule 218.00
99.00	Rule 219.00
100.00	Rule 220.00

Index to Rules of the United States District Court for the Eastern District of North Carolina

---

A

ADMIRALTY RULES.
Alternative dispute resolution, LAR-ED 220.00.
Appraisal of property, LAR-ED 213.00.
Arrest, attachment or garnishment.
  Appraisal of property, LAR-ED 213.00.
  Custody of seized property, LAR-ED 212.00.
  Intervention, LAR-ED 209.00.
  Post arrest procedure, LAR-ED 203.00.
  Release of seizures, LAR-ED 215.00.
  Sale of property, LAR-ED 214.00.
    Claims after sale, limitation, LAR-ED 219.00.
  Service of process, LAR-ED 201.00, 202.00.
    Publication, LAR-ED 204.00.
Bonds, LAR-ED 205.00, 206.00.
  General bonds, LAR-ED 215.00.
Cargo.
  Handling upon arrest or attachment.
    Court order, LAR-ED 212.00.
Complaints, LAR-ED 207.00.
  Intervening complaint, LAR-ED 209.00.
  Verification, LAR-ED 208.00.
Costs.
  Appraisal of property, LAR-ED 213.00.
  Stipulations for, LAR-ED 205.00.
  Taxation, LAR-ED 216.00.
Custody of seized property, LAR-ED 212.00.
Default.
  Expiration of time for filing claim or answer, LAR-ED 211.00.
  Stay on motion to set aside, LAR-ED 217.00.
Default judgment in action in rem, LAR-ED 210.00.
Deposit in security, LAR-ED 205.00.
Dismissal.
  Stay of execution or release of property, LAR-ED 217.00.
Exigent circumstances.
  Issuance of summons or process of arrest, attachment or garnishment, LAR-ED 201.00.
Form.
  Publication notice, LAR-ED 204.00.
General bonds, LAR-ED 215.00.
Hearing.
  Property arrested, attached or garnished.
    Party claiming interest in property, LAR-ED 203.00.
  Stipulations for costs, LAR-ED 205.00.
Insurance.
  Custody of seized property, LAR-ED 212.00.
Interrogatories.
  Verification of answers, LAR-ED 208.00.
Intervention, LAR-ED 209.00.
Movement of arrested or attached vessel.
  Court order, LAR-ED 212.00.
New trial.
  Stay on filing motion, LAR-ED 217.00.

ADMIRALTY RULES —Cont'd
Notice.
  Complaint in intervention, LAR-ED 209.00.
  Default judgment in action in rem, LAR-ED 210.00.
  Issuance of summons or process of arrest, attachment or garnishment, LAR-ED 202.00, 203.00.
  Publication, LAR-ED 204.00.
  Sale of property, LAR-ED 214.00.
  Stipulations for costs, hearing on, LAR-ED 205.00.
Order authorizing issuance of process of arrest, attachment or garnishment, LAR-ED 201.00.
Pleadings.
  Complaints, LAR-ED 207.00.
    Intervening complaint, LAR-ED 209.00.
  Verification, LAR-ED 208.00.
Publication, LAR-ED 204.00.
  Default judgment in action in rem, LAR-ED 210.00.
  Sale of property, LAR-ED 214.00.
Release of seizures, LAR-ED 215.00.
  Stay of execution or release of property, LAR-ED 217.00.
Repairs.
  Making upon arrested or attached vessel.
    Court order, LAR-ED 212.00.
Return of process, LAR-ED 201.00.
  Short day return, possessory actions, LAR-ED 218.00.
Sale of property, LAR-ED 214.00.
  Claims after sale, limitation, LAR-ED 219.00.
Scope of rules, LAR-ED 200.00.
Security.
  Stipulations for, LAR-ED 205.00.
Seized property.
  Appraisal of property, LAR-ED 213.00.
  Custody, LAR-ED 212.00.
  Release, LAR-ED 215.00.
  Sale of property, LAR-ED 214.00.
    Claims after sale, limitation, LAR-ED 219.00.
Service of process, LAR-ED 201.00, 202.00.
  Complaint in intervention, LAR-ED 209.00.
  Default judgment in action in rem, LAR-ED 210.00.
  Publication, LAR-ED 204.00.
  Short day return, possessory actions, LAR-ED 218.00.
Short day return.
  Possessory actions, LAR-ED 218.00.
Stay of execution or release of property, LAR-ED 217.00.
Stipulations for costs and security, LAR-ED 205.00, 206.00.
Summons and process of arrest, attachment or garnishment.
  Issuance, LAR-ED 201.00, 202.00.
    Publication, LAR-ED 204.00.
Title of rules, LAR-ED 200.00.

ADMIRALTY RULES —Cont'd
Undertakings, LAR-ED 205.00, 206.00.
  General bonds, LAR-ED 215.00.
Verification.
  Pleadings and answers to interrogatories, LAR-ED 208.00.

C

CIVIL RULES.
Admission of attorneys to bar, LocalCiv-ED Rule 83.1.
Affidavits.
  Motions accompanied by, LocalCiv-ED Rule 7.1.
  Responses to motions, LocalCiv-ED Rule 7.1.
Affiliate interest disclosure statement, LocalCiv-ED Rule 7.3.
Alternative dispute resolution.
  Court-hosted settlement conferences, LocalCiv-ED Rule 101.1.
  Mediated settlement conferences, LocalCiv-ED Rule 101.3.
  Summary trials, LocalCiv-ED Rule 101.2.
Appeals.
  Magistrate judges' decisions and findings, LocalCiv-ED Rule 72.4.
Appearance by attorney not admitted in district, LocalCiv-ED Rule 83.1.
Assignment of cases to division, LocalCiv-ED Rule 40.1.
Attorney fees.
  Minor or incompetent as party.
    Order of approval, LocalCiv-ED Rule 16.1.
Attorneys.
  Admission to bar, LocalCiv-ED Rule 83.1.
  Appearance by attorney not admitted in district, LocalCiv-ED Rule 83.1.
  Attorneys previously admitted to middle or western districts.
    Admission, LocalCiv-ED Rule 83.1.
  Change of address, notification, LocalCiv-ED Rule 83.3.
  Client disclosure statement, LocalCiv-ED Rule 11.3.
  Conduct in courtroom, LocalCiv-ED Rule 83.1.
  Ethical standards, LocalCiv-ED Rule 83.1.
  Local counsel.
    Out-of-state attorneys appearance, LocalCiv-ED Rule 83.1.
    Representation by, LocalCiv-ED Rule 83.1.
  Out-of-state attorneys appearance, LocalCiv-ED Rule 83.1.
  Pre-trial preparation.
    Filings required, LocalCiv-ED Rule 39.1.
  Pro hac vice.
    Appearance by attorney not admitted in district, LocalCiv-ED Rule 83.1.
  Roll of attorneys admitted, LocalCiv-ED Rule 83.1.
  Withdrawal of appearance, LocalCiv-ED Rule 83.1.
  Witnesses.
    Questioning, LocalCiv-ED Rule 83.1.
Bonds.
  Security, approval, prohibited sureties, LocalCiv-ED Rule 65.1.
Broadcasting court proceedings, LocalCiv-ED Rule 83.6.

CIVIL RULES —Cont'd
Citation of decisions.
  Supporting memoranda, LocalCiv-ED Rule 7.2.
Citation of rules, LocalCiv-ED Rule 1.1.
Civil contempt, LocalCiv-ED Rule 100.3.
Civil rights actions.
  Prisoners, LocalCiv-ED Rule 81.2.
Clerks.
  Court libraries, maintaining, LocalCiv-ED Rule 100.1.
  Entry of orders and judgments, LocalCiv-ED Rule 77.2.
  Exhibits.
    Custodian, destruction or other disposition, LocalCiv-ED Rule 79.1.
  Jurisdictional agreements with other courts, maintaining, LocalCiv-ED Rule 100.2.
Closing statement, LocalCiv-ED Rule 39.4.
Contempt, LocalCiv-ED Rule 100.3.
Continuous sessions.
  Court in, LocalCiv-ED Rule 77.1.
Corporations.
  Disclosure of direct financial interest in litigation, LocalCiv-ED Rule 7.3.
  Residency, LocalCiv-ED Rule 40.1.
Correspondence address to court, LocalCiv-ED Rule 83.5.
Costs.
  Applications for, LocalCiv-ED Rule 54.1.
  Juror costs, taxation, LocalCiv-ED Rule 54.2.
  Objections to application, filing, LocalCiv-ED Rule 54.1.
Counsel fees.
  Minor or incompetent as party.
    Order of approval, LocalCiv-ED Rule 16.1.
Court-hosted settlement conferences, LocalCiv-ED Rule 101.1.
Court libraries, LocalCiv-ED Rule 100.1.
Deposition de bene esse.
  Taking outside period of discovery, LocalCiv-ED Rule 32.1.
Deposition exhibits, LocalCiv-ED Rule 30.1.
Deposit of registry funds in interest bearing accounts, LocalCiv-ED Rule 67.1.
Disclosure of information to news media, LocalCiv-ED Rule 83.4.
Discontinuance of action.
  Minor or incompetent as party.
    Order of approval, LocalCiv-ED Rule 16.1.
Discovery and inspection, LocalCiv-ED Rule 26.1.
  Deposition de bene esse.
    Taking outside period of discovery, LocalCiv-ED Rule 32.1.
  Deposition exhibits, LocalCiv-ED Rule 30.1.
  Disputes, expedited briefing schedule, LocalCiv-ED Rule 26.1.
  Insurance agreements, LocalCiv-ED Rule 26.1.
  Interrogatories.
    Service, responses and objections, LocalCiv-ED Rule 33.1.
  Magistrate judges.
    Authority, LocalCiv-ED Rule 72.3.
  Motions.
    Replies, LocalCiv-ED Rule 7.1.
    Requirements, LocalCiv-ED Rule 7.1.
    Responses, LocalCiv-ED Rule 7.1.
  Planning meeting and report, LocalCiv-ED Rule 26.1.

CIVIL RULES —Cont'd
Discovery and inspection —Cont'd
  Providing pre-trial disclosures, LocalCiv-ED Rule 16.1.
Dismissal of action.
  Minor or incompetent as party.
    Order of approval, LocalCiv-ED Rule 16.1.
Divisions of district, LocalCiv-ED Rule 40.1.
Docket.
  Motions.
    Sealed documents, LocalCiv-ED Rule 79.2.
E-Government act of 2002 compliance, LocalCiv-ED Rule 10.3.
Electronic designation of judges, LocalCiv-ED Rule 40.2.
Electronic filing of documents, LocalCiv-ED Rule 5.2.
Electronic service of documents, LocalCiv-ED Rule 5.3.
Emergency arising.
  Informing court and opposing counsel of, LocalCiv-ED Rule 39.2.
Entry of orders and judgments.
  Clerks, LocalCiv-ED Rule 77.2.
Evidentiary motions.
  Filing prior to trial, LocalCiv-ED Rule 39.1.
Exhibits.
  Attorney preparation for trial, LocalCiv-ED Rule 39.1.
  Clerks, custodian, destruction or other disposition, LocalCiv-ED Rule 79.1.
  Deposition exhibits, LocalCiv-ED Rule 30.1.
  Motions.
    Restrictions, LocalCiv-ED Rule 10.2.
Extension of time to perform act.
  Motions, LocalCiv-ED Rule 6.1.
Failure to comply with rules.
  Sanctions, LocalCiv-ED Rule 11.2.
Filing pleadings and other papers.
  Applications for costs, objections, LocalCiv-ED Rule 54.1.
  Conventional means, LocalCiv-ED Rule 5.1.
  Electronic means, LocalCiv-ED Rule 5.2.
  Findings of fact and conclusion of law, LocalCiv-ED Rule 52.1.
  Form, requirements, LocalCiv-ED Rule 10.1.
  Jury instructions, request, LocalCiv-ED Rule 51.1.
  Motions.
    Time for filing, LocalCiv-ED Rule 7.1.
  Sealed documents, LocalCiv-ED Rule 79.2.
  Subsequently decided authority.
    Suggestion, LocalCiv-ED Rule 7.1.
Final pre-trail conference, LocalCiv-ED Rule 16.1.
Financial interest disclosure statement, LocalCiv-ED Rule 7.3.
Findings of fact and conclusion of law.
  Filing, LocalCiv-ED Rule 52.1.
Fines.
  Pre-trial orders, preparation, failure to comply, LocalCiv-ED Rule 16.1.
Form.
  Pleadings, motions and other papers, LocalCiv-ED Rule 10.1.
  Sample pre-trial order, LocalCiv-ED Rule 16.1.
  Sealed documents, information displayed, LocalCiv-ED Rule 79.2.

CIVIL RULES —Cont'd
Frivolous or delaying motions, LocalCiv-ED Rule 11.1.
Guarantees.
  Security, approval, prohibited sureties, LocalCiv-ED Rule 65.1.
Guardian ad litem.
  Representation of minor or incompetent, LocalCiv-ED Rule 16.1.
Habeas corpus.
  Prisoners, LocalCiv-ED Rule 81.3.
Headquarters of court, LocalCiv-ED Rule 40.1.
Hearings.
  Motions, LocalCiv-ED Rule 7.1.
Incompetents as parties.
  Generally, LocalCiv-ED Rule 17.1.
  Representation, settlement or dismissal of action, counsel fees, payment of judgments, LocalCiv-ED Rule 16.1.
In forma pauperis.
  Denial of application.
    Filing fee, payment, time limit, failure to pay, LocalCiv-ED Rule 3.2.
  Subsequent litigation by unsuccessful parties proceeding in, LocalCiv-ED Rule 3.1.
Insurance agreements.
  Discovery of existence and contents, LocalCiv-ED Rule 26.1.
Interest bearing accounts.
  Deposit of registry funds, LocalCiv-ED Rule 67.1.
Interrogatories.
  Service, responses and objections, LocalCiv-ED Rule 33.1.
Judges, designation electronically, LocalCiv-ED Rule 40.2.
Judgments entered by clerk, LocalCiv-ED Rule 77.2.
Jurisdictional agreements with other courts, LocalCiv-ED Rule 100.2.
Jurors.
  Contacting following discharge.
    Restrictions, LocalCiv-ED Rule 47.1.
  Contacting for background information.
    Prohibition, LocalCiv-ED Rule 47.1.
  Costs, taxation, LocalCiv-ED Rule 54.2.
  Examination of prospective jurors, LocalCiv-ED Rule 47.1.
  Lists.
    Furnishing members of bar, content requirement, LocalCiv-ED Rule 47.1.
  Polling, LocalCiv-ED Rule 48.1.
  Seating assignment.
    Chart or list showing, LocalCiv-ED Rule 47.1.
  Summary trials, LocalCiv-ED Rule 101.2.
  Verdict.
    Taking in open court in absence of party or counsel, LocalCiv-ED Rule 48.1.
  Voir dire questions.
    Time for counsel to submit, LocalCiv-ED Rule 47.1.
Jury instructions.
  Request, LocalCiv-ED Rule 51.1.
  Summary trials, LocalCiv-ED Rule 101.2.
Law school student.
  Student practice rule, LocalCiv-ED Rule 83.2.
Libraries, LocalCiv-ED Rule 100.1.
Magistrate judges.
  Appeal and review of decisions and findings, LocalCiv-ED Rule 72.4.

CIVIL RULES —Cont'd

Magistrate judges —Cont'd
- Assignment of case to, LocalCiv-ED Rule 72.2.
  - Cases in which parties consent to exercise of jurisdiction, LocalCiv-ED Rule 73.1.
- Authority, LocalCiv-ED Rule 72.3.
- Conduct of trial and disposition of case.
  - Appeal from judgments, LocalCiv-ED Rule 72.4.
  - Consent of parties, LocalCiv-ED Rules 72.3, 73.1.
- Discovery and inspection.
  - Authority, LocalCiv-ED Rule 72.3.
- Federal statutes and rules and local rules and procedures.
  - Magistrate to conform to, performance of duties, LocalCiv-ED Rule 72.1.
- Special master.
  - Designating to serve as, LocalCiv-ED Rule 72.3.
  - Review of report, LocalCiv-ED Rule 72.4.

Mediated settlement conferences, LocalCiv-ED Rule 101.3.

Mediators.
- Mediated settlement conferences, LocalCiv-ED Rule 101.3.

Memoranda.
- Supporting memoranda.
  - Motions accompanied by, form, citations, length, LocalCiv-ED Rules 7.1, 7.2.
  - Responses to motions, LocalCiv-ED Rule 7.1.
- Time for filing prior to trial, LocalCiv-ED Rule 39.1.

Minors as parties.
- Generally, LocalCiv-ED Rule 17.1.
- Representation, settlement or dismissal of action, counsel fees, payment of judgments, LocalCiv-ED Rule 16.1.

Motions.
- Admission of attorney to bar, LocalCiv-ED Rule 83.1.
- Affidavits, LocalCiv-ED Rule 7.1.
  - Responses, LocalCiv-ED Rule 7.1.
- Discovery and inspection.
  - Replies, LocalCiv-ED Rule 7.1.
  - Requirements, LocalCiv-ED Rule 7.1.
  - Responses, LocalCiv-ED Rule 7.1.
- Evidentiary motions.
  - Filing prior to trial, LocalCiv-ED Rule 39.1.
- Exhibits to motions.
  - Restrictions, LocalCiv-ED Rule 10.2.
- Extension of time to perform act, LocalCiv-ED Rule 6.1.
- Filing.
  - Time, LocalCiv-ED Rule 7.1.
- Form, requirements, LocalCiv-ED Rule 10.1.
- Frivolous or delaying, LocalCiv-ED Rule 11.1.
- General requirements, LocalCiv-ED Rule 7.1.
- Hearings on, LocalCiv-ED Rule 7.1.
- Replies, LocalCiv-ED Rule 7.1.
- Responses, LocalCiv-ED Rule 7.1.
- Sealed documents, LocalCiv-ED Rule 79.2.
- Subsequently decided authority.
  - Suggestion, filing, LocalCiv-ED Rule 7.1.
- Supporting memoranda.
  - Accompanied by, LocalCiv-ED Rule 7.1.
  - Form, citations, length, LocalCiv-ED Rule 7.2.
- Time for filing, LocalCiv-ED Rule 7.1.
  - Replies, LocalCiv-ED Rule 7.1.

CIVIL RULES —Cont'd

Naturalization.
- Petitions, acting on, ceremonies, LocalCiv-ED Rule 81.3.

News media.
- Photographing and reproducing court proceedings, LocalCiv-ED Rule 83.6.
- Release of information to, LocalCiv-ED Rule 83.4.

Notice.
- Change of address, attorneys, prose parties, LocalCiv-ED Rule 83.3.
- Exhibits, destruction or other disposition, LocalCiv-ED Rule 79.1.
- Order to unseal documents, LocalCiv-ED Rule 79.2.
- Pre-trail conference, LocalCiv-ED Rule 16.1.
- Release of person from subpoena, LocalCiv-ED Rule 45.1.

Opening statement, LocalCiv-ED Rule 39.3.

Order of approval.
- Minor or incompetent as party.
  - Settlement, compromise, dismissal or discontinuance of action, LocalCiv-ED Rule 16.1.

Orders entered by clerk, LocalCiv-ED Rule 77.2.

Parties, minors and incompetents as, LocalCiv-ED Rule 17.1.

Payment of judgments.
- Minor or incompetent as party.
  - Order of approval, LocalCiv-ED Rule 16.1.

Personal identifying information.
- E-Government act of 2002 compliance, LocalCiv-ED Rule 10.3.

Photographing court proceedings, LocalCiv-ED Rule 83.6.

Pleadings.
- Filing and service.
  - Conventional means, LocalCiv-ED Rule 5.1.
  - Filing by electronic means, LocalCiv-ED Rule 5.2.
  - Service by electronic means, LocalCiv-ED Rule 5.3.
- Form, requirements, LocalCiv-ED Rule 10.1.

Plenary contempt proceedings.
- Civil contempt, LocalCiv-ED Rule 100.3.

Polling jury, LocalCiv-ED Rule 48.1.

Preliminary working pre-trial conference.
- Scheduling, LocalCiv-ED Rule 16.1.

Pre-trial conference, LocalCiv-ED Rule 16.1.

Pretrial disclosures.
- Providing, LocalCiv-ED Rule 16.1.

Pre-trial order, LocalCiv-ED Rule 16.1.

Prisoners.
- Civil rights action by, LocalCiv-ED Rule 81.2.
- Habeas corpus, LocalCiv-ED Rule 81.3.

Pro hac vice.
- Appearance by attorney not admitted in district, LocalCiv-ED Rule 83.1.

Pro se disclosure statements, LocalCiv-ED Rules 3.3, 11.3.

Pro se parties.
- Change of address, notification, LocalCiv-ED Rule 83.3.

Public records.
- News media obtaining, LocalCiv-ED Rule 83.4.

Published decisions.
- Citation.
  - Supporting memoranda, LocalCiv-ED Rule 7.2.

CIVIL RULES —Cont'd

Real property.
- Use as security, LocalCiv-ED Rule 65.1.

Recognizances.
- Security, approval, prohibited sureties, LocalCiv-ED Rule 65.1.

Recording court proceedings, LocalCiv-ED Rule 83.6.

Release of information to news media, LocalCiv-ED Rule 83.4.

Replies.
- Motions, LocalCiv-ED Rule 7.1.

Representation of minor or incompetent, LocalCiv-ED Rule 16.1.

Responses.
- Motions, LocalCiv-ED Rule 7.1.

Sanctions.
- Failure to comply with rules, LocalCiv-ED Rule 11.2.
- Pre-trial orders, preparation, failure to comply, LocalCiv-ED Rule 16.1.

Scheduling.
- Pre-trail conference, LocalCiv-ED Rule 16.1.

Scope, LocalCiv-ED Rule 1.1.

Sealed documents, LocalCiv-ED Rule 79.2.

Seizure of person or property, LocalCiv-ED Rule 64.1.

Service of pleadings and other papers.
- Conventional means, LocalCiv-ED Rule 5.1.
- Electronic means, LocalCiv-ED Rule 5.3.
- Interrogatories, LocalCiv-ED Rule 33.1.

Sessions of court.
- In continuous session, LocalCiv-ED Rule 77.1.

Settlement.
- Court-hosted settlement conferences, LocalCiv-ED Rule 101.1.
- Informing court and opposing counsel, LocalCiv-ED Rule 39.2.
- Juror costs, taxation, LocalCiv-ED Rule 54.2.
- Mediated settlement conferences, LocalCiv-ED Rule 101.3.
- Minor or incompetent as party.
  - Order of approval, LocalCiv-ED Rule 16.1.
- Summary trial negotiations, LocalCiv-ED Rule 101.2.

Special masters.
- Magistrate judges.
  - Designating to serve as, LocalCiv-ED Rule 72.3.
  - Review of report, LocalCiv-ED Rule 72.4.

Stipulations.
- Security, approval, prohibited sureties, LocalCiv-ED Rule 65.1.

Student practice rule, LocalCiv-ED Rule 83.2.

Subpoenas.
- Release of person from, LocalCiv-ED Rule 45.1.

Suggestion of subsequently decided authority.
- Filing, LocalCiv-ED Rule 7.1.

Summary contempt proceedings.
- Civil contempt, LocalCiv-ED Rule 100.3.

Summary trials, LocalCiv-ED Rule 101.2.

Supporting memoranda.
- Motions, LocalCiv-ED Rule 7.1.
  - Form, citations, length, LocalCiv-ED Rule 7.2.
- Responses to motions, LocalCiv-ED Rule 7.1.

Sureties.
- Prohibited sureties, LocalCiv-ED Rule 65.1.

CIVIL RULES —Cont'd

Time.
- Applications for costs, objections, making and filing, LocalCiv-ED Rule 54.1.
- Change of address, attorneys, pro se parties.
  - Notice, LocalCiv-ED Rule 83.3.
- Discovery disputes.
  - Expedited briefing schedule, LocalCiv-ED Rule 26.1.
- Exhibits, destruction or other disposition, LocalCiv-ED Rule 79.1.
- Extension of time.
  - Motion, LocalCiv-ED Rule 6.1.
- Findings of fact and conclusion of law, filing, LocalCiv-ED Rule 52.1.
- Jury instructions, request, filing, LocalCiv-ED Rule 51.1.
- Memoranda of authorities.
  - Filing prior to trial, LocalCiv-ED Rule 39.1.
- Motions.
  - Extension of time, LocalCiv-ED Rule 6.1.
  - Filing, LocalCiv-ED Rule 7.1.
    - Replies, LocalCiv-ED Rule 7.1.
- Order to unseal documents, LocalCiv-ED Rule 79.2.
- Pre-trail conference.
  - Notice, LocalCiv-ED Rule 16.1.
- Pretrial disclosures, providing, LocalCiv-ED Rule 16.1.
- Summary trials, LocalCiv-ED Rule 101.2.
- Voir dire questions.
  - Counsel submitting, LocalCiv-ED Rule 47.1.

Undertakings.
- Security, approval, prohibited sureties, LocalCiv-ED Rule 65.1.

United States as plaintiff.
- Deemed not resident of district, LocalCiv-ED Rule 40.1.

Unpublished decisions.
- Citation.
  - Supporting memoranda, LocalCiv-ED Rule 7.2.

Verdict.
- Taking in open court in absence of party or counsel, LocalCiv-ED Rule 48.1.

Witnesses.
- Attorneys questioning, LocalCiv-ED Rule 83.1.
- Release from subpoena, LocalCiv-ED Rule 45.1.

Working pre-trial conference.
- Scheduling preliminary conference, LocalCiv-ED Rule 16.1.

CRIMINAL RULES.

Admission of attorneys to bar, LocalCrim-ED Rule 57.1.

Affidavits.
- Motions, LocalCrim-ED Rule 47.1.

Affiliate disclosure statement, LocalCrim-ED Rule 12.3.

Appeals.
- Misdemeanor cases heard by magistrate judges, LocalCrim-ED Rule 58.1.

Appearance bonds.
- Deed of trust used to secure, LocalCrim-ED Rule 10.2.

Appearance in misdemeanor cases.
- Waiver, LocalCrim-ED Rule 43.1.

Appearance of counsel.
- Attorney not admitted in district, LocalCrim-ED Rule 57.1.

CRIMINAL RULES —Cont'd
Appearance of counsel —Cont'd
  Notice of appearance, LocalCrim-ED Rule 44.1.
Arraignment, LocalCrim-ED Rule 10.1.
Assignment of cases to division, LocalCrim-ED Rule 56.1.
Attorneys.
  Admission to bar, LocalCrim-ED Rule 57.1.
  Appearance of counsel.
    Attorney not admitted in district, LocalCrim-ED Rule 57.1.
    Notice of appearance, LocalCrim-ED Rule 44.1.
  Change of address, notification, LocalCrim-ED Rule 57.3.
  Conduct in courtroom, LocalCrim-ED Rule 57.1.
  Ethical standards, LocalCrim-ED Rule 57.1.
  Extra-judicial statements, LocalCrim-ED Rule 61.1.
  Identity of retained counsel.
    Defendant to notify court, LocalCrim-ED Rule 44.1.
  Local counsel.
    Out-of-state attorney appearing.
      Service on and attendance by associated local counsel, LocalCrim-ED Rule 57.1.
    Representation by, signing documents, LocalCrim-ED Rule 57.1.
  Out-of-state attorneys.
    Appearance by attorney not admitted in district, LocalCrim-ED Rule 57.1.
  Preparation for trial, LocalCrim-ED Rule 24.1.
  Questioning witnesses, LocalCrim-ED Rule 57.1.
  Roll of attorneys admitted, LocalCrim-ED Rule 57.1.
  Withdrawal of appearance, LocalCrim-ED Rule 57.1.
Bonds.
  Appearance bonds.
    Deed of trust used to secure, LocalCrim-ED Rule 10.2.
Broadcasting court proceedings, LocalCrim-ED Rule 53.1.
Citation of decisions.
  Supporting memoranda, LocalCrim-ED Rule 47.2.
Clerks.
  Assignment of cases to division, LocalCrim-ED Rule 56.1.
  Court libraries, maintaining, LocalCrim-ED Rule 100.1.
  Exhibits, custodian, destruction or other disposition, LocalCrim-ED Rule 55.1.
  Jurisdictional agreements with other courts.
    Maintaining, LocalCrim-ED Rule 100.2.
  Orders and judgments entered by, LocalCrim-ED Rule 56.1.
Confidential records.
  Petition for disclosure, LocalCrim-ED Rule 32.1.
Continuance.
  Failure to serve subpoena within time period.
    Not grounds for, LocalCrim-ED Rule 17.1.
Continuous sessions of court, LocalCrim-ED Rule 56.1.
Correspondence addressed to court, LocalCrim-ED Rule 57.4.
Court libraries, maintaining, LocalCrim-ED Rule 100.1.

CRIMINAL RULES —Cont'd
Deed of trust.
  Used to secure appearance bond, LocalCrim-ED Rule 10.2.
Disclosure statements.
  Affiliate or financial interest, LocalCrim-ED Rule 12.3.
  Pro se litigants, LocalCrim-ED Rule 44.2.
Discovery and inspection.
  Additional discovery, motion, time for filing, LocalCrim-ED Rule 12.2.
  Defendant, discovery from, LocalCrim-ED Rule 16.1.
  Form of documents, requirements, LocalCrim-ED Rule 47.3.
  Mail.
    Exchange of discovery by, LocalCrim-ED Rule 16.1.
  Motions, LocalCrim-ED Rule 16.1.
    Additional discovery, LocalCrim-ED Rule 12.2.
  Pre-trial conference, LocalCrim-ED Rule 16.1.
Docket.
  Sealed documents, LocalCrim-ED Rule 55.2.
E-Government act of 2002 compliance, LocalCrim-ED Rule 47.5.
Electronic designation of judges, LocalCrim-ED Rule 5.2.
Electronic filing, LocalCrim-ED Rule 49.2.
Electronic service, LocalCrim-ED Rule 49.3.
Exhibits.
  Clerk, custodian, destruction or other disposition, LocalCrim-ED Rule 55.1.
  Form of exhibits to motions, LocalCrim-ED Rule 47.4.
Extension of time to perform act.
  Motions, LocalCrim-ED Rule 47.1.
Extra-judicial statements, LocalCrim-ED Rule 61.1.
Felonies.
  Assignment of magistrate judges, LocalCrim-ED Rule 5.1.
Filing or serving pleadings and papers.
  Conventional means, LocalCrim-ED Rule 49.1.
  Electronic filing, LocalCrim-ED Rule 49.2.
  Electronic service, LocalCrim-ED Rule 49.3.
  Sealed documents, LocalCrim-ED Rule 55.2.
Financial interest disclosure statement, LocalCrim-ED Rule 12.3.
Form.
  Pleadings, motions and other documents, LocalCrim-ED Rule 47.3.
  Sealed documents, LocalCrim-ED Rule 55.2.
Frivolous or delaying motions, LocalCrim-ED Rule 47.1.
Hearings.
  Motions, LocalCrim-ED Rule 47.1.
Judges, electronic designation, LocalCrim-ED Rule 5.2.
Judgments entered by clerks, LocalCrim-ED Rule 56.1.
Jurisdictional agreements with other courts.
  Maintaining, LocalCrim-ED Rule 100.2.
Jury.
  Contacting after verdict, LocalCrim-ED Rule 24.2.
  Contacting jurors to secure background information.
    Prohibition, LocalCrim-ED Rule 24.2.
  Examination of jurors, LocalCrim-ED Rule 24.2.

CRIMINAL RULES —Cont'd

Jury —Cont'd

- Extra-judicial statements during selection, LocalCrim-ED Rule 61.1.
- List.
  - Furnishing members of bar, content requirements, LocalCrim-ED Rule 24.2.
- Polling, LocalCrim-ED Rule 31.1.
- Seating assignments.
  - Furnishing chart or list, LocalCrim-ED Rule 24.2.
- Verdict.
  - Taking in open court, LocalCrim-ED Rule 31.1.
- Voir dire, LocalCrim-ED Rule 24.2.
  - Time for filing questions, LocalCrim-ED Rules 24.1, 24.2.

Jury instructions.

- Request for, LocalCrim-ED Rule 30.1.
  - Time for filing, LocalCrim-ED Rule 24.1.

Law school students.

- Student practice rule, LocalCrim-ED Rule 57.2.

List of witnesses to be called.

- Time for filing with court, LocalCrim-ED Rule 24.1.

Local counsel.

- Out-of-state attorney appearing.
  - Service on and attendance by associated local counsel, LocalCrim-ED Rule 57.1.
- Representation by, signing documents, LocalCrim-ED Rule 57.1.

Magistrate judges.

- Arraignment, conducting, LocalCrim-ED Rule 10.1.
- Assignment of cases, LocalCrim-ED Rule 5.1.
- Misdemeanors, disposition, appeals, LocalCrim-ED Rule 58.1.

Mail.

- Discovery and inspection.
  - Exchange of discovery by, LocalCrim-ED Rule 16.1.

Memoranda.

- Form, requirements, LocalCrim-ED Rule 47.3.
- Supporting memoranda.
  - Motions, LocalCrim-ED Rules 47.1, 47.2.

Misdemeanors.

- Magistrate judges.
  - Assignment of magistrate judges, LocalCrim-ED Rule 5.1.
  - Disposition, appeals, LocalCrim-ED Rule 58.1.
- Waiver of appearance, LocalCrim-ED Rule 43.1.

Motions, LocalCrim-ED Rule 47.1.

- Additional discovery.
  - Filing, LocalCrim-ED Rule 12.2.
- Affidavits, LocalCrim-ED Rule 47.1.
- Discovery and inspection, LocalCrim-ED Rule 16.1.
  - Additional discovery, LocalCrim-ED Rule 12.2.
- Exhibits to motions, form, LocalCrim-ED Rule 47.4.
- Extension of time to perform act, LocalCrim-ED Rule 47.1.
- Frivolous or delaying motions, LocalCrim-ED Rule 47.1.
- Hearing on, LocalCrim-ED Rule 47.1.
- Pre-trial motions.
  - Time for filing, LocalCrim-ED Rule 12.1.
- Responses, LocalCrim-ED Rule 47.1.
- Sealed documents, LocalCrim-ED Rule 55.2.

CRIMINAL RULES —Cont'd

Motions —Cont'd

- Suggestion of subsequently decided authority, LocalCrim-ED Rule 47.1.
- Supporting memoranda, LocalCrim-ED Rules 47.1, 47.2.

News media.

- Broadcasting, photographing or reproducing court proceedings, LocalCrim-ED Rule 53.1.
- Public records, obtaining, LocalCrim-ED Rule 61.1.

Notice.

- Appearance of counsel, LocalCrim-ED Rule 44.1.
- Change of address, attorneys or pro se parties, LocalCrim-ED Rule 57.3.
- Exhibits, destruction or other disposition, LocalCrim-ED Rule 55.1.
- Unsealing sealed documents, court order, LocalCrim-ED Rule 55.2.

Orders entered by clerks, LocalCrim-ED Rule 56.1.

Out-of-state attorneys.

- Appearance by attorney not admitted in district, LocalCrim-ED Rule 57.1.

Personal identifying information.

- E-Government act of 2002 compliance, LocalCrim-ED Rule 47.5.

Photographing court proceedings, LocalCrim-ED Rule 53.1.

Pleadings.

- Filing or serving.
  - Conventional means, LocalCrim-ED Rule 49.1.
  - Electronic filing, LocalCrim-ED Rule 49.2.
  - Electronic service, LocalCrim-ED Rule 49.3.
- Form, requirements, LocalCrim-ED Rule 47.3.

Polling jury, LocalCrim-ED Rule 31.1.

Preparation for trial.

- Attorneys, LocalCrim-ED Rule 24.1.

Presentence records.

- Petition for disclosure, LocalCrim-ED Rule 32.1.

Presentence report, LocalCrim-ED Rule 32.2.

Pre-trial conference, LocalCrim-ED Rule 16.1.

Pre-trial motions.

- Time for filing, LocalCrim-ED Rule 12.1.
  - Additional discovery, LocalCrim-ED Rule 12.2.

Probation officers.

- Production or disclosure of presentence or probation records.
  - Instruction from court as to response to process seeking, LocalCrim-ED Rule 32.1.

Probation records.

- Petition for disclosure, LocalCrim-ED Rule 32.1.

Production or disclosure of presentence or probation records, LocalCrim-ED Rule 32.1.

Pro hac vice.

- Appearance by attorney not admitted in district, LocalCrim-ED Rule 57.1.

Pro se parties.

- Change of address, notification, LocalCrim-ED Rule 57.3.
- Disclosure statement of litigant, LocalCrim-ED Rule 44.2.

Public communications.

- Publicity in court matters, LocalCrim-ED Rule 61.1.

Publicity in court matters, LocalCrim-ED Rule 61.1.

Public records.

- News media obtaining, LocalCrim-ED Rule 61.1.

CRIMINAL RULES —Cont'd
Published decision.
  Citation.
    Supporting memoranda, LocalCrim-ED Rule 47.2.
Reproducing court proceedings, LocalCrim-ED Rule 53.1.
Responses.
  Motions, LocalCrim-ED Rule 47.1.
Scope of rules, LocalCrim-ED Rule 1.1.
Sealed documents, LocalCrim-ED Rule 55.2.
Sentencing guidelines.
  Procedures for implementing, LocalCrim-ED Rule 32.2.
Service of subpoenas.
  Time, LocalCrim-ED Rule 17.1.
Serving pleadings and papers.
  Conventional means, LocalCrim-ED Rule 49.1.
  Electronic filing, LocalCrim-ED Rule 49.2.
  Electronic service, LocalCrim-ED Rule 49.3.
Sessions of court.
  Continuous session, LocalCrim-ED Rule 56.1.
Student practice rule, LocalCrim-ED Rule 57.2.
Subpoenas.
  Time for service, LocalCrim-ED Rule 17.1.
Suggestion of subsequently decided authority, LocalCrim-ED Rule 47.1.
Supporting memoranda.
  Form, requirements, LocalCrim-ED Rule 47.3.
  Motions, LocalCrim-ED Rules 47.1, 47.2.
Time.
  Additional discovery.
    Motion, filing, LocalCrim-ED Rule 12.2.
  Change of address, attorneys or pro se parties, notice, LocalCrim-ED Rule 57.3.
  Exhibits, destruction or other disposition, LocalCrim-ED Rule 55.1.
  Extension of time to perform act.
    Motions, LocalCrim-ED Rule 47.1.
  Jury instruction, request for, filing, LocalCrim-ED Rule 24.1.
  List of witnesses to be called.
    Filing with court, LocalCrim-ED Rule 24.1.
  Presentence reports.
    Completion, objections, filing, revised report, LocalCrim-ED Rule 32.2.
  Pre-trial motions.
    Filing, LocalCrim-ED Rule 12.1.
  Responses to motions, filing, LocalCrim-ED Rule 47.1.
  Subpoenas, service, LocalCrim-ED Rule 17.1.
  Suggestion of subsequently decided authority, filing, LocalCrim-ED Rule 47.1.
  Unsealing sealed documents, court order, LocalCrim-ED Rule 55.2.
  Voir dire questions, filing, LocalCrim-ED Rules 24.1, 24.2.
Title of rules, LocalCrim-ED Rule 1.1.
Unpublished decision.
  Citation.
    Supporting memoranda, LocalCrim-ED Rule 47.2.
Unsealing sealed documents, LocalCrim-ED Rule 55.2.
Verdict.
  Taking in open court, LocalCrim-ED Rule 31.1.
Voir dire, LocalCrim-ED Rule 24.2.
  Questions, time for filing, LocalCrim-ED Rules 24.1, 24.2.

CRIMINAL RULES —Cont'd
Waiver of appearance in misdemeanor cases, LocalCrim-ED Rule 43.1.
Withdrawal of attorney, LocalCrim-ED Rule 57.1.
Witnesses.
  Attorneys questioning, LocalCrim-ED Rule 57.1.
  List of witnesses to be called.
    Time for filing with court, LocalCrim-ED Rule 24.1.

P

PATENT RULES.
Admissibility.
  Statements, disclosures and charts, LPR-ED 302.4.
Briefs.
  Claim construction.
    Service, filing, time, LPR-ED 304.5.
Claim construction.
  Briefs, service, filing, time, LPR-ED 304.5.
  Completion, time, LPR-ED 304.4.
  Extrinsic evidence.
    Court order on, LPR-ED 304.5.
  Hearing, LPR-ED 304.6.
  Joint statement, LPR-ED 304.3.
  Preliminary claim construction.
    Exchange, LPR-ED 304.2.
  Proposed terms and claim elements for construction.
    Exchange, LPR-ED 304.1.
Confidential.
  Marking documents, filing documents, LPR-ED 302.2.
Contentions.
  Amendment to contentions, LPR-ED 303.7.
  Disclosure of asserted claims and preliminary infringement contentions.
    Production of documents with disclosure, LPR-ED 303.2.
    Service, time, information required, LPR-ED 303.1.
  Final contentions, LPR-ED 303.6.
  Preliminary non-infringement and invalidity contentions.
    Production of documents accompanying, LPR-ED 303.4.
    Service, time, information required, LPR-ED 303.3.
Declaratory judgment.
  Patent not infringed, invalid or unenforceable, LPR-ED 303.5.
Depositions.
  Expert witnesses, LPR-ED 305.2.
Discovery of counsel's opinions.
  Willful infringement charged, LPR-ED 303.8.
Discovery plan.
  Matters discussed, LPR-ED 302.1.
Discovery requests.
  Objections to, LPR-ED 302.5.
Effective date, LPR-ED 301.3.
Expert witnesses.
  Depositions, LPR-ED 305.2.
  Disclosure, LPR-ED 305.1.
  Rebuttal witnesses.
    Disclosure, LPR-ED 305.1.
Extrinsic evidence.
  Claim construction.
    Court order on, LPR-ED 304.5.

PATENT RULES —Cont'd
Governing procedure, LPR-ED 302.1.
Hearing.
  Claim construction, LPR-ED 304.6.
Initial scheduling conference, LPR-ED 302.1.
Objections to discovery requests and disclosures, LPR-ED 302.5.
Purpose, scope and construction, LPR-ED 301.2.
Scheduling conferences, LPR-ED 302.1.
Signing and dating.
  Statements, disclosures and charts, LPR-ED 302.3.

PATENT RULES —Cont'd
Statements, disclosures and charts.
  Admissibility, LPR-ED 302.4.
  Signing and dating, certification, LPR-ED 302.3.
Title, LPR-ED 301.1.
Willful infringement charged.
  Discovery of counsel's opinions, LPR-ED 303.8.

S

STANDING ORDERS, LocalCiv-ED Rule 100.4.

RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Revised effective December 1, 2008.

Preface

Part I. Commencement of Case; Proceedings Relating to Petition and Order for Relief

Rule
1006-1. Fees — Installment payments.
1007-1. Lists, schedules, and statements; Time limits.
1007-2. Mailing — List or Matrix.
1007-3. Statement of intention a Chapter 7 case.
1009-1. Amendments to Lists and Schedules.
1071-1. Bankruptcy Court Divisions.
1073-1. Assignment of Cases.

Part II. Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants

2002-1. Notice to creditors and other interested parties.
2003-1. Meeting of creditors and equity security holders.
2004-1. Examination.
2014-1. Employment of professional persons.
2014-2. Application for approval of mental health evaluation.
2015-2. Debtor in possession duties — With respect to giving notice.
2015-5. Chapter 13 trustees — Search fees.
2016-1. Compensation of professionals.
2090-1. Attorneys — Admission to Practice.

Part III. Claims and Distribution to Creditors and Equity Interest Holders; Plans

3001-1. Claims and Equity Security Interests — Place of Filing Proof of Claim or Interest.
3002-1. Chapter 11 Debtor's Notice Of Disputed, Contingent or Unliquidated Claims.
3003-1. Time for filing proof of claim or interest in a Chapter 11 case.
3004-1. Filing of Claims by Debtor or Trustee.
3010-1. Small dividends.
3012-1. Valuation of security.
3070-1. Chapter 13-Payments.

Part IV. The Debtor: Duties and Benefits

4001-1. Relief from the Automatic Stay.
4001-2. Secured Creditor Duties.
4002-1. Debtor duties.
4003-1. Exemptions.

Part V. Courts and Clerks

5001-2. Clerk — Office Location and Hours.
5003-1. Clerk — General Authority.
Rule
5003-4. Register of Mailing Addresses of Federal and State Governmental Units.
5005-1. Filing Paper Documents — Requirements.
5005-2. Filing Paper Documents — Number of Copies.
5005-3. Filing Paper Documents — Size of Papers, Two-Sided Documents.
5005-4. Electronic Case Filing.
5005-4(1). Assignment to System and Filing Requirements.
5005-4(2). Eligibility, Registration and Passwords.
5005-4(3). Consequences of Electronic Filing; Deadlines.
5005-4(4). Entry of Court Orders; Issuance of Electronic Summons.
5005-4(5). Format; Attachments and Exhibits.
5005-4(6). Sealed Documents.
5005-4(7). Original Signatures and Retention Requirements.
5005-4(8). Signatures and Certification.
5005-4(9). Service of Documents by Electronic or Conventional Means; Calculation of Response Time.
5005-4(10). Technical Failures.
5005-4(11). Limitation on Public Access.

Part VI. Collection and Liquidation of the Estate

6004-1. Sale of Estate Property.
6005-1. Appraisers and auctioneers.
6070-1. Tax Returns and Tax Refunds.

Part VII. Adversary Proceedings

7005-1. Serving and Filing Pleadings and Other Papers.
7007-1. Motion Practice in Adversary Proceedings.
7016-1. Pretrial Procedures.
7016-2. Trials.
7026-1. Discovery — General.
7055-1. Dismissal of actions for lack of prosecution.
7065-1. Temporary Restraining Order and Preliminary Injunction.
7067-1. Registry Fund.

Part VIII. Appeals to District Court [Reserved]

Part IX. General Provisions

9004-2. Caption — Documents, General.
9007-1. Designation of parties to provide notice.
9009-1. Forms.
9010-1. Attorneys — Notice of Appearance.
9011-1. Attorneys — Duties.
9011-3. Sanctions.
9011-4. Signatures.
9013-1. Service of Motions.

Rule
9013-2. Briefs and Memoranda of Law.
9013-3. Certificate of Service.
9014-1. Contested matters — General.
9014-2. Contested matters — Expedited.
9019-1. Settlements and Agreed Orders.
9019-2. Mediated Settlement Conference.
9019-2(1). Mediated settlement order and motions.
9019-2(2). Selection of Mediator.
9019-2(3). Mediated Settlement Conference Location and Time.
9019-2(4). Duties of Parties, Representatives and Attorneys.
9019-2(5). Sanctions for Failure to Attend.
9019-2(6). Authority and Duties of Mediator.
9036-1. Notice by Electronic Transmission.
9070-1. Exhibits.
9072-1. Proposed orders.
9074-1. Telephone and Video Conferences and Hearings.

Appendix

Index follows Rules.

Editor's note. — For North Carolina court system website, see **www.nceb.uscourts.gov.**

Adoption of Interim Bankruptcy Rules. — On September 2, 2005, the United States Bankruptcy Court for the Eastern District of North Carolina adopted Interim Bankruptcy Rules amending the Federal Rules of Bankruptcy Procedure to implement the substantive and procedural changes mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pursuant to 28 U.S.C.S. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 9029 of the Federal Rules of Bankruptcy Procedure, the Interim Rules were adopted in their entirety without change by all judges of the court, effective October 17, 2005, and shall remain in effect until further order of the court. For cases and proceedings not governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court for the Eastern District of North Carolina, other than the Interim Rules, shall apply.

The Interim Bankruptcy Rules may be viewed at the website for the United States Bankruptcy Court for the Eastern District of North Carolina located at **www.nceb.uscourts.gov/reformact.htm.**

JUDGES

Raleigh

A. Thomas Small
Chief Bankruptcy Judge

Chambers contact person:
Linda Weaver, Secretary to Judge
(919) 856-4603

J. Rich Leonard
Bankruptcy Judge

Chambers contact person:
Cathy Barnes, Judicial Assistant
Telephone: (919) 856-4033

Wilson

Randy D. Doub
Bankruptcy Judge

Chambers contact person:
Sharon Angel, Judicial Assistant
Telephone: (252) 291-6412

CLERK OF COURT

Peggy B. Deans

Wilson

1760-A Parkwood Boulevard
Wilson, NC 27893-3564
(252) 237-0248

Raleigh
Post Office Drawer 1441
Century Station
Raleigh, NC 27602-1441

Room 209, Century Station
300 Fayetteville Street Mall
Raleigh, NC 27602
(919) 856-4752

BANKRUPTCY ADMINISTRATOR

Marjorie K. Lynch

Wilson

Post Office Box 3758
Wilson, NC 27895-3758

1760-B Parkwood Boulevard
Wilson, NC 27893
(252) 237-6854

Raleigh

434 Fayetteville Street
Suite 620
Raleigh, NC 27601
(919) 856-4886

PREFACE

The Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of North Carolina are adopted to facilitate the administration of bankruptcy cases, to assist the court in the management of contested matters and adversary proceedings and to provide for uniformity in local practice in this court. In a particular case, if justice requires, the court may modify or abrogate any local rule.

The numbering system for the Local Bankruptcy Rules is patterned after the uniform numbering system for local bankruptcy rules approved by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. The numbering of the local rules generally corresponds to the numbering of the Federal Rules of Bankruptcy Procedure. The Local Bankruptcy Rules will be cited as: "E.D.N.C. LBR" (Example: "E.D.N.C. LBR 1007-1.")

PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

Rule 1006-1. Fees — Installment payments.

(a) An application for permission to pay the filing fees in installments shall contain the following:

(1) reasons why the debtor cannot pay the full fee at the time of filing;

(2) a statement of fees paid to the debtor's attorney;

(3) a statement that the debtor does not owe any outstanding fees to the court on account of any other prior case; and

(4) the signature of both the debtor and the debtor's attorney.

(b) Following the filing of a petition and an application, each application will be reviewed by the court and an order entered granting or denying the application. If the application is denied, the debtor shall have 10 days from the date of the order to pay the full fee. If the full fee is not paid within 10 days of the order, the petition may be dismissed by the court without any further prior notice.

(c) Final installments of the filing fee shall be paid within 10 days following the date first set for the meeting of creditors pursuant to 11 U.S.C. § 341, unless otherwise ordered by the court upon appropriate motion for extension and for cause shown.

(d) The debtor and the debtor's attorney are responsible for knowing the dates the payments are due. No reminders of the due date will be provided from the court. Upon failure to make any payment as scheduled, the petition is subject to dismissal after hearing on notice to the debtor and trustee.

Rule 1007-1. Lists, schedules, and statements; Time limits.

Schedules and statements required: In cases other than those filed under chapter 11, upon the filing of an accelerated case when the schedules and statements are not filed with the voluntary petition, the schedules and statements shall be filed within 15 days thereafter and a copy transmitted to the bankruptcy administrator and the trustee. In cases filed under chapter 11, upon the filing of an accelerated case when the schedules and statements are not filed with the voluntary petition, the schedules and statements shall be filed within 15 days thereafter and a copy transmitted to the bankruptcy administrator and the Internal Revenue Service. If the chapter 11 debtor is a corporation or limited partnership, then a copy of the schedules and statements shall also be served within 15 days upon the following:

(1) Securities & Exchange Commission; and

(2) Secretary of the Treasury.

Addresses for these agencies are contained in the Administrative Guide to Practice and Procedure and are listed on the court's website at www.nceb.uscourts.gov. A certificate of service shall be filed reflecting that service has been made on each party.

Rule 1007-2. Mailing — List or Matrix.

Petition accompanied by matrix. A petition requesting relief under chapters 7, 11, 12, or 13 shall be accompanied by a mailing matrix containing the complete mailing address, including zip code, for the following:

(1) all creditors listed in the petition, alphabetically arranged;

(2) Internal Revenue Service, except in chapters 7, 12 and 13 when the Internal Revenue Service is not listed as a creditor;

(3) North Carolina Department of Revenue, except in chapters 7, 12 and 13 when the North Carolina Department of Revenue is not listed as a creditor; and

(4) Employment Security Commission, except in chapters 7, 12 and 13 when the Employment Security Commission is not listed as a creditor;

(5) United States Attorney, if the United States is a party, other than for taxes (EXAMPLE: Farm Service Agency, Federal Housing Administration, Veteran's Administration, Small Business Administration);

(6) if the debtor is a corporation, the name and title of the managing agent; and

(7) if the debtor is a partnership, each member of the partnership.

Addresses for the governmental agencies listed above are contained in the Administrative Guide to Practice and Procedure and are listed on the court's website at www.nceb.uscourts.gov.

(b) *Preparation of matrix.* The matrix shall be prepared in the format approved by the clerk and its content shall be certified as accurate by the filing attorney or party. The party shall be responsible for any errors in or omissions from the listing. The preparation of the matrix for paper or electronic filing shall be in the format prescribed in the Administrative Guide to Practice and Procedure.

Rule 1007-3. Statement of intention a Chapter 7 case.

(a) *Statement of intention.* A chapter 7 debtor who is required to file a statement of intention pursuant to 11 U.S.C. § 521(a)(2)(A) shall serve a copy of the statement upon the creditor whose claim is secured by the property which is the subject of the statement. The debtor shall file a certificate of service with the clerk of court within three days of the filing of the statement.

(b) *Failure to perform statement of intention.* If a chapter 7 debtor fails to perform the intention as required by 11 U.S.C. § 521(a)(2)(B), the court may, upon motion of the affected creditor, enter an ex parte order lifting the stay of 11 U.S.C. § 362(a) and order the debtor to turn over the property to the creditor.

Rule 1009-1. Amendments to Lists and Schedules.

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served, and must be certified as correct by the person making the service.

Rule 1071-1. Bankruptcy Court Divisions.

There shall be six divisions of the court: Elizabeth City, Fayetteville, New Bern, Raleigh, Wilmington and Wilson. The counties comprising each division are contained in the Administrative Guide to Practice and Procedure.

Rule 1073-1. Assignment of Cases.

(a) In accordance with Local Bankruptcy Rule 1071-1, the clerk shall assign all cases and proceedings to a division when the action is filed or removed. The place of filing shall be determined by the debtor's domicile, residence, principal place of business or location of the debtor's principal assets immediately preceding the filing of the bankruptcy case. In cases involving an affiliate, a general partner or partnership, related cases may be filed in the division where the original case was filed.

(b) In adversary proceedings in which there is no bankruptcy case pending in this district, the division will be assigned at the discretion of the clerk. The decision of the clerk to assign a case or proceeding to a particular division may be reviewed by the court upon written request.

PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 2002-1. Notice to creditors and other interested parties.

(a) *Amended or supplemental schedules.* The § 341 meeting will be scheduled and the clerk of court, or such other person as the clerk of court may designate, will notify the creditors listed on the matrix filed with the petition. If additional creditors are added either through filed schedules or amendments to schedules being filed after notice has been given, the debtor shall serve the notice of commencement of case, meeting of creditors, and deadlines, along with a proof of claim form if a notice to file a proof of claim has been given, on the added creditors and file a certificate of service with the clerk of court within three days after service.

(b) *Payment of fee required.* If a debtor files a request for conversion to another chapter, payment of the fee shall be a condition of the conversion.

(c) *Guide to service and notice requirements.* The chart included in the Administrative Guide to Practice and Procedure shall serve as a guide for the giving of notice to creditors and other parties in interest.

(d) *Returned and undeliverable mail:* The procedure for returned and undeliverable mail is provided in the Administrative Guide.

Rule 2003-1. Meeting of creditors and equity security holders.

(a) The bankruptcy administrator shall retain and preserve the recordings of the meeting of creditors required by 11 U.S.C. § 341(a) for a period of two years from the date of the meeting. After the expiration of two years from the date of the meeting, the bankruptcy administrator is authorized to destroy the recordings.

(b) Upon the request of any entity, the bankruptcy administrator may certify and provide a copy of the recording of the meeting of creditors at the entity's expense.

Rule 2004-1. Examination.

A motion for an examination under this rule shall be reviewed by the court and allowed ex parte. Upon filing of a motion to reconsider, the obligation to appear or produce documents is stayed pending a ruling on the motion to reconsider.

Rule 2014-1. Employment of professional persons.

The chapter 11 debtor may not employ any professional person, including but not limited to any attorney, accountant, appraiser, business consultant, broker, agent, or auctioneer, without first obtaining approval of the court.

Rule 2014-2. Application for approval of mental health evaluation.

The debtor may apply to the court for approval of a pro bono mental health evaluation. The application shall be filed and a copy of the application shall be transmitted by the debtor to the bankruptcy administrator and any other interested party. The application shall substantially conform to the Application for Approval of Mental Health Evaluation contained in the Administrative Guide to Practice and Procedure.

Rule 2015-2. Debtor in possession duties — With respect to giving notice.

In addition to the duties set forth in Local Bankruptcy Rule 4002-1(b), the debtor in possession in a chapter 11 case shall be responsible for serving the following notices and documents on creditors, after having their form and content approved by the clerk of court, and for filing a certificate of service with the clerk of court within three days of the date of service:

(1) the notice of the hearing on disclosure statement;

(2) the plan, the approved or conditionally approved disclosure statement, and the notice regarding balloting and date for hearing on confirmation;

(3) the confirmation order; and

(4) any notices the court or clerk of court may direct.

Rule 2015-5. Chapter 13 trustees — Search fees.

The standing chapter 13 trustees are authorized to charge a search fee when answering inquiries which require a search of the records for each name or item searched in the amount established under 28 U.S.C. § 1930(b), and to use the funds as a part of operating expenses. The trustees shall include in the chapter 13 trustee's annual report the amount of any search fees received.

Rule 2016-1. Compensation of professionals.

(a) *Compensation of attorney for debtor in Chapter 13 cases.*

(1) *Amount of standard base fee.* The standard base fee in a chapter 13 consumer case and a chapter 13 business case is as provided in the statement of approved compensation published annually by the clerk and included in the Administrative Guide to Practice and Procedure.

(2) *Services included in the base fee.* The standard base fee includes the basic services reasonably necessary to properly represent the debtor before the bankruptcy court during the first 12 months after filing the case.

(3) *Applying for a higher base fee.* Applications for approval of a base fee higher than the standard base fee must be filed by the debtor's attorney within 60 days after the conclusion of the creditor's meeting under § 341 of the Bankruptcy Code.

(4) *Non-Base fee services defined.* The following services are not covered by the standard base fee, and additional compensation for these services may be awarded by the court:

(A) motion for authority to sell real property;

(B) application to incur debt;

(C) motion to extend or impose the automatic stay for repeat filers;

(D) prosecution or defense of adversary proceedings;

(E) filing of formal motions or responses pertaining to four or more matters arising during the first year of the case, including but not limited to the services listed below in subsection (6); and

(F) any other service that, in the discretion of the court, reasonably warrants additional compensation.

(5) *Approval of Non-Base fees.* Except as specified in subsection (6), applications for fees for any non-base fee services provided to a chapter 13 debtor must be approved by the court. Notice of each application for fees and expenses in any amount under $1,000 must be sent to each debtor, the trustee, and the bankruptcy administrator. Notice of each application for fees and expenses of $1,000 and above must be given to all parties in interest.

(6) *Presumptive Non-Base fees/approval/notice.* The list of presumptively reasonable non-base fee services are contained in the statement of approved compensation

published by the clerk and included in the Administrative Guide to Practice and Procedure. Applications for the presumptive non-base fee must be filed with a notice verifying completion of the service and a certificate of service evidencing service of the notice on each debtor, the trustee and the bankruptcy administrator. The applications for presumptive non-base fees will automatically be approved by the court. Alternatively, the debtor's attorney may apply to the court for approval of non-base fees on a "time and expense" basis pursuant to Rule 2016 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 330.

(7) *Disclosure of fee procedures.* Every attorney for a chapter 13 debtor must disclose to the debtor the procedures applicable in this district to awards of attorneys' fees in chapter 13 cases.

(8) *Interim approval of partial base fee.* An attorney fee as specified in the Administrative Guide to Practice and Procedure for services provided to the debtor up to and including the petition date is authorized and shall be considered part of the base fee. Any amount in excess of the base fee collected by the attorney prior to filing the chapter 13 petition must be held in the attorney's client trust account pending further order of the court or approval of the fees in accordance with this rule.

(9) *Payment of attorney fees / modification of plan.* The following will be treated and paid as administrative expenses of the chapter 13 case:

(A) the standard base fee, less any partial base fee paid prior to filing the chapter 13 petition; and

(B) any additional amounts awarded in excess of the standard base fee or for non-base fee services.

These fees shall be paid by the trustee at the rate set in the Administrative Guide to Practice and Procedure unless the court directs otherwise. The trustee may, without application to the court, modify the chapter 13 plan to extend the duration of the plan and/or increase the monthly amount of the plan payment in order to provide the funds necessary to pay attorney fees. The trustee must notify the debtor and the debtor's attorney of the plan modification.

(b) *Compensation of professionals in Chapter 7, 11, and 12 cases.* The bankruptcy administrator's Procedures for Preparing and Submitting Applications for Compensation by Professionals shall serve as a guide for applications for compensation to professionals. The Procedures for Preparing and Submitting Applications for Compensation by Professionals outline is available from the office of the bankruptcy administrator.

Rule 2090-1. Attorneys — Admission to Practice.

(a) *Local Civil Rule 83.1(f), EDNC Applicable:* Except as otherwise provided in this rule, Local Civil Rule 83.1 of the Local Rules of Practice and Procedure for the United States District Court, Eastern District of North Carolina, entitled, "Attorneys," is applicable in this court with the following exceptions:

(1) An individual may represent himself;

(2) A corporate entity may be represented at a meeting of creditors by its officers and agents;

(3) The following documents may be filed by a corporate entity or an attorney not admitted to practice before this court on behalf of a client; (i) a proof of claim, (ii) a reaffirmation agreement; and (iii) an assignment/transfer of claim. Corporate entities not represented by an attorney and attorneys not admitted to practice before this court may obtain a limited password for access to the court's CM/ECF system for the purpose of filing the above documents.

(b) *Admission:* Only those persons who are admitted to the bar of the United States District Court for the Eastern District of North Carolina are admitted to practice before this court. Except as permitted herein, all courtroom appearances, pretrial conferences, discovery procedures, pleadings, motions, objections, and other documents filed with this court, aside from certificates of service, must be by an attorney admitted to practice before this court.

(c) *Pro Hac Vice Appearance:* Local Rule 83.1(e)-(f) of the Local Rules of Practice and Procedure for the United States District Court, Eastern District of North Carolina, addresses attorneys appearing pro hac vice.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3001-1. Claims and Equity Security Interests — Place of Filing Proof of Claim or Interest.

All claims shall be filed with the clerk of court in accordance with Rule 5005, Federal Rules of Bankruptcy Procedure. All creditors not represented by an attorney who file more than ten proofs of claim in any 12-month period shall file the proofs of claim, including all transfers, assignments, amendments and withdrawals of proofs of claim, electronically according to the procedures established by the court.

Rule 3002-1. Chapter 11 Debtor's Notice Of Disputed, Contingent or Unliquidated Claims.

In addition to the duties set forth in Local Bankruptcy Rule 4002-1(b), the chapter 11 debtor shall notify each creditor whose claim is scheduled as contingent, disputed, or unliquidated of that fact within 15 days after filing the schedule of assets and liabilities or within 15 days after addition of any creditors to the petition. Failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor. The debtor shall file a certificate of service with the clerk of court within three days after service has been made.

Rule 3003-1. Time for filing proof of claim or interest in a Chapter 11 case.

In a chapter 11 case, a proof of claim or interest shall be filed within 90 days after the date first set for the meeting of creditors pursuant to 11 U.S.C. § 341(a), except as otherwise ordered by the court.

CASE NOTES

Applicability to Divorce Action. — Where debtor listed pending divorce action against spouse appellee as a "chose in action" under the asset schedule, listing the value as "undetermined," and where debtor did not schedule spouse as a creditor, but did place her name and address on the original mailing matrix, appellee was not aware that her marital rights were being extinguished and, therefore, was not bound by the confirmed Chapter 11 plan. Hoffman v. Hoffman, 157 Bankr. 580 (E.D.N.C. 1992), aff'd, 998 Bankr. 1009 (1993).

Rule 3004-1. Filing of Claims by Debtor or Trustee.

In chapter 13 cases, if a creditor fails to file a timely proof of claim, the debtor or trustee may do so in the name of the creditor within 30 days after service by the chapter 13 trustee of the List of Claims Filed in the debtor's case. If the debtor or trustee does file a proof of claim on behalf of a creditor, the creditor may file an amended proof of claim pursuant to Rules 3002 or 3003(c) of the Federal Rules of Bankruptcy Procedure.

Rule 3010-1. Small dividends.

Rule 3010(b), Federal Rules of Bankruptcy Procedure, is amended to the extent that standing chapter 13 trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting until that creditor's dividends accumulate to $15. The decision as to whether to make smaller payments shall be solely in the discretion of the trustee as to what is in the best interest of the individual estate.

Rule 3012-1. Valuation of security.

After the § 341 meeting, a chapter 13 trustee may recommend the value of a creditor's security pursuant to a motion. Unless an objection is filed within 25 days after notice of the motion, the court may accept the recommendation of value for the purpose of distribution under the plan.

Rule 3070-1. Chapter 13-Payments.

(a) *Return of plan payments to debtor:* Upon conversion or dismissal of a chapter 13 case prior to confirmation, and unless the court orders otherwise, the standing trustee shall return to the debtor any payments made by the debtor under the proposed plan, less any claim under 11 U.S.C. 503(b).

(b) *Adequate protection payments to secured creditors and direct payments to lessors.*

(1) The debtor shall pay directly to the lessor all payments scheduled in a lease of personal property for that portion of the obligation that becomes due after the order for relief.

(2) Unless the chapter 13 plan provides that the entire secured claim is to be paid directly by the debtor to the creditor, the debtor shall pay to a creditor, who holds an allowed claim secured by personal property to the extent that the claim is attributable to the purchase of the property by the debtor, pre-confirmation adequate protection payments through the chapter 13 trustee; however, the court may order payments to be made by any other method.

(3) The presumptive adequate protection payment to be paid pursuant to Section 1326(a)(1) shall be at least one percent (1%) of the value of the subject collateral at the discretion of the Chapter 13 trustee as of the petition date. The valuation of the collateral shall be made solely by the Chapter 13 trustee, subject to further court consideration.

(4) All adequate protection payments paid through the Chapter 13 trustee shall be subject to an administrative fee in favor of the trustee equal to the trustee's statutory percentage commission then in effect, and the trustee shall collect the fee at the time of the distribution of the adequate protection payment to the claimant.

(5) The Chapter 13 trustee shall make adequate protection payments to the creditor at the address duly noted on the proof of claim. The use of the address shall be deemed proper notice of the creditors for purpose of the adequate protection payments.

(6) The Chapter 13 trustee shall not be required to make pre-confirmation adequate protection payments on account of any claim for which the secured value of the claim is less than $2,000.00.

(7) All adequate protection payments made through the Chapter 13 trustee shall be disbursed in the ordinary course of the trustee's business, according to the trustee's standard monthly distribution schedule, from funds in the case as they become available for distribution to claimants prior to or after entry of the Order Confirming Plan.

(8) Upon the dismissal or conversion of the Chapter 13 case to another chapter prior to confirmation, the Chapter 13 trustee shall make the pre-confirmation adequate protection payments, or portion thereof, from any funds available for that purpose received on or before the date of the entry of the order of dismissal or conversion, to creditors that have filed proofs of claim that have been deemed allowed pursuant to Section 502(a), prior to the date of the dismissal or conversion.

(9) Subsections (b)(2) and (b)(3) of this rule shall not apply if the adequate protection is provided by means other than by direct payments to the holder of the secured claim.

PART IV. THE DEBTOR: DUTIES AND BENEFITS

Rule 4001-1. Relief from the Automatic Stay.

(a) *Standing modification.* The automatic stay provided in 11 U.S.C. § 362(a) is modified as follows:

(1) *Chapter 7.*

(A) Secured Creditors. The automatic stay shall be modified as provided in Local Bankruptcy Rule 4001-2(a).

(B) Internal Revenue Service. The Internal Revenue Service is authorized to:

(i) make income tax refunds, in the ordinary course of business, directly to the debtors unless otherwise ordered by the court or otherwise instructed by the chapter 7 trustee;

(ii) offset against any refund due a debtor any taxes due the United States government pursuant to 11 U.S.C. § 553;

(iii) assess any tax liability satisfied by offsetting any refunds, when such liability has not been assessed previously; and

(iv) assess tax liabilities shown on voluntarily filed returns and other agreed-to liabilities.

(2) *Chapter 11.*

(A) *Internal Revenue Service.*

(i) The Internal Revenue Service may contact the debtor or the trustee and the debtor's depository to verify that all required tax deposits are being made and reported and that all tax returns are being filed and remittances paid in the manner prescribed by law.

(ii) The debtor or trustee and the debtor's designated depository shall assist the Internal Revenue Service with the monitoring and verification of the provisions of this rule.

(B) *North Carolina Department of Revenue.*

(i) The North Carolina Department of Revenue may contact the debtor or the trustee and the debtor's depository to verify that all required tax deposits are being made and reported and that all tax returns are being filed and remittances paid in the manner prescribed by law.

(ii) The debtor or trustee and the debtor's designated depository shall assist the North Carolina Department of Revenue with the monitoring and verification of the provisions of this rule.

(3) *Chapter 12.*

(A) *Internal Revenue Service.*

(i) The Internal Revenue Service may contact the debtor or the trustee and the debtor's depository to verify that all required tax deposits are being made and reported and that all tax returns are being filed and remittances paid in the manner prescribed by law.

(ii) The debtor or trustee and the debtor's designated depository shall assist the Internal Revenue Service with the monitoring and verification of the provisions of this rule.

(B) North Carolina Department of Revenue.

(i) The North Carolina Department of Revenue may contact the debtor or the trustee and the debtor's depository to verify that all required tax deposits are being made and reported and that all tax returns are being filed and remittances paid in the manner prescribed by law.

(ii) The debtor or trustee and the debtor's designated depository shall assist the North Carolina Department of Revenue with the monitoring and verification of the provisions of this rule.

(4) *Chapter 13.*

(A) Secured Creditors. Secured creditors may:

(i) contact the debtor about the status of insurance coverage on property securing a claim; and

(ii) contact the debtor about any post confirmation payment in default if a confirmed plan provides for direct payments by the debtor to creditors.

(B) Internal Revenue Service. The Internal Revenue Service is authorized to:

(i) make income tax refunds, in the ordinary course of business, directly to the debtors unless otherwise ordered by the court or otherwise instructed by the standing chapter 13 trustee;

(ii) offset against any refund due a debtor any taxes due the United States government pursuant to 11 U.S.C. § 553;

(iii) assess any tax liability satisfied by offsetting any refunds, when such liability has not been assessed previously; and

(iv) assess tax liabilities shown on voluntarily filed returns and other agreed-to liabilities.

(b) *Relief with respect to surrendered property in Chapter 13 cases.* If a chapter 13 debtor's plan provides that property is to be surrendered to a secured creditor, the order confirming the plan may provide for the modification of the automatic stay and co-debtor stay with respect to the property.

(c) *Motion for relief from automatic stay.*

(1) Secured creditors seeking relief from the automatic stay on grounds of post-petition default by the debtor must specify in a motion that they seek relief on grounds of the debtor's default and must itemize, with specificity, all amounts alleged to be past due.

(2) If no response is filed, the motion may be granted without a hearing. If a response is filed, a debtor must comply with the requirements of Local Bankruptcy

Rule 9014-1(f). Upon the debtor's request, the creditor shall immediately transmit the debtor's payment history to counsel for the debtor (or to the pro se debtor) by electronic or facsimile transmission or other expedited means.

(d) *Motion for continuance or imposition of automatic stay.* The court may, in its discretion, rule on a motion for continuation or imposition of the automatic stay under 11 U.S.C. § 362(c)(3)(B) and § 362(c)(4)(B) without hearing if:

(1) the debtor files a motion for continuation of the automatic stay within 5 days of the petition date;

(2) no objection is filed by a party in interest;

(3) the motion is accompanied by a notice of motion and the debtor's affidavit with sufficient facts to support the motion; and

(4) the motion and accompanying documents are timely served on all creditors and the trustee, if one has been appointed, contemporaneous with the filing of the motion.

Rule 4001-2. Secured Creditor Duties.

(a) A secured creditor may send all payment coupons or statements of account that the creditor provides to its non-bankruptcy customers as follows:

(1) To chapter 7 debtors who have indicated, in their statement of intention, their intent to retain the secured creditor's collateral by complying with the terms of the contract.

(2) To chapter 13 debtors who have indicated in their proposed chapter 13 plan their intent to retain the secured creditor's collateral by complying with the terms of the contract.

(b) The transmission of the payment coupons or statements of account shall not violate the automatic stay or the debtor's discharge injunction.

(c) If a secured creditor, in its ordinary course of business, does not provide payment coupons and statements of account, then upon request by the debtor, that secured creditor shall provide the debtor with a telephone number or other means to access account information that would normally be provided by the payment coupons or statements of account.

(d) A secured creditor shall respond promptly to a trustee's or debtor's reasonable requests for account information.

Rule 4002-1. Debtor duties.

(a) *Chapter 7 debtor — Duties.* The following shall apply in chapter 7 cases. The Chapter 7 debtor shall comply with the requirements of Local Bankruptcy Rules 1007-1 and 1007-3, regarding statements of intention.

(b) *Chapter 11 debtor — Duties.* The following shall apply in chapter 11 cases.

(1) *Notice of disputed, contingent or unliquidated claims.* The debtor shall notify each creditor whose claim is scheduled as contingent, disputed or unliquidated in compliance with the requirements of Local Bankruptcy Rule 3002-1.

(2) *Monthly report.*

(A) Except as provided in small business cases, Federal Rules of Bankruptcy Procedure 2015(a)(6), effective December 1, 2008, the debtor shall file with the clerk monthly accountings, the first report being due within 30 days following the end of the month in which the petition was filed or date of conversion from another chapter, and subsequent reports on or before the the thirtieth day of each month thereafter.

(B) The debtor shall transmit a copy of all monthly reports to the bankruptcy administrator, attorney and the chair for the unsecured creditors committee. That report shall be in a format prescribed by the bankruptcy administrator.

(3) *Books of account.*

(A) The debtor shall close the present books of account as of the close of business on the date on which the petition is filed and open new books of account and a bank account in a depository acceptable to the bankruptcy administrator and meeting the requirements of 11 U.S.C. § 345(b) with respect to amounts on deposit exceeding $100,000.00 as of the opening of business on the next succeeding business day.

(B) In the new books of account, the debtor shall keep proper records of earnings, expenses, receipts and disbursements, and all obligations incurred and business transactions. The debtor shall preserve proper vouchers for all payments made on account of the disbursements.

(C) If the debtor is authorized to use cash collateral, separate cash collateral accounts must be established and maintained pursuant to 11 U.S.C. § 363(c)(4).

(4) *Proof of insurance coverage.*

(A) The debtor shall keep the property of the debtor and the bankruptcy estate insured in a manner and to the extent as may be deemed necessary and prudent with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear.

(B) Within five days of the filing of the petition, or date of conversion from another chapter, the debtor shall file with the bankruptcy administrator a verified statement or written evidence that workers' compensation, general liability, fire, theft and motor vehicle insurance are in full force and effect, together with all other insurance coverage ordinarily used in the debtor's operations.

(C) Monthly bank statements shall be transmitted to the bankruptcy administrator at the time the monthly report is filed with the court. However, the monthly bank statements shall not be filed with the court.

(5) *Tax accounts.*

(A) The debtor shall segregate and hold separate from all other funds, all monies withheld from employees or collected from others for taxes, including social security taxes, under any law of the United States or any state or subdivision thereof.

(B) The debtor shall deposit the funds withheld or collected, together with the debtor's share of social security taxes, in a separate bank account simultaneously with the collection or withholding. The debtor shall pay from the bank account to the appropriate taxing authority the amounts due at the times and in the manner prescribed by law.

(6) *Banking institution.* The debtor shall advise the bankruptcy administrator of the name of the bank to be used as the debtor's depository within 10 days of the filing of the petition or date of conversion from another chapter.

(7) *Filing of plan and disclosure statement.* The debtor shall file a plan of reorganization and a disclosure statement within 120 days of the date of the filing of the petition commencing the case or date of conversion from another chapter, unless another deadline is set by the court.

(8) *Physical inventory.* The debtor shall procure a physical inventory, if applicable, upon the filing of the petition and file the inventory with the bankruptcy administrator within 30 days of the filing of the petition, date of conversion from another chapter, or such other time as the court may direct.

(9) *Projected operating statement.* The debtor shall file with the bankruptcy administrator a projected operating statement for the next 30 days of operation under chapter 11 within 10 business days of the filing of the petition commencing the case or date of conversion from another chapter. The statement must contain:

(A) the estimated costs of operation for the next succeeding 30 days;

(B) the estimated profit or loss for the period;

(C) the amount of cash available for the operation;

(D) how the debtor intends to fund the cost of operation for the next 30 days; and

(E) any additional information that is pertinent to determine the desirability of continuing the debtor's business.

(10) *Relationship with secured creditors and unsecured creditors' committee.* The debtor shall promptly respond to reasonable inquiries of secured creditors, the unsecured creditors' committee, and any court appointed consultant.

(11) *Payment of judicial conference quarterly fee.* In all cases filed after April 1, 2002, the debtor shall promptly remit quarterly fees to the clerk, which fee shall be calculated on the graduated scale as prescribed by 28 U.S.C. § 1930(a)(7), based upon the total sum of all disbursements made during a calendar quarter until the case is either converted to a case under another chapter or closed.

(c) *Chapter 11 — Debtor prohibitions.*

(1) *Payment to principals.* The chapter 11 debtor shall not compensate or remunerate any of its partners, officers, directors or shareholders in any manner, prior to confirmation of a plan of reorganization or prior to approval of the court, except as provided in the interim exception under subparagraph (c)(1)(B) herein.

(A) An application for approval of compensation must be signed under oath by an officer of the debtor and must set forth the following:

(i) the name and proposed position of the individual sought to be employed along with a detailed description of the duties the individual is to perform, the number of hours the individual will devote to those duties each week, and the reasons why the employment of the individual is necessary to the successful reorganization of the debtor;

(ii) the amount of compensation sought on a weekly or monthly basis and details of all perquisites, benefits and consideration of any kind the individual is to receive. Examples include use of company vehicles, payment of life or health insurance premiums, reimbursement of expenses; and

(iii) the salary history of the individual to be employed for the year immediately preceding the filing of the petition. Supporting documentary evidence thereof shall be provided directly to the bankruptcy administrator.

(B) If the debtor has filed an application for an interim payment for post-petition services which substantially conforms to the requirements of subsection (c)(1)(A) above, the debtor may make an interim payment in an amount not to exceed the ordinary pre-petition salary or wages for a 14 day period to those individuals who were employed on the date of the filing of the bankruptcy petition, or date of conversion from another chapter, and for whom approval is being sought.

(C) The court may reconsider orders to compensate principals sua sponte "On the court's own motion." or at the request of the bankruptcy administrator, any creditor or other party in interest.

(2) *Payment of pre-petition debt.* The debtor shall pay pre-petition unsecured debt including pre-petition wages without approval of the court.

(d) *Chapter 12 — Debtor duties.*

(1) *Schedules and statements required.* The debtor sahll comply with the requirements of Local Bankruptcy Rule 1007-1.

(2) *Monthly reports.* The debtor shall file with the chapter 12 trustee monthly reports, the first report being due within 30 days following the end of the month in which the petition is filed or date of conversion from another chapter. Subsequent reports are due no later than the fifteenth day of each month thereafter. The reports shall contain:

(A) monthly receipts from every source;
(B) monthly disbursements by accounting classification;
(C) expenses charged and not paid;
(D) crop inventory (if applicable);
(E) livestock inventory (if applicable);
(F) tax deposit statement (if applicable).

(3) *Books of account.*

(A) The debtor shall close the present books of account as of the close of business on the date on which the petition is filed, or date of conversion from another chapter, and open new books of account and a bank account as of the opening of business on the next succeeding business day.

(B) In the new books of account, the debtor shall keep proper records of earnings, expenses, receipts, disbursements, and all obligations incurred and transactions had in the operation of the business. The debtor shall preserve proper vouchers for all payments made on account of the disbursements.

(4) *Insurance coverage.* The debtor shall keep the property of the debtor and the bankruptcy estate insured in a manner and to the extent as may be deemed necessary with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear.

(5) *Tax accounts.*

(A) The debtor shall segregate and hold separate and apart from all other funds, all monies withheld from employees or collected from others for taxes, including social security taxes, under any law of the United States or any state or subdivision thereof.

(B) The debtor shall deposit the funds so withheld or collected, together with the debtor's share of social security taxes, in a separate bank account simultaneously with the collection or withholding. The debtor shall pay from the bank account to the appropriate taxing authorities the amounts due at the times and in the manner prescribed by law.

(6) *Banking institution.* The debtor shall advise the trustee of the name of the bank to be used as the debtor's depository within 10 days of the filing of the petition commencing the case under chapter 12 or date of conversion from another chapter.

(7) *Filing of plan.* The debtor shall file a plan of reorganization within 90 days of the order for relief pursuant to 11 U.S.C. § 1221.

(8) *Relationship with creditors.* The debtor shall promptly respond to reasonable inquiries of creditors.

(e) *Chapter 12 — Debtor prohibitions.*

(1) *Payments to principals.* The debtor shall not compensate or remunerate any of its partners, officers, directors or shareholders in any manner, prior to confirmation of a plan of reorganization or prior approval of the court, except as provided in the interim exception under subparagraph (e)(1)(B) herein.

(A) An application for approval of compensation must be signed under oath by an officer of the debtor and must set forth the following:

(i) the name and proposed position of the individual sought to be employed along with a detailed description of the duties the individual is to perform, the number of hours the individual will devote to those duties each week, and the reasons why the employment of the individual is necessary to the successful reorganization of the debtor;

(ii) the amount of compensation sought on a weekly or monthly basis and details of all perquisites, benefits and consideration of any kind the individual is to receive, (examples include use of company vehicles, payment of life or health insurance premiums, and reimbursement of expenses); and

(iii) the salary history of the individual to be employed for the year immediately preceding the filing of the petition. Supporting documentary evidence thereof shall be provided directly to the bankruptcy administrator.

(B) If the debtor has filed an application for an interim payment for post-petition services which substantially conforms to the requirements of subsection (e)(1)(A) above, the debtor may make an interim payment in an amount not to exceed the ordinary pre-petition salary or wages for a 14 day period to those individuals who were employed on the date of the filing of the bankruptcy petition, or date of conversion from another chapter, and for whom approval is being sought.

(C) The court may reconsider orders to compensate principals *sua sponte* "On the court's own motion." or at the request of the bankruptcy administrator, any creditor or other party in interest.

(2) *Payment of pre-petition debt.* The debtor shall not pay pre-petition unsecured debt including pre-petition wages without approval of the court.

(f) *Chapter 13 — Debtor duties.* The following shall apply in chapter 13 cases.

(1) *Schedules and statements required.* A debtor in a case under chapter 13 shall comply with the requirements of Local Bankruptcy Rule 1007-1.

(2) *Payments under plan.* The debtor shall begin making the payments called for in the proposed plan on the first day of the first month following the month in which the chapter 13 case is filed. The payments shall be made as directed by the standing chapter 13 trustee.

(3) *Direct payments to creditors.* If secured claims are to be paid outside the plan, the debtor shall continue to make the regular scheduled payments to the secured creditor prior to confirmation.

(4) *Disposition of property.* The debtor shall not dispose of any non-exempt property having a fair market value of more than $5,000 by sale or otherwise without prior approval of the trustee and an order of the court.

(5) *Obtaining credit.* The debtor shall not purchase additional property or incur additional debt of $7,500 or more without prior approval from the court. The debtor must give notice of the application to purchase additional property or to incur additional debt to the chapter 13 trustee, who must respond within five days of receipt of the notice. If no objection is filed, the court may approve the application without a hearing.

(6) *Adequate protection.* When a case is dismissed prior to confirmation, the court may require the debtor to provide adequate protection to one or more secured creditors by directing that the chapter 13 trustee make adequate protection payments from funds received under paragraph (f)(2) (Payments Under Plan) of this rule.

(7) *Insurance Coverage.*

(A) The debtor shall keep the property of the debtor and the bankruptcy estate insured in a manner and to the extent as may be deemed necessary, with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear.

(B) The debtor shall ensure that no vehicle that is property of the debtor or property of the estate is driven unless covered by collision insurance.

CASE NOTES

Cited in In re Neal, 106 Bankr. 90 (Bankr. E.D.N.C. 1989).

Rule 4003-1. Exemptions.

(a) *Form:* If the debtor is an individual and desires to claim exemptions, the debtor shall file a claim for exempt property pursuant to 11 U.S.C. § 522(b)(1). If the debtor is entitled to claim exemptions under North Carolina law the debtor shall use the local form, Schedule C-1, Property Claimed as Exempt. If the debtor is entitled to claim exemptions under Federal bankruptcy law or the law of a State other than North Carolina the debtor shall use the local form, Schedule C-2, Property Claimed as Exempt.

(b) *Extension of time for objections to exemptions.* The court may grant any party in interest an extension of time for objecting to the debtor's claim of exempt property. The request for extension must be by motion which must contain the reasons for requesting the extension. The motion must be filed before the time for objecting expires.

(c) *Claiming exemptions under law other than that of North Carolina:* Any claim of exemptions under Federal bankruptcy law or the law of a State other than North Carolina requires the debtor to use the local form, Schedule C-2, Property Claimed as Exempt. As required by that local form, the debtor shall provide the specific constitutional, statutory, or case law citation supporting each claim of exemption and shall specify the exact dates and addresses of the debtor's domicile(s) during the 730 days preceding the date of the filing of the bankruptcy petition.

PART V. COURTS AND CLERKS

Rule 5001-2. Clerk — Office Location and Hours.

The office of the clerk of court, with the clerk of court or a deputy clerk in attendance, shall be open to the public from 8:30 a.m. until 4:30 p.m. on all days except Saturdays, Sundays and the legal holidays listed in Rule 6(a), Federal Rules of Civil Procedure, or as otherwise ordered.

Rule 5003-1. Clerk — General Authority.

The clerk of court is authorized to enter the orders and judgments listed below without further direction of the court. However, the action may be suspended, altered or rescinded by the court for cause shown:

(1) consent orders for the substitution of attorneys;

(2) orders setting status conferences and preliminary conferences;

(3) orders extending for a reasonable amount of time the period within which to file a response or answer to a complaint (first request only);

(4) orders continuing trial with consent of all parties;

(5) stipulations of dismissal or consent orders dismissing a proceeding;

(6) judgments by default as provided for in Rule 55(a) and 55(b)(1) of the Federal Rules of Civil Procedure; and

(7) orders canceling liability on bonds.

Rule 5003-4. Register of Mailing Addresses of Federal and State Governmental Units.

The Register of Mailing Addresses of Federal and State Governmental Units required by Rule 5003, Federal Rules of Bankruptcy Procedure, is contained in the Administrative Guide to Practice and Procedure and is posted on the court's website at **www.nceb.uscourts.gov**.

Rule 5005-1. Filing Paper Documents — Requirements.

(a) *Paper documents filed with the clerk:* All paper documents filed by pro se individuals and attorneys who have been granted an exemption from electronic filing, including proofs of claim, pleadings, and proposed orders shall be tendered to the clerk of court rather than directly to the judge, unless otherwise specifically directed.

(b) *Filing by facsimile:*

(1) *Filing:* Pro se individuals and attorneys who have been granted an exemption fromelectronic filing may file the following paper documents by facsimile transmission to the clerk.

(A) motions for a continuance stipulated to by all parties;

(B) withdrawal of motions that are scheduled for hearing; and

(C) any other filings allowed by the court.

(2) *Faxed document serves as original:* A paper document filed by facsimile serves as an original, and subjects the signer to the same penalties as an original document, including penalties of Rule 9011, Federal Rules of Bankruptcy Procedure.

(c) *Paper exhibits or attachments containing excerpted material:* Any exhibit or attachment to any paper document filed under these rules must contain only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. A party filing excerpts of documents as exhibits or attachments under this rule may supplement the excerpt without prejudice to timely file additional excerpts or the complete document. Responding parties likewise may timely file excerpts or the complete document to the extent that the excerpts or document are directly germane to the matter under consideration. Upon request by any party in interest or the court, the complete document containing any such excerpt shall be made available to both the party making the request and the court, unless otherwise ordered.

Rule 5005-2. Filing Paper Documents — Number of Copies.

Any person requesting file stamped copies of paper documents filed in accordance with Local Bankruptcy Rule 5005-1 above must submit a copy, together with a stamped, self-addressed envelope.

Rule 5005-3. Filing Paper Documents — Size of Papers, Two-Sided Documents.

(a) *Paper size:* The Judicial Conference of the United States has adopted 8½ x 11 inch letter size paper as the standard for use throughout the federal judiciary. All documents and other papers submitted to this court must conform to this standard.

(b) *Attachments:* Any attachments to a document which are necessary to an understanding of the matters set forth in the document must conform to the standard paper size unless advance permission is sought to submit oversized materials.

(c) *Two-sided documents:* No document submitted to the court shall have text on both sides of the paper.

Rule 5005-4. Electronic Case Filing.

Local Bankruptcy Rule 5005-4 shall be read in conjunction with the Administrative Guide to Practice and Procedure. The guide is available from the Office of the Clerk of the United States Bankruptcy Court for the Eastern District of North Carolina and is maintained on the court's web site at: **www.nceb.uscourts.gov**. In the event of a conflict between the Local Bankruptcy Rules and the Administrative Guide to Practice and Procedure, the Local Bankruptcy Rules shall control.

Rule 5005-4(1). Assignment to System and Filing Requirements.

(a) *Assignment:* All cases are assigned to the Electronic Case Filing System ("ECF System").

(b) *Filing:* All petitions, motions, memoranda of law, and other pleadings or documents required to be filed with the court in connection with the case must be electronically filed except as provided in these rules or in exceptional circumstances preventing a Filing User from filing electronically.

(c) *Exception to Filing Requirement:* Notwithstanding the foregoing, pro se individuals and attorneys who have been granted an exemption from electronic filing are not required to electronically file pleadings and other documents in cases assigned to the ECF System, but are required to comply with Local Bankruptcy Rules 5005-2 and 5005-3.

Rule 5005-4(2). Eligibility, Registration and Passwords.

(a) *Eligibility and registration.* Attorneys admitted to the bar of this court, the bankruptcy administrator, private trustees, and others as the court deems appropriate, may register as Filing Users of the court's Electronic Case Filing System. Registration is in the form prescribed by and available from the clerk. The registration form also is contained in the Administrative Guide to Electronic Filing maintained by the clerk and published on the court's web site.

(b) *Electronic Notice and Service; Waivers:* As to all documents properly filed and served electronically, registration as a Filing User constitutes (1) a waiver of the right to receive notice or service by first class mail or personal delivery; and (2) consent to electronic service pursuant to Local Bankruptcy Rule 5005-4(9), except with regard to service of a summons and complaint under Rule 7004 of the Federal Rules of Bankruptcy Procedure, a motion initiating a contested matter under Rule 9014 of the Federal Rules of Bankruptcy Procedure, and with regard to any other applicable rule or statute pursuant to which service by mail is not permitted. Waiver and consent pursuant to this subsection (c) applies to notice of the entry of an order or judgment under Rule 9022 of the Federal Rules of Bankruptcy Procedure.

Rule 5005-4(3). Consequences of Electronic Filing; Deadlines.

(a) *Filing.* Electronic transmission of a document to the Electronic Case Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the clerk, constitutes filing of the document for all purposes of the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of this court, and constitutes entry of the document on the docket kept by the clerk under Rule 5003 of the Federal Rules of Bankruptcy Procedure.

(b) *Official Record.* When a document has been filed electronically or imaged by the court, the official record is the electronic recording of the document as stored by the clerk, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing.

(c) *Deadlines Unchanged by Electronic Filing.* Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before 12:00 midnight, Eastern Time, in order to be considered timely filed that day.

Rule 5005-4(4). Entry of Court Orders; Issuance of Electronic Summons.

(a) *Filing of Court Orders; Effect of Electronic Filing on Court Orders.* All orders or other documents generated by the court and filed electronically, with the electronic signature of a judge, shall have the same force and effect as if the judge had affixed the judge's signature to a paper copy of the order.

(b) *Submission of Documents for Judge's Signature.* Any document submitted for a judge's signature in a case assigned to the ECF System must be submitted electronically to the clerk's office in the format specified by the Administrative Guide to Practice and Procedure.

(c) *Issuance of electronic summons.* The clerk may sign, seal, and issue a summons electronically, although a summons may not be served electronically.

Rule 5005-4(5). Format; Attachments and Exhibits.

(a) All documents filed electronically within the ECF System are subject to the same rules pertaining to format as documents filed in paper form, including but not limited to Local Bankruptcy Rule 5005-3, and in the Administrative Guide to Practice and Procedure.

(b) Filing Users must submit, in electronic form, all documents referenced as exhibits or attachments as provided in Local Bankruptcy Rule 5005-1(d), unless the court permits paper filing pursuant to Local Bankruptcy Rules 5005-1, 5005-2 and 5005-3. Excerpted material must be clearly and prominently identified as such.

Rule 5005-4(6). Sealed Documents.

(a) In connection with the filing of any document in an action assigned to the ECF system, any person may apply by motion for an order allowing the filing of such document under seal, or limiting the electronic access to, any specifically-identified document as provided by 11 U.S.C. § 107 or as authorized by law.

(b) A motion to file a document under seal or subject to restricted access may be filed electronically unless prohibited by law. A court order authorizing the filing of a document under seal or subject to restricted access may be filed electronically unless prohibited by law.

(c) Any document ordered to be placed under seal must be filed in paper form, and not electronically, unless specifically authorized by the court. A paper copy of the order authorizing the filing of documents under seal must be attached to the documents and delivered to the clerk, who will place the order and the sealed documents in the safe located in the clerk's office under restricted access until further order of the court.

Rule 5005-4(7). Original Signatures and Retention Requirements.

(a) A Filing User must obtain original signatures prior to filing on all electronically fileddocuments that require original signatures from any person other than the Filing User (e.g., petitions, lists, schedules, statements, amendments, affidavits, verifications, and otherdocuments that require verification under Fed. R. Bankr. P. 1008 or an unsworn declaration asprovided in 28 U.S.C. § 1746), which documents must be maintained by the Filing Userin paper form, bearing the original signatures, for four years after the closing of the case orproceeding in which the documents were filed. Upon the court's request, the Filing User mustprovide the original signed documents for review.

(b) Except as provided above when original signatures are required on a document, a Filing User may electronically file documents (including the submission of proposed consent orders) signed by persons other than the Filing User without obtaining the original signature of such persons on the document, provided that the Filing User first has confirmed that the content of the document is acceptable to all persons required to sign the document and has obtained in writing proof that the document has been signed, or that each signature is authorized, by all persons (e.g., a faxed signature, scanned signature, or e-mail authorized signature). The Filing User shall retain the writing evidencing or authorizing each signature on the document for four years after the closing of the case or proceeding in which the documents were filed.Upon the court's request, the Filing User must provide the writing(s) evidencing or authorizing the signature(s) on the document for review.

Rule 5005-4(8). Signatures and Certification.

(a) *Electronic Filing Constitutes Signature and Certification.* The use of the login and password of the Filing User to electronically file any petition, pleading, motion, claim, or other document shall constitute the signature of that Filing User on the electronically filed document for purposes of the Federal Rules of Bankruptcy Procedure, including Rule 9011, the Local Bankruptcy Rules of this court, and any other purpose for which a signature is required in connection with proceedings before this court. Use of the login and password also shall constitute certification by the Filing User, and by any agent authorized by the Filing User to use the login and password, that: (1) all persons indicated to have signed the document have actually executed the original or a copy of the original, or have approved the content of and authorized their signature on the document, prior to electronic filing; and (2) the Filing User has authorized the electronic filing of the executed document.

(b) *Use of Login/Password.* No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an agent of the Filing User authorized to use such login and password.

Note. — Subparagraph C is being moved to the Administrative Code.

Rule 5005-4(9). Service of Documents by Electronic or Conventional Means; Calculation of Response Time.

(a) *Certificate of service required.* A Filing User who electronically files a pleading or other document in a case assigned to the ECF System must include a certificate of service indicating how service was made.

(b) *Service of notice of electronic filing to filing users.* Service of an electronically filed document on other Filing Users may be made by transmitting or causing transmission of a "Notice of Electronic Filing" to those other Filing Users. Electronic service of process is not effective for purposes of obtaining service of process under Rules 7001 or 9014, Federal Rules of Bankruptcy Procedure.

(c) *Conventional service to documents and notice to non-consenting parties.* Parties who are entitled to service of a document but who have not consented to electronic service must be served with a paper copy of the document in compliance with the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules.

(d) *Calculation of Response Time.* Rule 9006(f) of the Federal Rules of Bankruptcy Procedure applies to the calculation of deadlines for responses to electronically filed pleadings and other documents.

Rule 5005-4(10). Technical Failures.

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Rule 5005-4(11). Limitation on Public Access.

Material filed on the ECF System shall not be accessed or downloaded for any purpose inconsistent with the privacy concerns of any person.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6004-1. Sale of Estate Property.

Following a public sale, the trustee shall file a report of sale and serve the report on the debtor and the bankruptcy administrator.The report shall include an itemized statement of the property sold, list of bidders, the name of each purchaser, and the price received for each item or lot or for the property as a whole, if sold in bulk, and shall state the date, time, and place of the sale. The report shall include a calculation of compensation allowable under the order of employment and copies of the sale advertisement along with a summary listing of all advertising expenses, sign expenses, shipping costs and postage expenses.

Rule 6005-1. Appraisers and auctioneers.

(a) *Employment of auctioneer:* Unless otherwise ordered by the court, an auctioneer shall be paid pursuant to the scale provided in the Administrative Guide. Ordinary expenses of the sale shall be included in the commission scale, and other expenses may be reimbursed as allowed by the court.

(b) *Conditions precedent to employment.* The trustee may employ and compensate an auctioneer without application to the court on the basis set out in (a) above only if the following conditions are satisfied in advance:

(1) the auctioneer to be employed under subsection (a) above must have been employed as an auctioneer in a chapter 7 case in this district, by order of this court, within the prior 12 months;

(2) the auctioneer must be licensed and in good standing with the North Carolina Auctioneer's Commission consistent with North Carolina General Statute §§ 85B-3 and 4;

(3) the auctioneer must execute and deliver to the trustee the same affidavit that would be required in support of an application for employment of auctioneer otherwise filed with the court;

(4) the auctioneer must not have been censured or suspended; and

(5) the affidavit executed by the auctioneer must affirmatively set out compliance with the conditions of subsections (2) and (4) above.

The trustee shall be entitled to rely on the truth and accuracy of the affidavit submitted by the auctioneer.

(c) *Report by trustee.* The trustee shall prepare a report of sale that discloses fees paid to the auctioneer, and the report shall be accompanied by the auctioneer's affidavit. The trustee must file the report of sale with the clerk and serve copies on the bankruptcy administrator.

(d) *Report by auctioneer.* An auctioneer employed to conduct a sale on behalf of the bankruptcy estate must file a report of sale following the conclusion of any sale within the time and in the format as prescribed by the bankruptcy administrator.

Rule 6070-1. Tax Returns and Tax Refunds.

Tax returns and tax refunds, and their treatment in the context of the automatic stay provided in 11 U.S.C. § 362(a), are addressed in Local Bankruptcy Rule 4001-1(a).

PART VII. ADVERSARY PROCEEDINGS

Rule 7005-1. Serving and Filing Pleadings and Other Papers.

Electronic service through the court's transmission facilities is allowed as provided in Local Bankruptcy Rule 5005-4 or as the party served may otherwise consent in writing. If the party making service learns that the attempted electronic service did not reach the person to be served, the party making service shall cause the pleading to be re-served by electronic means or served by other acceptable means of service as provided in Rule 7005(b) of the Federal Rules of Bankruptcy Procedure.

Rule 7007-1. Motion Practice in Adversary Proceedings.

(a) *General requirements.* All motions shall state with particularity the facts supporting the motion and shall state the relief requested. All motions, except those seeking a shortening or extension of any time period, shall be filed with an accompanying memorandum.

(b) *Responses to motions.* Any party may file a written response to any motion within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable rules of bankruptcy procedure. The response may be a memorandum and may be accompanied by affidavits or other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum. In the event no response is filed, the court may proceed to rule on the motion.

(c) *Hearing on motions.* Hearings on motions may be ordered by the court in its discretion.

Rule 7016-1. Pretrial Procedures.

(a) *Preliminary pretrial conference.*

(1) *Scheduling and notice.* A preliminary pretrial conference may be scheduled at the discretion of the court. The clerk of court shall give at least 20 days notice of the conference.

(2) *Preparation by counsel for preliminary pretrial conference.* Counsel shall be prepared to discuss at the conference the following:

(A) the issues raised by the pleadings;

(B) issues concerning jurisdiction, venue, or the authority of the bankruptcy court;

(C) whether the parties, if the proceeding is not a core proceeding, have consented to the bankruptcy judge hearing and determining the proceeding pursuant to 28 U.S.C. § 157(c)(2);

(D) the disposition of pending motions;

(E) the necessity, desirability, and timing of amendments to pleadings, joinder of additional parties, the filing of additional motions and discovery;

(F) the timing and form of disclosures under Rule 26(a)(1) of the Federal Rules of Civil Procedure, including a statement of when disclosures under (a)(1) were made or should be made;

(G) the amount of time that will be needed for discovery;

(H) changes that should be made in the limitations on discovery imposed by the Federal Rules of Civil Procedure;

(I) whether use of expert witnesses is contemplated, and if so, whether and when the disclosure of expert information as required by Rule 26(a)(2) of the Federal Rules of Civil Procedure should be required;

(J) if a jury demand has been made in a core proceeding, whether the parties consent to a jury trial in the bankruptcy court;

(K) whether the parties have engaged in settlement discussions;

(L) whether the parties have considered voluntary or court ordered mediation and/or arbitration;

(M) the need for additional pretrial conferences;

(N) whether there are witnesses whose testimony could be accommodated at deposition or trial by video conferencing, and if so, what stipulations can be made regarding the appearance of witnesses by video conferencing.

(3) *Preliminary pretrial conference report.* At least one week prior to the preliminary pretrial conference, counsel shall file with the clerk of court a joint report containing information concerning all the items to be discussed at the preliminary pretrial conference.

(4) *Disclosures.* Unless counsel agree to disclosures at an earlier date, disclosures required to be made by Rule 26(a) and (b), Federal Rules of Civil Procedure, shall be made at the time and under the circumstances directed by the court in the scheduling order entered after receipt of the preliminary pretrial conference report.

(b) *Final pretrial conference.*

(1) *Scheduling and notice.* A final pretrial conference may be scheduled at the discretion of the court. The clerk of court shall give at least 30 days notice of the conference.

(2) *Preparation by counsel for final pretrial conference.* At least 10 days prior to the final pretrial conference, trial counsel for each of the parties shall confer and prepare a proposed final pretrial order. In the event no pretrial conference is scheduled, counsel shall confer, prepare and submit a proposed final pretrial order to the court no later than 10 days prior to the scheduled trial. It is the duty of counsel for the plaintiff to arrange this conference. The conference of attorneys shall be held in a mutually agreeable location or may be conducted by telephone conference. Each counsel must bring to the conference or be responsible for the exchange of copies of exhibits to be introduced into evidence, lists of witnesses to be called and designations of discovery material to be used at the trial. The disclosure of witnesses and exhibits under this section supersedes the requirements of timing and format otherwise required by Rule 26(a)(3), Federal Rules of Civil Procedure.

(c) *Pretrial order.* The pretrial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by Roman numerals, as indicated:

(1) *I. Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(2) *II. Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pretrial order are deemed abandoned.

(3) *III. Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Local Bankruptcy Rule 7016-1(b)(2). The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pretrial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pretrial order.

(4) *IV. Designation of pleadings and discovery materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and requests for admissions that each party may offer at trial by reference to document, volume, page, and line. Objections by opposing counsel must be noted by document, volume, page and line, and reasons for objections must be stated.

(5) *V. Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony. A pretrial order should be submitted in detail sufficient to comply with these rules. A sample pretrial order is in the Administrative Guide to Practice and Procedure.

(d) *Pretrial conference.*

(1) The purpose of the pretrial conference is to resolve any disputes concerning the contents of the pretrial order. At the pretrial conference, counsel should be prepared to present to the court all information and documentation necessary for completion of the pretrial order. Failure to do so shall result in the sanctions provided by this rule.

(2) Rule 16(f) of the Federal Rules of Civil Procedure which provides for sanctions if a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, is applicable to adversary proceedings pursuant to Rule 7016, Federal Rules of Bankruptcy Procedure.

Rule 7016-2. Trials.

(a) *Opening statements.* At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) may, without argument and in such reasonable time as the court allows, state to the court the following:

(1) the substance of the claim, counterclaim, cross claim or defense; and

(2) what counsel contends the evidence will show.

Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

(b) *Witnesses.* Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to the person that arise subsequent to the request for release. The court, in its discretion and in the interest of justice, may permit a party to call and examine a witness not listed in the final pretrial order.

(c) *Exhibits.*

(1) All exhibits shall be pre-marked with stickers with sequential numbers as listed in the pretrial order.

(2) Copies of all exhibits, properly bound, shall be provided to the court at the beginning of the trial.

(3) The original exhibit shall bear a sticker. After receipt into evidence, it shall remain in the custody of the courtroom deputy except when being used by a witness.

(4) Copies of all exhibits shall bear the photocopy of the sticker or a typed or printed reproduction thereof.

(5) Upon presentation of an exhibit to a witness, counsel shall announce to the court the exhibit number.

(d) *Closing argument.* The court will set the times for closing argument after consultation with parties. Unless otherwise ordered by the court, the party with the burden of proof shall open and close the arguments. The opening argument may not be waived.

Rule 7026-1. Discovery — General.

Transcripts of depositions, interrogatories, requests for production of documents, requests for admissions, answers and responses thereto, notices of deposition (unless filing is needed to obtain a subpoena in another district), or any subpoena or subpoena duces tecum, are not to be filed unless by order of the court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk of court. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

Rule 7055-1. Dismissal of actions for lack of prosecution.

(a) Except where a complaint objecting to a discharge has been filed, an adversary proceeding may be dismissed by the court for lack of prosecution as follows:

(1) where no service of process has been made and certified to the court within 30 days after the filing of the complaint; or

(2) where no responsive pleadings have been filed and plaintiff has not moved for entry of default within 30 days after the time for filing responsive pleadings has expired.

(b) Dismissal under this local bankruptcy rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

Rule 7065-1. Temporary Restraining Order and Preliminary Injunction.

(a) Prior to submitting a motion for a temporary restraining order or for a preliminary injunction, an adversary proceeding shall be filed seeking such relief.

(b) A motion for a temporary restraining order or for a preliminary injunction shall be made in a document separate from the complaint and shall be accompanied by:

(1) a proposed temporary restraining order or preliminary injunction; and

(2) a declaration or affidavit by the moving party or counsel for the moving party showing compliance with Rule 7065, Federal Rules of Bankruptcy Procedure, regarding notice to opposing parties.

Rule 7067-1. Registry Fund.

In the event a depository intended by the court to receive registry funds is not able, immediately upon the court's receipt of the registry funds, to pledge sufficient collateral for receipt of those funds, the funds may be retained temporarily in non-interest-bearing U.S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

PART VIII. APPEALS TO DISTRICT COURT

[Reserved]

PART IX. GENERAL PROVISIONS

Rule 9004-2. Caption — Documents, General.

Pursuant to Local Bankruptcy Rule 1071-1, all documents filed with the clerk or the court shall state in the caption the court and division in which the action is pending and the chapter under which the case is being administered.

Rule 9007-1. Designation of parties to provide notice.

The clerk of court is authorized to designate the parties who shall provide the notice to creditors and parties in interest as required under the Federal Rules of Bankruptcy Procedure or Local Bankruptcy Rules.

Rule 9009-1. Forms.

Local forms are included in the Administrative Guide to Practice and Procedure and are on the court's website at **www.nceb.uscourts.gov**.

Rule 9010-1. Attorneys — Notice of Appearance.

Changed to 2090-1

Rule 9011-1. Attorneys — Duties.

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the attorney of record for all purposes, including the representation of the debtor in all matters that arise in conjunction with the proceeding, until the case is closed or the attorney is relieved upon application and court order. If additional fees are required, application must be made pursuant to Rule 2016, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rule 2016-1.

CASE NOTES

Duty to Represent Debtor Until Relieved. — In addition to the requirements of the N.C. R. Prof. Conduct 1.3, Bankr. E.D.N.C. R. 9011-1 as enacted by the U.S. Bankruptcy Court for the eastern District of North Carolina, Wilmington Division, require an attorney to remain the attorney of record for all purposes, including the representation of the debtor in all matters that arise in conjunction with the proceeding, until the case is closed or the attorney is relieved upon application and court order. In re Sledge, 352 B.R. 742, 2006 Bankr. LEXIS 2795 (Bankr. E.D.N.C. 2006).

Rule 9011-3. Sanctions.

(a) *Failure to comply with local bankruptcy rules.* If any attorney or party willfully fails to comply with any Local Bankruptcy Rule of this court, the court, in its discretion, may impose sanctions.

(b) *Sanctions under § 362(k).* When determining sanctions under 11 U.S.C. § 362(k), the court shall consider whether the moving party notified the offending party and gave the party an opportunity to cure the alleged violation.

CASE NOTES

Applied in Lofton v. Carolina Fin., LLC (In re Lofton), 385 B.R. 133, 2008 Bankr. LEXIS 1102 (Bankr. E.D.N.C. 2008).

Rule 9011-4. Signatures.

All documents signed by an attorney pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure and filed with the court shall contain the individual name, firm name, address, telephone number, facsimile number and State Bar identification number, where applicable, of the signing attorney(s).

Rule 9013-1. Service of Motions.

(a) *Service on trustee and attorney for debtor in possession.* In addition to the parties affected by the pleading, all filings (except claims) in all proceedings and cases must be served on the trustee whether or not the trustee is a party to the proceeding. In chapter 11 cases, the attorney for the debtor in possession must be served in like manner.

(b) *Service on bankruptcy administrator.* In chapter 11 cases, all filings (except claims) must be served on the bankruptcy administrator. In chapter 7 cases, all pleadings filed by the chapter 7 trustee, or filed in response to a pleading filed by the trustee, must be served on the bankruptcy administrator.

Rule 9013-2. Briefs and Memoranda of Law.

Except as provided in Local Bankruptcy Rule 7007-1, supporting briefs or memoranda of law are optional and are not required unless ordered by the court.

Rule 9013-3. Certificate of Service.

Each pleading or document to be served on any party shall have attached a certificate reflecting that service has been made on that party and identifying the method of service.

Rule 9014-1. Contested matters — General.

(a) *Requirements of motion.* A motion shall be accompanied by all exhibits and attachments referred to in the motion, together with a notice of motion and certificate of service, and filed with a proposed order pursuant to Local Bankruptcy Rule 9072-1. The notice of motion shall give notice of the filing of the motion, allow for a specific response time to the motion and shall conform substantially to the notice of motion in the local forms. A response to a motion does not require a notice of motion or an accompanying proposed order.

(b) *Content of motions.* Motions seeking relief other than as to the debtor or the trustee must recite the name and address of the party against whom relief is sought.

(c) *Time for response.* A response and accompanying affidavits, if any, to any motion shall be filed within 15 days from the date of the service of the motion, unless otherwise ordered or provided in the Federal Rules of Bankruptcy Procedure or Local Bankruptcy Rules.

(d) *Service of motion.* The moving party shall serve the notice of the motion together with the motion and all exhibits and attachments (unless service of the motion itself is not required) in the manner prescribed in Rule 9014, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rule 9013-1.

(e) *Response.* Any party against whom relief is sought may file a written response to the motion. The response may be accompanied by affidavits and other supporting documents and shall be served on all interested parties.

(f) *Content of response.* All responses shall contain sufficient information to reasonably disclose the basis for the party's position and what specific issues are contested. If a response is not in compliance with this provision, the court in its discretion may resolve the matter without a hearing.

(g) *Hearing on motion.* Unless a hearing is requested in the motion or in the response, motions may be determined without a hearing. A hearing on a motion may be ordered by the court in its discretion.

(h) *Evidentiary hearings.* Evidentiary hearings, at which witnesses may testify, will be held in contested matters at the first appearance before the court, unless otherwise ordered.

(i) *Frivolous or delaying motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing the motion. Any party filing a request for a hearing shall appear at the hearing set by the court in support of the request or costs may be assessed.

Rule 9014-2. Contested matters — Expedited.

(a) *Applicability.* This rule is applicable to any motion in which a hearing or the entry of an order is requested with less than 15 days notice.

(b) *Procedure.*

(1) Any request for a shortened notice time and expedited hearing shall be filed as a separate motion.

(2) The motion for which shortened notice time is requested shall be filed contemporaneously with the filing of the motion for shortened notice.

(3) The movant shall contact the clerk's office by telephone to inform that the motion has been filed so that the motion may be immediately referred to the judge.

(c) *Service of motion and notice of hearing.*

(1) *Motion.* The moving party shall immediately serve a copy of the motion to shorten time and the motion upon which expedited relief is requested by hand delivery, overnight delivery, facsimile or electronic transmission.

(2) *Notice of motion.* Immediately upon receipt of the order on the motion to shorten time, the movant shall file a notice of motion consistent with the order indicating the response due date, and notice of hearing, if applicable, and shall serve the notice upon the parties in the manner prescribed in subparagraph (c)(1) above.

(3) In instances where service of the notice of motion may not provide sufficient time for parties in interest to respond or appear, counsel shall telephonically provide notice.

(4) A certificate of service indicating the manner of service shall be filed immediately upon completion of service.

Rule 9019-1. Settlements and Agreed Orders.

Unless additional time is granted by the court, parties to a settlement shall submit a consent order within 20 days of the notification to the court that the settlement has been reached.

Rule 9019-2. Mediated Settlement Conference.

The court may require parties and their representatives to attend a pretrial mediated settlement conference in any adversary proceeding or contested matter pending in the court.

Rule 9019-2(1). Mediated settlement order and motions.

(a) *Timing of the order.* The court may issue the order at any time.

(b) *Content of order.* The court's order shall:

(1) require that a mediated settlement conference be held in the case;

(2) establish a deadline for the completion of the conference;

(3) state clearly that the parties have the right to select their own mediator as provided by Local Bankruptcy Rule 9019-2(2);

(4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Local Bankruptcy Rule 9019-2(2); and

(5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(c) *Motion to dispense with mediated settlement conference.* A party may move the court, within 10 days after entry of the court's order, to dispense with the conference. The motion shall state the reasons the relief is sought. Any party may file a written objection specifically stating the reasons for opposing the motion.

(d) *Motion for court ordered mediated settlement conference.* In cases not ordered to mediated settlement conference, any party may move the court to order such a conference. The motion shall state the reasons why the order should be allowed. Objections may be filed in writing with the court within 10 days after the date of the service of the motion.

(e) *Mediated settlement conference is not to delay other proceedings.* The mediated settlement conference shall not delay other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the court.

Rule 9019-2(2). Selection of Mediator.

(a) *Selection of mediator by agreement of parties.* The parties appearing of record may select a mediator. The plaintiff (or movant in a contested matter) shall file with the court a notice indicating the selection of a mediator by agreement within 10 days of the court's order. This notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; and state that the mediator and the parties have agreed upon the selection and rate of compensation.

(b) *Appointment of mediator by the court.* If the parties cannot agree upon the selection of a mediator, the plaintiff (or movant in a contested matter) shall submit a motion for court appointment of mediator. The motion must be filed within 10 days after the court's order requiring mediation and shall state that the parties and their attorneys discussed the selection of a mediator and are unable to agree.

(c) *Disqualification of mediator.* Any party may move for an order disqualifying the mediator. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this rule. Nothing in this provision shall preclude mediators from disqualifying themselves upon written notice to the court and the parties.

Rule 9019-2(3). Mediated Settlement Conference Location and Time.

(a) *Location of conference.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the United States Bankruptcy Courthouse or other public or community building in the Eastern District. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

(b) *Time of conference.* The court's order issued pursuant to Local Bankruptcy Rule 9019-2(1) shall state a date of completion for the conference. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

(c) *Request to extend date of completion.* A party, or the mediator, may request the judge to extend the deadline for completion of the conference. The request shall state the reasons the continuance is sought and shall be served by the movant upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the judge. The judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. The order shall be served on all parties and on the mediator by the person who sought the extension.

(d) *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

Rule 9019-2(4). Duties of Parties, Representatives and Attorneys.

(a) *Attendance.* The following persons shall physically attend the entire mediated settlement conference until an agreement is reduced to writing and signed as provided by subsection (c) of this rule or an impasse has been declared, unless excused by the court or by the mediator with approval of all parties and attorneys:

(1) *Parties.*

(A) all individual parties;

(B) any party that is not a natural person or a governmental entity, represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action; and

(C) any party that is a governmental entity, represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(2) *Insurance company representatives.* A representative of each insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have decision-making authority.

(3) *Attorneys.* At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(b) *Notifying lien holders.* Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify the lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request the lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

(c) *Finalizing agreement.* Upon reaching agreement, either before or during the mediation conference, the settlement shall be immediately reduced to writing and signed by the parties, their counsel, and others with settlement authority.

(d) *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid in equal shares by the parties. Multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally unless the court otherwise orders.

Rule 9019-2(5). Sanctions for Failure to Attend.

(a) If any person required to attend the conference pursuant to Local Bankruptcy Rule 9019-2(4) fails to attend without good cause, the court may impose an appropriate monetary sanction, including but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and losses of earnings incurred by persons attending the conference.

(b) A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought.

Rule 9019-2(6). Authority and Duties of Mediator.

(a) *Authority of mediator.*

(1) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) *Private consultation.* The mediator may meet and consult privately with any participant or counsel during the conference.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time is convenient to the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) *Duties of mediator.*

(1) *Generally.* The mediator shall define and describe the following to the parties at the beginning of the conference:

(A) the process of mediation;

(B) the differences between mediation and other forms of conflict resolution;

(C) the costs of the mediated settlement conference;

(D) that the mediated settlement conference is not a trial, the mediator is not a court, and the parties retain their right to trial if they do not reach settlement;

(E) the circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(F) whether and under what conditions communications with the mediator will be held in confidence during the conference;

(G) the inadmissibility of conduct and settlements as provided by applicable Rules of Evidence;

(H) the duties and responsibilities of the mediator and the participants; and

(I) the fact that any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to timely determine that an impasse exists and that the conference should end.

(4) *Location of conference.* Unless all parties agree, the mediated settlement conference shall be held at a place selected by the mediator. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

(5) *Reporting results of conference.* The mediator shall submit a Report of Mediator to the court which indicates the results of the conference. This report shall be filed within two weeks of the conclusion of the conference or upon the receipt of a copy of a written settlement agreement, whichever comes first.

(A) If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file the consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative who was absent without permission from the conference.

(B) Unless confidential, the mediator shall attach the written settlement agreement prepared by the parties to the Report of Mediator.

Rule 9036-1. Notice by Electronic Transmission.

(a) Whenever the clerk or some other person as directed by the court is required to send notice by mail, and the entity or person entitled to receive the notice requests in writing that instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission.

(b) Notice by electronic transmission is complete, and the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received, except where the recipient of the notice has agreed in writing that confirmation is not required, in which case notice is complete upon transmission.

Rule 9070-1. Exhibits.

Exhibits filed in this district, in either paper or electronic form, and in the context of an adversary proceeding, contested matter, or any other proceeding, shall conform to the requirements of the Local Bankruptcy Rules, including Local Bankruptcy Rules 5005-1, 5005-4(5), 7016-1, 7016-2, and 9014-1, as they may apply.

Rule 9072-1. Proposed orders.

A proposed order shall be submitted contemporaneously with the filing of any document requesting relief in accordance with the procedures established in the Administrative Guide.

Rule 9074-1. Telephone and Video Conferences and Hearings.

(a) *Conferences and hearings.* The court may schedule any matter in a bankruptcy case, contested matter or adversary proceeding to be heard by video or telephone conference. Any party in interest affected by or involved in a case, matter or proceeding may request the court to hear the matter by telephone or video conference.

(b) *Exchange of exhibit and witness lists.* The parties involved in video conferences and hearings shall exchange proposed witness and exhibit lists and copies of all proposed exhibits, and file such lists and exhibits with the court, at least three business days prior to a hearing or trial unless otherwise ordered by the court. The moving party in a contested matter shall identify exhibits in numerical sequence. The responding party in a contested matter shall identify exhibits in alphabetical sequence. If multiple parties are involved, the parties prior to hearing or trial shall determine an identification sequence that eliminates any duplicative sequence. Failure to exchange timely and file proposed witness and exhibit lists and copies of proposed exhibits in accordance with this rule may result in the court barring any undisclosed witness testimony and denying the admission of any unexchanged exhibits.

APPENDIX

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

ADMINISTRATIVE GUIDE
TO
PRACTICE AND PROCEDURE

SUPPLEMENT TO THE LOCAL RULES
EFFECTIVE OCTOBER 2008

The Administrative Guide to Practice and Procedure has been prepared as a supplement to the Local Bankruptcy Rules to facilitate publication of changes in practice and procedure in the Eastern District without the necessity for a revision to the Local Rules.

The format for the Guide is set to correspond to the governing rule.

TABLE OF CONTENTS

Page
General Information 1
List of County Codes for North Carolina 2

Rule	Subject	
Rule 1007-1	Lists, Schedules and Statements; Time Limits	3
Rule 1007-2	Mailing – List or Matrix	3
Rule 1071-1	Divisions – Bankruptcy Court	6
Rule 2002-1(c)	Guide to Service and Notice Requirements.	7
Rule 2002-1(d)	Notice to Creditors	13
Rule 2016-1	Compensation of Professionals	14
Rule 5003-4	Register of Mailing Addresses of Federal and State Governmental Units	15
Rule 5005-4(1)	Assignment to System and Filing Requirements	16
Rule 5005-4(2)	Eligibility, Registration and Passwords	16
Rule 5005-4(4)	Entry of Court Orders; Issuance of Electronic Summons	17
Rule 5005-4(5)	Format; Attachments and Exhibits	17
Rule 5005-4(8)	Signatures and Certification	18
Rule 6005-1	Appraisers and Auctioneers	18
Rule 7016-1	Pretrial Procedures	19
Rule 9009-1	Forms	22

Local Miscellaneous Forms

Application and Order for Approval of Mental Health Evaluation 23
Electronic Filing User Registration Form-Admitted Attorneys 25
Electronic Filing User Registration Form-Out of District 27
Electronic Filing User Registration Form-Limited Users 29
Model Chapter 13 Plan 31
Voluntary Attorney Questionnaire 36
Pro Bono Volunteer Form 38

Local Bankruptcy Case Forms

Appearance of Child Support Creditor* or Representative 40
Certification of Mailing Matrix 41
Notice of [Motion to] [Objection to] 42
Notice of Objection to Claim 44
Reaffirmation Agreement-cases filed before October 17, 2005 46
Reaffirmation Agreement-cases filed after October 17, 2005 51
Schedule C-1– Property Claimed as Exempt 60
Schedule C-2 - Property Claimed as Exempt (other jurisdictions) 66
Subpoena for Rule 2004 Examination 67
Subpoena in a Case under the Bankruptcy Code 69
Summons to Debtor in Involuntary Case 71

Local Adversary Proceeding Forms

Bill of Costs 73
Deposition Subpoena in an Adversary Proceeding 76
Entry of Default 78
Motion to Claim Exempt Property 79
Notice of Right to Have Exemptions Designated 85
Order Designating Exempt Property 87

Forms continued
Subpoena in an Adversary Proceeding 88
Summons in an Adversary Proceeding 90
Third-Party Summons 92
Writ of Execution to the United States Marshal 94

GENERAL INFORMATION
PUBLIC ACCESS TO INFORMATION
VCIS
(Voice Case Information System)

Telephonic access to the court's electronic records may be obtained at the following toll-free telephone number. The system provides information about debtors by using the numbers or letters on the telephone keypad. A search may be performed by name, case number, and, if known, the full social security number or tax identification number. A social security number or tax identification number is unique to an individual or business and may be more reliable than a name search. To access the court's VCIS system by telephone, the number is:

VCIS
(Voice Case Information System)

(888) 513-9765

INTERNET

Public Access to Court Electronic Records (PACER) may be obtained in the follow ways::

Home web page:
`http://www.nceb.uscourts.gov`

Pacer Case information web page:
`http://ecf.nceb.uscourts.gov`

Electronic e-filing:
`http://ecf.nceb.uscourts.gov`

There is a fee for using the Public Access to Court Electronic Records System (PACER).

LIST OF COUNTY CODES FOR NORTH CAROLINA

North Carolina-Eastern

37013 Beaufort
37015 Bertie
37017 Bladen
37019 Brunswick
37029 Camden
37031 Carteret
37041 Chowan
37047 Columbus
37049 Craven
37051 Cumberland
37053 Currituck
37055 Dare
37061 Duplin
37065 Edgecombe
37069 Franklin
37073 Gates
37077 Granville
37079 Greene
37083 Halifax
37085 Harnett
37091 Hertford
37095 Hyde
37101 Johnston
37103 Jones
37107 Lenoir
37117 Martin
37127 Nash
37129 New Hanover
37131 Northampton
37133 Onslow
37137 Pamlico
37139 Pasquotank
37141 Pender
37143 Perquimans
37147 Pitt
37155 Robeson
37163 Sampson
37177 Tyrrell
37181 Vance
37183 Wake
37185 Warren
37187 Washington
37191 Wayne
37195 Wilson

North Carolina-Middle

37001 Alamance
37025 Cabarrus
37033 Caswell
37037 Chatham
37057 Davidson
37059 Davie
37063 Durham
37067 Forsyth
37081 Guilford
37093 Hoke
37105 Lee
37123 Montgomery
37125 Moore
37135 Orange
37145 Person
37151 Randolph
37153 Richmond
37157 Rockingham
37159 Rowan
37165 Scotland
37167 Stanly
37169 Stokes
37171 Surry
37197 Yadkin

North Carolina-Western

37003 Alexander
37005 Alleghany
37007 Anson
37009 Ashe
37011 Avery
37021 Buncombe
37023 Burke
37027 Caldwell
37035 Catawba
37039 Cherokee
37043 Clay
37045 Cleveland
37071 Gaston
37075 Graham
37087 Haywood
37089 Henderson
37097 Iredell
37099 Jackson
37109 Lincoln
37111 McDowell
37113 Macon
37115 Madison
37119 Mecklenburg
37121 Mitchell
37149 Polk
37161 Rutherford
37173 Swain
37175 Transylvania
37179 Union
37189 Watuaga
37193 Wilkes
37199 Yancey

LISTS, SCHEDULES AND STATEMENTS; TIME LIMITS
[Rule 1007-1]
(See Administrative Guide to Practice and Procedure Rule 5003-4)

MAILING - LIST OR MATRIX
[Rule 1007-2]

(a) PETITION ACCOMPANIED BY MATRIX. For register of mailing addresses of Federal and State Government Units, see Administrative Guide to Practice and Procedure 5003-4.

(b) PREPARATION OF MATRIX

(1) Filing petitions electronically through CM/ECF. Filing users must create a mailing list by entering all creditors for each petition into the petition preparation software. The creditor matrix must be saved in an ASCII (.txt) format or a format required by the users software before it can be successfully uploaded. The matrix must be uploaded into the electronic filing system at the same time the petition is filed electronically.

(2) Filing petitions in paper. All bankruptcy petitions submitted in paper for filing must be accompanied by a paper matrix which lists all creditors and their addresses. In order to ensure that creditor names and addresses are scanned to create a clear image for display on the Internet and properly read by the Optical Character Reader (OCR) for transfer into the court's database, compliance with specific standards and requirements is necessary.

(3) Instructions for Preparation of Mailing Matrix.

(A) The paper matrix should be prepared on plain white 8 ½ X 11 unruled or unblocked paper and shall not contain any extra marks such as letterhead, dates, debtor name, stains or handwritten marks on the front of the matrix. The debtor's name and social security number must be shown on the back of the paper matrix.

(B) The only writing on the paper matrix should be the typed names and address of the creditors. The certification of mailing matrix must be attached as a separate page from the matrix.

(C) Use good letter quality print to print the matrix. LaserJet or InkJet printers provide better quality print than dot matrix printers.

(D) **Do not** use unreadable type faces or print styles such as proportionally-spaced fonts or exotic fonts (such as Olde English or script) or bold print. Twelve (12) pitch Times New Roman and Courier New fonts create good print quality that allows the Optical Character Reader (OCR) to accurately read the matrix.

(E) Provide the original paper matrix. Poor quality photocopies are not readable by the scanner.

(F) List creditors in alphabetical order.

(G) **Do not** include the following parties on the creditor matrix, as the name and address of each of these parties are added during case opening procedures by court staff:
Debtor
Joint Debtor
Attorney for the Debtor(s)
Bankruptcy Administrator
Trustee

(H) Names should be shown as first name <space> last name.

(I) Names and address must be typed so that letters are no closer than 1½ inches from any edge of the paper.

(J) Each line of the address may have a maximum of 35 characters.

(K) The maximum number of lines per address is 4.

(L) Make every effort to obtain a complete address for each creditor.

(M) Leave one blank line between each address.

(N) Never use the following symbols in names and/or addresses:

Ampersand (&). Type the word "and" instead
Percent (%). If used to signify "care of" in a creditor's address, type "c/o" instead.

(O) **Do not** type a lower case "L" to signify the number one (1).

(P) **Do not** type an upper or lower case letter "o" to signify the number zero (0).

(Q) Avoid misaligned lists caused by removing the paper from the typewriter before completing the list, or improperly inserting the paper into the typewriter.

(R) Type in upper and lower case as you would on a letter.

(S) States should be abbreviated using two capital letters without periods or other punctuation.

(T) A comma must appear between the city and the state.

(U) The last line of the matrix must be the city, state, zip code.

(V) Do not type the attention line on the last line of the address. The attention line should be the second line of the address.

(W) **Do not** include account numbers in the address.

(X) The ZIP Code must be typed on the last line of each address. If only a five digit ZIP Code is used, **Do not** add extra zeroes (0000s) to make nine digits. Separate the 5-digit ZIP code with the "plus four" with a dash, not a space.

(Y) Address examples:

123 Incorporated
P.O. Box 123
City, NC XXXXX

Finance Company
P.O. Box 123456
City, NC XXXXX

Mr. and Mrs. Landlord
c/o Mr. Joe Attorney
879 Rent Avenue
City, NC XXXXX

Mr. and Mrs. Carolina
1111 Carolina Avenue
City, NC XXXXX

Business Company
1992 Inc. Street
City, NC XXXXX-XXXX

M and M Business
Company
1212 Candy Lane
City, NC XXXXX

Paper Business
213 Pulp Mill Road
City, NC XXXXX-XXXX

DIVISIONS - BANKRUPTCY COURT
[Rule 1071-1]

Name of Division	**Counties**		
Elizabeth City	Bertie	Dare	Perquimans
	Camden	Gates	Tyrrell
	Chowan	Hertford	Washington
	Currituck	Pasquotank	
Fayetteville	Cumberland	Robeson	Sampson
New Bern	Beaufort	Jones	Onslow
	Carteret	Lenoir	Pamlico
	Craven	Martin	Pitt
	Hyde		
Raleigh	Franklin	Johnston	Wake
	Granville	Vance	Warren
	Harnett		
Wilmington	Bladen	Columbus	New Hanover
	Brunswick	Duplin	Pender
Wilson	Edgecombe	Nash	Wayne
	Greene	Northampton	Wilson
	Halifax		

NOTICE TO CREDITORS AND OTHER INTERESTED PARTIES

[Rule 2002-1(c)]

GUIDE TO SERVICE AND NOTICE REQUIREMENTS

This chart is a guide to common service and notice requirements in this court. It should be used in conjunction with the following explanatory notes.

1. Bankruptcy Rule 9014 requires all contested matters to be served in the manner provided by Bankruptcy Rule 7004. This chart has no effect on the methods of service prescribed by that rule, including the special rules for service upon the United States federal officers and agencies, state or municipal governments, and insured depository institutions. Service pursuant to 7004(h) on an insured depository should be either first class mail addressed to the servicing agent for the bank or by certified mail addressed to any officer.
2. In chapter 11 cases, a trustee appointed under 11 U.S.C. § 1104 should be served.
3. Filing fees referenced in the chart are authorized by 28 U.S.C. § 1930, and by the appendices thereto prescribed by the Judicial Conference of the United States.
4. This chart does not address filings by trustees in chapter 7 cases.
5. If a case has been previously converted to a case under another chapter and a motion to reconvert is filed, the notice of the motion to reconvert should be served upon the trustee in the previously converted case.

Codes for parties to serve:
D = Debtor
DA = Debtor's Attorney
AP = Affected Parties
T = Trustee
BA = Bankruptcy Administrator
All = All creditors on matrix
20 LUC = 20 Largest Unsecured Creditors
UCC = Unsecured Creditor's Committee or its counsel

NOTE: The BANKRUPTCY ADMINISTRATOR is served in CHAPTER 7 AND 11 CASES; therefore, this chart does not itemize service on the Bankruptcy Administrator for these chapters. The bankruptcy administrator need not be served in chapter 12 and 13 cases except (1) when a fee is requested above the standard base fee or (2) when an additional fee is requested above the presumptive non-base fee. The BA need not be served in adversary proceedings unless named as a party.

Pleading	# of Notice Days	Chapter	Parties to Serve	Comments
11 U.S.C. § 506(c) Fees & Expenses, Application for	15	All	AP	
Abandon, Motion to	15	7, 11, 13	All, T, DA, D	Fee required except for Debtor in Possession

Pleading	# of Notice Days	Chapter	Parties to Serve	Comments
Accept/Reject/Assign Executory Contract, Motion to	15			
(1) Debtor's		(1) 11	(1) AP, 20 LUC or UCC	
(2) Creditor's		(2) 11	(2) D, DA, T, 20 LUC or UCC	
(3) Debtor's		(3) 12, 13	(3) T, AP	
(4) Creditor's		(4) 12, 13	(4) D, DA, T	
Accept/Reject Lease, Motion to	15			
(1) Debtor's		(1) 11	(1) AP, 20 LUC or UCC	
(2) Creditor's		(2) 11	(2) D, DA, T, 20 LUC or UCC	
(3) Debtor's		(3) 12, 13	(3) T, AP	
(4) Creditor's		(4) 12, 13	(4) D, DA, T	
Amendment to Schedules	None	All	AP, T	Fee may be required. See 28 U.S.C. § 1930 Certificate of Service should show that a copy of the Meeting of Creditors Notice was served on creditors affected by the amendment
Approval of Consent Order under BR 4001(d), Motion for	15	11	D, DA, 20 LUC or UCC	
Avoid a Lien under 11 U.S.C. § 522(f), Motion to	15	All	AP, T	
Cash Collateral	15			For emergency situations, see BR 4001(b)
(1) Debtor's Motion to Use		(1) 11,	(1) AP, 20 LUC or UCC	
(2) Creditor's Motion to Prohibit		(2) 11	(2) D, DA, T, 20 LUC or UCC	
(3) Debtor's Motion to Use		(3) 7, 12, 13	(3) T, AP	
(4) Creditor's Motion to Prohibit		(4) 7, 12, 13	(4) D, DA, T	

Pleading	# of Notice Days	Chapter	Parties to Serve	Comments
Confirm Stay Not in Effect, Motion to (1) Creditor's	15	7, 11, 13	D, DA, T	Only in Individual debtor cases
Compensation and Expenses, Application for	20	All	All, T, D, DA	See BR 2002(a)(6)
Compensation for Additional Presumptive Non-Base Fee, Application for	None	13	T, D, BA	
Compromise, Motion to	20	All	All, D, DA	
Contempt/Sanctions, Motion for	15	All	D, DA, T, AP	See BR 9020 for pleading requirements
Continue 341 Meeting of Creditors, Motion to	None	(1) 11 (2) 7 (3) 12, 13	(1) T (2) T (3) T	
Continue Hearing/Conference, Motion to	None	All	D, DA, T, AP	Motion to be filed as soon as the need for a continuance arises
Convert from Chapter 7 to 12, Motion to (1) Debtor's	None	7	T	If the case was previously converted, see 11 U.S.C. § 706
Convert from Chapter 7 to 11, Motion to (1) Debtor's (2) Creditor's	(1) None (2) 20	7	(1) T (2) All, T, D, DA,	(1) Fee required (2) No fee required
Convert from Chapter 11 to 7, Motion to (1) Debtor In Possession's (2) Creditor's or Debtor Not In Possession's	(1) None (2) 20	11	(1) T (2) All, D, DA, T	Fee required for all motions For exceptions, see 11 U.S.C. § 1112(a)
Convert from Chapter 13 to 11, Motion to (1) Debtor's (2) Creditor's	15	13	(1) All, T, BA (2) All, T, D, DA, BA	(1) Fee required (2) No fee required (2) If the debtor is a farmer, see 11 U.S.C. § 1307 (f)

Pleading	# of Notice Days	Chapter	Parties to Serve	Comments
Convert from Chapter 12 to 7, Notice to (1) Debtor's	None	12	T	Fee required
Convert from Chapter 12 to 7, Motion to (1) Creditor	15	12	D, DA, T	See 11 U.S.C. §1208(d)
Convert from Chapter 7 to 13, Motion to (1) Debtor's	None	7	T	If the case previously converted, see 11 U.S.C. § 706 and serve the trustee in the formerly converted case
Convert from Chapter 11 to 13, Motion to (1) Debtor's	20	11	All, DA, D	If the case previously converted, serve the trustee in the formerly converted case
Convert from Chapter 13 to 7 (1) Debtor's (Notice) (2) Creditor's (Motion)	(1) None (2) 15	13	(1) T (2) D, DA, T	Fee required
Dismiss, Motion to (1) Debtor's (2) Creditor's (3) Debtor's (4) Creditor's	(1) None (2) 15 (3) 20 (4) 20	(1) 13 (2) 13 (3) 7, 11, 12 (4) 7, 11, 12	(1) T (2) D, DA, T (3) All, T (4) All, D, DA, T	
Employ Professional Person, Application to	None	7, 11, 12	T	
Employ Debtor's Attorney Under a Flat Fee Arrangement, Application to	20	11	All	In re Pineloch, 192 BR 675 (Bankr. E.D.N.C. 1996)
Examination Under 2004, Application for	None	All	D, DA, AP, T	Motion should be filed at least 10 days prior to the examination date
Examination by Interrogatories in lieu of attendance at the 341 meeting, Motion for	None	All	T	If request is due to medical reasons, the motion should be accompanied by a doctor's statement
Extend Automatic Stay, Motion to (1) Debtor's	15	7, 11, 13	All, T	Only in individual debtor cases Motion should be filed with petition - Hearing must be scheduled within 30 days of petition filing date
Extend Filing Deadline for 11 U.S.C. § 523 and/or § 727 Complaint, Motion to	None	All	D, DA, T	
Hardship Discharge, Motion for	None	12, 13	T	

Pleading	# of Notice Days	Chapter	Parties to Serve	Comments
Incur Debt, Motion to; or Obtain Credit, Motion to; or Post-Petition Financing, Motion for	(1) None (2) 15	(1) 12, 13 (2) 11	(1) T (2) 20 LUC or UCC, AP	See LBR 4002-1(f)(5) For emergency situations see BR 4001(c)
Impose Stay, Motion to (1) Debtor's	15	7, 11, 13	All, T	Only in individual debtor cases
Modify Plan, Motion to (1) Plan Proponent's (2) Debtor's (3) Creditor's	20	(1) 11 (2) 12, 13 (3) 12, 13	(1) All, T, D, DA (2) All, T (3) All, T, D, DA	Ch 13 - If no adverse affect to creditors, notice to All not required
Objection to Claim	30	All	D, DA, AP, T	
Objection to Claim of Exemptions	15	All	D, DA, T	This applies to individual debtors only
Objection to Disclosure Statement	None	11	D, DA, T	
Objection to Plan	None	11, 12, 13	D, DA, T	
Re-Open Case, Motion to (1) Debtor's (2) Creditor's	(1) None (2) 15	All	(1) T (2) D, DA, T	§ 1930(b) requires payment of filing fee and retrieval fee
Reconsider or Vacate Order, Motion to	15	All	D, DA, T, AP	See BR 9023 and BR 9024 This does not apply to Motions to Set Aside Dismissals in Chapter 13 cases - See Set Aside Dismissal
Relief from Automatic Stay, Motion for	15	(1) 7, 12, 13 (2) 11	(1) D, DA, T (2) D, DA, T, 20 LUC or UCC	Fee required, see 11 U.S.C. § 1930(b) (2) see BR 4001
Relief from Co-debtor Stay, Motion for	15	13	D, DA, T, Co-debtor	No fee required
Schedule of unpaid debts incurred after confirmation but before conversion to Chapter 7 / Report Upon Conversion	None	11, 12, 13	T, AP	Certificate of Service should show that a copy of the Meeting of Creditors Notice was served on creditors affected by the schedule of unpaid debt No fee required
Sell Free and Clear of Liens, Motion to	15	All	D, DA, AP	

Pleading	# of Notice Days	Chapter	Parties to Serve	Comments
Sell Property, Application to	20	All	All, D, DA, T	15-day response time required in all chapters See BR 6004 regarding a hearing date
Set Aside Dismissal, Motion to (1) Debtor's	20	13	All, T	
Surrender, Motion to	15	13	T, AP	
Turnover Order, Motion for	15	All	D, DA, T, AP	
Valuation of Collateral, Motion for	15	All	D, DA, T, AP	
Withdraw as Counsel, Motion to (1) Debtor's	15	All	D, T	
Withdrawal of Motion/Response/Claim	None	All	D, DA, T, AP	

NOTICE TO CREDITORS
[RULE 2002-1(d)]

RETURNED AND UNDELIVERABLE MAIL

(a) Upon the trustee's receipt of mail marked returned or undeliverable, with the exception of disbursement checks returned to the trustee, the trustee shall make a text entry in CM/ECF notifying the clerk of the returned or undeliverable mail, and the clerk will delete the address from the matrix. The Clerk will provide, to counsel for the debtor or to a pro se debtor, Notice of the Returned Mail and Deletion of the Address, referencing the returned or undeliverable document.

(b) If counsel for a debtor receives notification from the clerk of the deletion of the creditor's address, or receives returned or undeliverable mail, counsel shall notify the debtor that the debtor is directed to diligently search for a correct address. After the debtor provides counsel with a correct address, counsel shall promptly:

(1) forward the returned document to the correct address, and
(2) update the address by making a text entry in CM/ECF, also stating that the returned or undeliverable mail was forwarded to the creditor's correct address.

(c) If a pro se debtor receives notification from the clerk of the deletion of the creditor's address, or receives returned or undeliverable mail, the pro se debtor is directed to:

(1) diligently search for a correct address,
(2) forward the returned document to the correct address,
(3) file a certificate of service with the court stating that the returned or undeliverable mail was forwarded to the creditor's correct address, and
(4) promptly file with the court a notice of the creditor's correct address.

The clerk will update the address on the official matrix upon notification by counsel for the debtor or by a pro se debtor.

COMPENSATION OF PROFESSIONALS

[Rule 2016-1]

(a)(1) Amount of Standard Base Fee:

Effective in cases filed on and after April 1, 2006, the standard base fee in a chapter 13 case is $3,000.00.

(a)(6) Presumptive Non-base Fees effective October 1, 2008, in all cases, whether filed before or after that date.

Motion to extend or impose the automatic stay for repeat filers	$400.00
Motion to use interrogatories, and interrogatories	$150.00
Motion for turnover	$300.00
Motion to avoid lien	$350.00
Motion to modify plan post-confirmation	$350.00
Motion to substitute collateral	$350.00
Motion for authority to sell property	$300.00
Application to incur debt	$200.00
Defense of motion for relief from stay and/or co-debtor stay	$500.00
Handling of an insurance inquiry received more than twelve (12) months after the Chapter 13 case is filed	$ 75 .00
Motion to set aside dismissal	$ 350.00
Defense of motion to dismiss	$250.00
Motion for hardship discharge	$350.00
Objection to claims (up to three claims whether filed separately or combined)	$250.00

CREDITOR:

Stay motions	$500.00

COSTS APPLIED TO ALL:

When the costs for copying and postage exceed $25.00, the actual amount, plus the presumptive fee, shall be reimbursed to counsel.

(a)(9)(B) Payment of Attorney Fees/Modification of Plan

These fees shall be paid by the Trustee at the rate of $200.00 per month during the first year of the plan unless the Court directs otherwise. **In a case where this rate will not pay the entire amount of the Standard Base Fee authorized to be paid in the Chapter 13 plan during the first 12 months of the plan, the trustee may adjust the monthly rate upward to pay the entire fee during this period.**

REGISTER OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS

[Rule 5003-4]

Register of Mailing Addresses of Federal and State Governmental Units

Bankruptcy Administrator
Post Office Box 3758
Wilson, NC 27895-3758

Bankruptcy Administrator
434 Fayetteville Street, Suite 620
Raleigh, NC 27601

Employment Security Commission
Post Office Box 26504
Raleigh, NC 27611-6504

Internal Revenue Service
Insolvency Support Services
320 Federal Place, Room 335
Greensboro, NC 27401

Internal Revenue Service
P. O. Box 21126
Philadelphia, PA 19114

North Carolina Department of Revenue
Office Services Division
Bankruptcy Unit
Post Office Box 1168
Raleigh, North Carolina 27602-1168

Secretary of the Treasury
1500 Pennsylvania Ave., N. W.
Washington, DC 20220

Securities & Exchange Commission
Branch of Reorganization
Suite 1000
3475 Lennox Road, N. E.
Atlanta, GA 30326-1232

*United States Attorney
310 New Bern Avenue, Suite 800
Federal Building
Raleigh, NC 27601-1461

*NOTE: Federal Housing Administration, Farm Service Agency, Veterans Administration, Small Business Administration

ASSIGNMENT TO SYSTEM AND FILING REQUIREMENTS
[Rule 5005-4(1)]

When a document is electronically filed within one day or on the day of a hearing scheduled in that case, the filing party must send an email to the appropriate judge's law clerk and to the courtroom staff notifying them of the filing. The e-mail addresses are posted on the court's website at www.nceb.uscourts.gov

ELIGIBILITY, REGISTRATION AND PASSWORDS
[Rule 5005-4(2)(a)]

(1) ELIGIBILITY. Each filing user must enroll in and complete a CM/ECF Filing User Training Program conducted by the clerk. Filing users may enroll one or more assistants or staff in the training. Selection and scheduling of applicants for CM/ECF training will be determined by the clerk. The clerk will use discretion in a fair and nondiscriminatory manner to ensure that all registrants are treated fairly.

After completion of training, each filing user will receive a login and password and help desk contact information for assistance with the filing process.

The court accepts training provided by another bankruptcy or district court and waives the classroom training requirement. Filing users trained by other courts must indicate on the CM/ECF Filing User Registration Form the court in which they were trained.

(2) REGISTRATION. A person must register as a filing user by submitting the appropriate form prescribed by the clerk for an attorney admitted to practice in this district, an attorney not admitted to practice in this district, or a creditor. An attorney must attach to the registration form a declaration that the attorney is admitted to practice before this court, is exempt from the admission requirements or has been granted or has applied for leave to appear pro hac vice pursuant to Within a law firm, a separate registration form must be submitted for each filing user. A copy of each registration form is included in the Administrative Guide to Practice and Procedure and may be obtained from the clerk of court or the court's web site at ***www.nceb.uscourts.gov***. The form may be duplicated for use by multiple applicants. All registration forms must be mailed or delivered in a sealed envelope to the address shown on the registration form.

(3) PASSWORDS. Filing users should periodically notify the court to change their password. If an employee of a filing user leaves their employment, the filing user must immediately notify the court to activate a new password, remove the employee's e-mail address and add the e-mail address of the new employee, if applicable. If a filing user decides to discontinue practice or business in this district, the court should be notified immediately to deactivate the users password and remove their e-mail address.

Filing users are responsible for notifying the court of all applicable changes associated with the password and should maintain a record of their password and user profile information. Filing users are also responsible for keeping their office address, e-mail address, preferred notification method and other user profile information current in the Electronic Filing System by notifying the court to any modifications.

ENTRY OF COURT ORDERS; ISSUANCE OF ELECTRONIC SUMMONS
[Rule 5005-4(4)]

(b) Submission of Documents for Judges Signature. When motions, applications, objections to claim, and other requests for relief are filed electronically, the moving party must submit a proposed order for each request for relief through the **Order Upload** option in CM/ECF. The format of the proposed order must comply with Local Bankruptcy Rules 9004-2 and 5005-4(5) and conform to the following format requirements:

(1) The top margin on the FIRST PAGE must be three (3) inches. All other pages of the order will have a top margin of one (1) inch.

(2) To assist the court in verifying that the "entire" body of the submitted order has been properly transmitted, the LAST LINE in the order must be "End of Document", centered in the middle of the line.

(3) Only consent orders showing parties signed signatures may be scanned and converted to PDF format. The "End of Document" statement must appear after the signatures. All other orders must be created in a word processing program and converted to PDF format.

(4) A line for the date and a signature line for the judge is omitted. All orders will be signed electronically by the judge in the space provided by the top margin on the first page.

(5) Proposed orders which do not comply with this format will be rejected.

FORMAT; ATTACHMENTS AND EXHIBITS
[Rule 5005-4(5)]

All electronic documents must be submitted in portable document format (.pdf) as created by Adobe Acrobat or another similar and compatible program supported by the court with the exception of the creditor list (matrix) which must be submitted in an ASCII text (.txt) format. Electronic filings must not exceed 3 megabytes in size. Transmission time for effecting such filings is time sensitive. Filings that take more than 5 minutes to transmit, for security reasons, will time out. If a filing is larger than 3 megabytes and if any portion of the filing has been scanned, the filing document should be no more than 8 ½ by 11 inches, without color and the resolution should not exceed 300 DPI. If making these adjustments does not reduce the filing size to 3 megabytes or less, the filing user must make suitable arrangements with the court to effect the filing.

SIGNATURES AND CERTIFICATION
[Rule 5005-4(8)]

Electronically filed documents requiring a signature shall either (1) show an image of such signature as it appears on the original document or as appended as an image file, in which case such document shall indicate that it has been filed electronically, or (2) bear the name of the signatory preceded by an "s/" typed in the space where the signature would otherwise appear, as follows: s/Jane D. Doe.

APPRAISERS AND AUCTIONEERS
[Rule 6005-1]

(a) EMPLOYMENT OF AUCTIONEER WITH APPLICATION TO THE COURT : The court approved commission scale for auctioneers is:

Personal Property	Real Property
20% on the first $20,000	10% on the first $25,000
10% on the next $50,000	4% on the balance
4% on the balance	

PRETRIAL PROCEDURES
[Rule 7016-1(c)]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
DIVISION

IN RE: CASE NO.
JOE SMITH, 99-02272-5-ATS
Debtor

ABC CORP.,)
Plaintiff)
) ADVERSARY PROCEEDING
v.)
) NO.: 07-00001-5-ATS
JOE SMITH,)
Defendant)

FINAL PRETRIAL ORDER

DATE OF CONFERENCE: May 5, 1999

Appearance: John Y. Lawyer, Raleigh, North Carolina, for plaintiff; Sam X. Attorney, Fayetteville, North Carolina, for defendant.

I. STIPULATIONS

A. All parties are properly before the court.

B. The court has jurisdiction of the parties and of the subject matter.

C. This is a core proceeding, or in the alternative, both parties have consented to hearing by the bankruptcy court.

D. All parties have been correctly designated.

E. There is no question as to misjoinder or nonjoinder of parties.

F. Facts:

1. Plaintiff is a New York corporation, licensed to do business and doing business in the State of North Carolina.
2. Defendant is a citizen of Wake County, North Carolina.

G. Legal Issues: The legal issue is whether the debt owed by the defendant to the plaintiff is nondischargeable under 11 U.S.C. § 523(a)(2)(B).

H. Factual Issues:

1. Did the defendant receive money, property, services, or an extension, renewal, or refinancing of credit through the use of a statement in writing that was materially false?
2. Did the written statement relate to the defendant's or an insider's financial condition?
3. Did the plaintiff reasonably rely on the written statement?
4. Did the defendant make or publish the written statement with the intent to deceive the plaintiff?

II. CONTENTIONS

A. Plaintiff

1. Facts:

(a) Plaintiff loaned defendant $XXX,XXX.XX based on written property appraisals that defendant had falsified materially.

(b) The written appraisals were on real property owned by the defendant.

(c) Plaintiff had no factual reason not to accept the appraisal and, therefore, reasonably relied on the appraisal.

(d) Defendant had the appraisal done simply for its use in obtaining the loan from plaintiff.

2. Law:

(a) The falsified property appraisal used by the defendant in obtaining a loan from the plaintiff has created a nondischargeable debt under 11 U.S.C. § 523(A)(2)(B).

B. Defendant

1. Facts:

(a) Defendant did not falsify the property appraisals he used in obtaining the loan from the plaintiff.

(b) Plaintiff is experienced as a commercial lender in the area and has made loans on property appraisals for 50 years.

(c) Defendant had the appraisal done at the plaintiff's request.

2. Law:

(a) The loan from plaintiff was not obtained through the use of a false appraisal and, therefore, the debt is dischargeable.

III. EXHIBITS

A. Plaintiff:

Number	Title	Objection
1	Appraisal of Bob Hope	Hearsay
2	Deed of Trust dated 1/4/84	None
3	Promissory Note dated 1/4/84	None
4	Personal Financial Statement dated 12/3/83	None

B. Defendant:

Number	Title	Objection
1	Appraisal of Joe Smith	Hearsay
2	Debtor's Bankruptcy Petition	None

IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. Plaintiff:

Document	Portion	Objection	Reason
Plaintiff's first set of interrogatories	Nos. 1, 8 and 9	No. 8	Privilege
Deposition of Richard Roe	Vol. 1, line 6 p. 1, thru line 5, p. 6	Line 6, p. 1, thru line 2, p. 7	Hearsay

B. Defendant: None

V. WITNESSES

A. Plaintiff:

Name	Address	Proposed Testimony
Frank Flake	Selma, N. C.	Loan officer - facts surrounding the loan

B. Defendant:

All witnesses listed by plaintiff:

Name	Address	Proposed Testimony
Sam Smith	Apex, N. C.	Facts surrounding value of real property in the debtor's area

Trial Time estimate:_____________days.

____
John Y. Lawyer
Counsel for Plaintiff

____
Sam X. Attorney
Counsel for Defendant

RULE 9009-1

FORMS

Rev. 5/03

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
______________DIVISION

IN RE: **CASE NO.**

DEBTOR

APPLICATION FOR APPROVAL OF MENTAL HEALTH EVALUATION

Comes now the debtor, and requests the Court to approve a pro bono or low cost mental health evaluation, and states as follows:

1. The debtor's mental health is a genuine issue of material fact to these bankruptcy proceedings in that . . . . (state relevance, examples: the debtor claims that debtor's mental health is relevant to the debtor's failure to attend meeting of creditors or hearings; the debtor claims that debtor's mental health is relevant to allegations related to challenges to the debtor's general discharge (Section 727) or arguments for an exception to discharge based upon fraud allegations (Section 523(a)(2)); the debtor seeks to discharge student loans based upon mental illness under Section 523(a)(8) or 42 U.S.C. 294g; the debtor seeks to avoid a default judgment based upon excusable neglect; or the debtor seeks to exempt personal injury award related to mental health);

2. Based upon information and belief, the debtor's mental health should be examined by a mental health professional to determine whether the debtor may have . . . (examples: manic depression, bipolar disorder, schizophrenia, paranoid personality disorder), or another recognized mental illness;

3. Based upon the bankruptcy schedules and the debtor's available income and assets as follows, (set out monthly income and any liquid assets), the debtor is currently unable to pay for a mental health evaluation that is necessary and relevant to bankruptcy issues presented;

4. After making diligent efforts to obtain mental health services to assist the debtor, the debtor has been unable to obtain relevant services based upon available health insurance, public health programs, or other third party services. A copy of this application has been transmitted to the Bankruptcy Administrator and (identify any other interested party).Wherefore, based upon the foregoing, the debtor respectfully requests that the Court approve a pro bono or low cost mental health evaluation in this case.

Date:

____
Debtor

Rev. 5/03

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
________________ DIVISION

IN RE:

DEBTOR **CASE NO.**

ORDER

Based upon the Application for Approval of Mental Health Evaluation by the debtor and the representations contained therein, the Court approves the debtor's request for a pro bono or low cost mental health evaluation for purposes of this action.

SO ORDERED.

END OF DOCUMENT

Rev. 2/04

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF) SYSTEM ELECTRONIC FILING USER REGISTRATION FORM

(For attorneys admitted to practice in the Eastern District of North Carolina)

An attorney desiring to register as a Filing User for filing documents through the internet component of the court's Case Management/Electronic Case Filing system must provide the information requested below:

Name ____

Bar ID # ____________________ State of Admission ____________________

Firm Name ____

Mailing Address ____

____

Voice Phone Number ____________________ FAX Number ____________________

E-Mail Address ____

Bankruptcy court(s) in which the filing user is registered as an ECF filer: ____________________

____

By signing and submitting this registration form, the Filing User agrees to abide by the following requirements:

1. Pursuant to Federal Rule of Bankruptcy Procedure 9011 and Local Bankruptcy Rule 5005-4(8), every pleading, motion and other paper (except lists, schedules, statements or amendments thereto) shall be signed by a least one attorney of record and that signatures shall be indicated by "s/" and the typed name of the person signing in the following format: "s/Jane Doe" on the signature line. The unique password issued to each Filing User identifies the person upon login and constitutes the signature of the Filing User.

2. The Filing User must protect and secure the login and password issued by the court. The login and password must be used exclusively by the Filing User and authorized employees. The Filing User must not knowingly permit the login and password to be used by anyone who is not authorized. After the password is first issued by the court, the Filing User agrees to change the password on a regular basis, if an employee is no longer an authorized user, or as needed for other reasons to ensure its security. The Filing User must immediately notify the court if misuse of a password is suspected.

3. The Filing User expressly consents to receive notice and service of pleadings and other papers by electronic means from the court and other Filing Users in all cases, except with regard to service

of a summons and complaint under Bankruptcy Rule 7004 or a motion initiating a contested matter under Bankruptcy Rule 9014. Applicant must maintain the accuracy of the CM/ECF Filing User account to ensure the receipt of electronic notice.

4. The Filing User understands that electronically filed documents that require original signatures from any person other than the Filing User must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed. Upon the court's request, the Filing User must provide the original signed documents for review.

5. The Filing User agrees to abide by all the requirements set out in the Local Bankruptcy Rules and the Administrative Guide to Practice and Procedure currently in effect, and any changes or additions that later may be made.

6. The Filing User understands that the court may revoke a Filing User's login and password and, therefore, authority and ability to electronically file documents for cause, including failure to comply with any provisions of this agreement, failure to adequately protect the Filing User password, failure to comply with the provisions of the Local Bankruptcy Rules and/or Administrative Guide to Practice and Procedure, failure to pay any fees required for documents electronically filed, or other misuse of the electronic case filing system.

7. The Filing User agrees, as authorized by Local Bankruptcy Rule 9036-1, Notice by Electronic Transmission, to waive the electronic confirmation required in the Federal Rules of Bankruptcy Procedure 9036, as to notices issued by the court.

__________________ ____________________________________
Date Filing User Applicant

Return to:
U. S. Bankruptcy Court
Attn: Training Specialist
1760-A Parkwood Boulevard
Wilson, North Carolina 27893

For Court Use Only:
Date Approved __________________

CM/ECF Filing User Login Name __________________________

Rev. 7/05 - Out of District

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF) SYSTEM
ELECTRONIC FILING USER REGISTRATION FORM FOR
OUT OF DISTRICT ATTORNEYS

An attorney desiring to register as a filing user for filing notices of appearance, assignments/ transfers of claims, reaffirmation agreements, and proofs of claim through the internet component of the court's Case Management/Electronic Case Filing system must provide the information requested below:

Name: ________________________________

Bar ID # ____________ State of Admission :____________

Firm Name: ________________________________

Mailing Address ________________________________

Voice Phone Number: ____________ FAX Number:____________

E-Mail Address: ________________________________

Bankruptcy court(s) in which the filing user is registered as an ECF filer:____________

____

By signing and submitting this registration form, the Filing User agrees to abide by the following requirements:

1. Pursuant to Federal Rule of Bankruptcy Procedure 9011 and Local Bankruptcy Rule 5005-4(8), every pleading, motion and other paper (except lists, schedules, statements or amendments thereto) shall be signed by a least one attorney of record and that signatures shall be indicated by "s/" and the typed name of the person signing in the following format: "s/Jane Doe" on the signature line. The unique password issued to each Filing User identifies the person upon login and constitutes the signature of the Filing User.

2. The Filing User must protect and secure the login and password issued by the court. The login and password must be used exclusively by the Filing User and authorized employees. The Filing User must not knowingly permit the login and password to be used by anyone who is not authorized. After the password is first issued by the court, the Filing User agrees to change the password on a regular basis, if an employee is no longer an authorized user, or as needed for other reasons to ensure its security. The Filing User must immediately notify the court if misuse of a password is suspected.

CM/ECF Electronic Filing User Registration Form - Page 2

3. The Filing User expressly consents to receive notice and service of pleadings and other papers by electronic means from the court and other Filing Users in all cases, except with regard to service of a summons and complaint under Bankruptcy Rule 7004 or a motion initiating a contested matter under Bankruptcy Rule 9014. Applicant must maintain the accuracy of the CM/ECF Filing User account to ensure the receipt of electronic notice.

4. The Filing User understands that electronically filed documents that require original signatures from any person other than the Filing User must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed. Upon the court's request, the Filing User must provide the original signed documents for review.

5. The Filing User agrees to abide by all the requirements set out in the Local Bankruptcy Rules and the Administrative Guide to Practice and Procedure currently in effect, and any changes or additions that later may be made.

6. The Filing User understands that the court may revoke a Filing User's login and password and, therefore, authority and ability to electronically file documents for cause, including failure to comply with any provisions of this agreement, failure to adequately protect the Filing User password, failure to comply with the provisions of the Local Bankruptcy Rules and/or Administrative Guide to Practice and Procedure, failure to pay any fees required for documents electronically filed, or other misuse of the electronic case filing system.

7. The Filing User agrees, as authorized by Local Bankruptcy Rule 9036-1, Notice by Electronic Transmission, to waive the electronic confirmation required in Federal Rules of Bankruptcy Procedure 9036, as to notices issued by the court.

______________________	______________________________
Date	Filing User Applicant

Return to:
U. S. Bankruptcy Court
Attn: Training Specialist
1760-A Parkwood Boulevard
Wilson, North Carolina 27893

For Court Use Only:

Date Approved ____________CM/ECF Filing User Login Name ______________________

Rev. 07/05 - Limited User

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF) SYSTEM LIMITED FILING PRIVILEGES REGISTRATION FORM

This form is to be used by Filing Users to register for filing requests for notice, proofs of claim, assignments/transfers of claim, and reaffirmation agreements via the internet component of the Case Management/Electronic Case Filing System (CM/ECF), in the United States Bankruptcy Court for the Eastern District of North Carolina. Firm name is the name of the creditor entity on whose behalf an employee or agent (Filer) is to be issued a login and password and authorized to file electronically. Complete a separate form for each separate corporate or other distinct legal entity.

Firm Name: ______________________________

Federal Tax ID # ______________________________

Mailing Address: ______________________________

The undersigned certifies under penalty of perjury that he/she is authorized to submit this registration form on behalf of the firm identified above. By submitting this registration form, the firm agrees to adhere to the terms and conditions specified on this form..

Firm Officer/Manager Name (Print): ______________________________

Mailing Address: ______________________________

Phone # ______________ FAX Phone # ______________

Internet E-Mail Address: ______________________________

The undersigned filer (person who processes documents submitted for filing) agrees to adhere to the terms and conditions specified on this form.

Filer Name: ______________________________

Mailing Address: ______________________________

Phone # ______________ FAX Phone # ______________

Internet E-Mail Address ______________________________

Filer Signature: ______________________________

By signing and submitting this registration form, the firm and filer agree to abide by the following requirements:

1. Pursuant to Federal Rule of Bankruptcy Procedure 9011 and Local Bankruptcy Rule 5005-4(8), every document shall be signed by the person authorized to submit the document for filing and that signature shall be indicated by "s/" and the typed name of the person signing in the following format: "s/Jane Doe" on the signature line. The unique password issued to each Filing User identifies the creditor upon login and constitutes the signature of the authorized filer.

2 The Filing User must protect and secure the login and password issued by the court. The login and password must be used exclusively by the Filing User and authorized employees. The Filing User must not knowingly permit the login and password to be used by anyone who is not authorized. After the password is first issued by the court, the Filing User agrees to change the password on a regular basis, if an employee is no longer an authorized user, or as needed for other reasons to ensure its security. The Filing User must immediately notify the court if misuse of a password is suspected.

3. The Filing User expressly consents to receive notice and service of pleadings and other papers by electronic means from the court and other Filing Users in all cases, except with regard to service of a summons and complaint under Bankruptcy Rule 7004 or a motion initiating a contested matter under Bankruptcy Rule 9014. Applicant must maintain the accuracy of the CM/ECF Filing User account to ensure the receipt of electronic notice.

4. The Filing User understands that electronically filed documents that require original signatures from any person other than the Filing User must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed. Upon the court's request, the Filing User must provide the original signed documents for review.

5 The Filing User agrees to abide by all the requirements set out in the Local Bankruptcy Rules and the Administrative Guide to Practice and Procedure currently in effect, and any changes or additions that later may be made.

6. The Filing User understands that the court may revoke a Filing User's login and password and, therefore, authority and ability to electronically file documents for cause, including failure to comply with any provisions of this agreement, failure to adequately protect the Filing User password, failure to comply with the provisions of the Local Bankruptcy Rules and/or Administrative Guide to Practice and Procedure, or other misuse of the electronic case filing system.

7. The Filing User agrees, as authorized by Local Bankruptcy Rule 9036-1, Notice by Electronic Transmission, to waive the electronic confirmation required in Federal Rules of Bankruptcy Procedure 9036, as to notices issued by the court.

______________________	________________________________
Date	Officer/Manager

Return to:
U. S. Bankruptcy Court
Attn: Training Specialist
1760-A Parkwood Boulevard
Wilson, North Carolina 27893
For Court Use Only:

Date Approved _______________ CM/ECF Filing User Login Name _______________________________

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
_______________________ DIVISION

IN RE: CASE NO: ____________________

Debtor (in a joint case, "debtor"
shall include "debtors")

CHAPTER 13 PLAN

The format of this chapter 13 plan has been approved by the bankruptcy judges for the Eastern District of North Carolina.

CONFIRMATION PROCESS: Before a plan is confirmed, the chapter 13 trustee will file a separate Motion and Notice for Confirmation that will be served on all creditors. The trustee's Motion and Notice for Confirmation may incorporate some or all of the terms of the debtor's proposed plan, and will state the date by which objections to confirmation must be filed with the court. Any objections to confirmation must state with particularity the grounds for the objection. **The rights of creditors may be affected if the plan is confirmed, and creditors should carefully read the plan.**

PROOF OF CLAIM: A creditor's claim will not be allowed or paid unless a proof of claim is filed by or on behalf of the creditor. Only allowed claims will receive a distribution from the chapter 13 trustee. Confirmation of a plan does not preclude the debtor, trustee or a party in interest from filing an objection to a claim.

PRE-CONFIRMATION ADEQUATE PROTECTION PAYMENTS: Pre-confirmation adequate payments required by 11 U.S.C. § 1326(a)(1) that are to be made through the chapter 13 trustee pursuant to Local Rule 3070-1(b) shall be disbursed by the trustee in accordance with the trustee's customary distribution process. A creditor will not receive a pre-confirmation adequate protection payment unless the creditor timely files a proof of claim.

INFORMATION ABOUT THE DEBTOR: The debtor's Current Monthly Income as defined in 11 U.S.C. § 101(10A) is ABOVE /BELOW (designate one) the applicable state median income.

The debtor's projected disposable income as referred to in 11 U.S.C. § 1325(b)(1)(B) is $________

________________.______________________________

The amount referred to in 11 U.S.C. § 1325(a)(4) that would be paid to unsecured claims if the debtor's estate were liquidated in a case under chapter 7 of title 11 is $_____________. The "liquidation test" has been computed as follows:

Asset (Real Property, Auto, Other)	Liquidation Value Net of Security Interest

PLAN TERMS PROPOSED BY DEBTOR

1. PAYMENTS AND LENGTH OF PLAN

The debtor shall make payments to the trustee in the aggregate amount of $ ________________, which shall be payable as follows (state amount of monthly payment and the number of months to be paid): ___ ________________________________.

2. PAYMENT OF DEBTOR'S BASE ATTORNEY'S FEES

The balance of the debtor's attorney's base fee to be paid through the plan is $ ______________ (representing a base fee of $______________ less the amount of $______________ which has already been paid).

3. PAYMENT OF SECURED CLAIMS (PAID THROUGH THE PLAN)

The secured claims to be paid through the plan are listed in the chart at the end of this paragraph. The allowed amounts of the secured claims will be limited to the amounts stated in the column "Amount of Secured Claim to be Paid," which will be paid with interest at the rate shown in the chart. Distributions will be made by the trustee to the holders of secured claims over the duration of the plan as stated in Paragraph 1., and shall be subject to the disbursements for attorney's fees as set forth in Local Rule 2016-1. Unless otherwise ordered by the court, the amount of a creditor's claim in excess of the allowed amount of the secured claim shall be a general unsecured claim.

Creditor	Collateral Description	910 / 365 Claim under § 1325(a) ? Y/N	Amount of Claim	Collateral Value	Amount of Secured Claim to be Paid	Int. Rate	If Entitled to §1326 PMSI Adeq. Prot. Pymt. Specify Amt. of Pymt.	Est. Mo. Pymt.

4. PROPERTY TO BE SURRENDERED TO SECURED CREDITORS

The Debtor Will Surrender The Collateral Listed In The Chart At The End Of This Paragraph. **Upon confirmation of the plan, the automatic stay and, if applicable, the co-debtor stay, will terminate with respect to the surrendered collateral.** No claim for a deficiency will be allowed unless it is filed within 180 days after confirmation of the plan, and no distribution will be made to an affected secured creditor unless the secured creditor has given the debtor credit and reduced its claim to account for the surrendered collateral.

Creditor	Collateral Description

5. CURING DEFAULTS

Pursuant to 11 U.S.C. § 1322(b)(3) and/or (5), the pre-petition defaults listed in the chart at the end of this paragraph will be cured through the plan in full with interest, if any, at the rate specified in the chart. The amount of the arrearage in the chart is an estimation and the amount of the arrearage, unless otherwise ordered by the court, shall be determined by the amount stated in the creditor's proof of claim. After the arrearage, as stated in the proof of claim or as otherwise determined by the court, has been paid through the plan, all pre-petition defaults shall be deemed to be cured, the debtor's obligation shall be deemed to be current as of the date of the petition, the secured creditor shall have no right to recover any amount alleged to have arisen prior to the filing of the petition, and the secured creditor may not declare a default of the note, mortgage or other loan document based upon a pre-petition default.

Creditor	Collateral Description	Estimated Amount of Arrearage	Interest to be Paid on Arrearage (0% if none specified)

6. SECURED CLAIMS TO BE PAID DIRECTLY TO CREDITORS BY DEBTOR

The following secured claims shall be paid by the debtor directly to the secured creditors according to the contractual terms of the secured claims:

Creditor	Collateral Description

7. PRE-PETITION DOMESTIC SUPPORT OBLIGATIONS

The following arrearage claims for pre-petition domestic support obligations as defined in 11 U.S.C. § 101(14A) shall be paid in full through this plan pursuant to 11 U.S.C. § 507(a)(1) unless the domestic support obligation claimant agrees to a different treatment or the court orders otherwise:

Creditor	Collection Agency	Amount of Arrearage

The debtor shall directly pay all ongoing domestic support obligations that become due after the filing of the petition.

8. PRIORITY CLAIMS (EXCLUDING DOMESTIC SUPPORT OBLIGATIONS)

The following claims that are entitled to priority pursuant to 11 U.S.C. § 507 shall be paid in full through this plan unless the claimant agrees to a different treatment or the court orders otherwise:

Creditor	Type of Priority	Amount of Priority Claim

9. EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Executory contracts and leases that are being assumed shall be paid directly by the debtor according to the contractual terms of the executory contract or lease. Pre-petition defaults listed in the chart at the end of this paragraph will be cured through the plan. The amount of the arrearage in the chart is an estimation and the amount of the arrearage, unless otherwise ordered by the court, shall be determined by the amount stated in the creditor's proof of claim. After the arrearage, as stated in the proof of claim, has been paid through the plan, all pre-petition defaults shall be deemed to be cured, the debtor's obligation shall be deemed to be current as of the date of the petition, the lessor or party to the executory contract shall have no right to recover any amount alleged to have arisen prior to the filing of the petition, and the lessor or party to the executory contract may not declare a default of the lease or contract based upon a pre-petition default. Claims arising from the rejection of executory contracts and leases shall be general unsecured claims.

Lessor/Creditor	Subject of Lease/Contract	To be Assumed, Rejected, or other Treatment	Amount of Arrearage	Term of Cure (Months)

10. CO-DEBTOR AND OTHER SPECIALLY CLASSIFIED UNSECURED CLAIMS

The following claims, if allowed, shall be paid as specially classified unsecured claims and shall receive the following designated treatment:

Creditor	Amount of Debt Specially Classified	Treatment of Claim

11. GENERAL UNSECURED CLAIMS

General unsecured claims shall be paid through the plan pro rata to the extent that funds are available after disbursements are made to pay secured claims, arrearage claims, priority claims, and other specially classified claims.

12. DISCHARGE

Subject to the requirements, conditions and limitations provided in 11 U.S.C. § 1328, and unless the court approves a written waiver of discharge executed by the debtor, the court shall, as soon as practicable after completion by the debtor of all payments under the plan, grant the debtor a discharge of all debts provided for by the plan or that are disallowed under 11 U.S.C. § 502.

13. OTHER PLAN PROVISIONS

A. Lien Retention. Holders of allowed secured claims shall retain the liens securing their claims to the extent provided by 11 U.S.C. § 1325(a)(5)(B)(i).

B. Vesting of Property of the Estate. Property of the estate shall vest in the debtor pursuant to 11 U.S.C. § 1327(b) unless this box is checked, in which event property of the estate shall remain property of the estate after confirmation of the plan.

Except as otherwise provided, property of the estate and property that vests in the debtor upon confirmation shall remain in the possession and control of the debtor, and the trustee shall have no liability arising out of the property or its retention or use by the debtor. The debtor's use of the property shall be subject to the requirements of 11 U.S.C. § 363, all other provisions of title 11, the Federal Rules of Bankruptcy Procedure and the Local Rules of this court.

C. Creditor Notices When Debtor to Make Direct Payments. Secured creditors, lessors and parties to executory contracts that will be paid directly by the debtor may send standard payment notices to the debtor without violating the automatic stay.

D. Rights of Debtor and Trustee to Avoid Liens and to Recover Transfers. Confirmation of the plan shall not prejudice the rights of the debtor or the trustee to bring actions to avoid liens or to avoid and recover transfers. Actions to avoid liens or to avoid and recover transfers must be initiated by separately filed motions or complaints.

E. Other Provisions of the Plan:

(Please attach additional pages as necessary)

X ______________________ ______________________
Signature of Debtor Date

X ______________________ ______________________
Signature of Joint Debtor Date

United States Bankruptcy Court
Eastern District of North Carolina

Volunteer Attorney Questionnaire

The United States Bankruptcy Court for the Eastern District of North Carolina recognizes the need for a formal program to provide pro bono representation in certain types of bankruptcy litigation. A program has been established to provide representation without charge to certain parties in bankruptcy litigation who are not able to employ an attorney on their own behalf. The Bankruptcy Court for the Eastern District of North Carolina encourages members of the bar to participate in this worthwhile program. Through the program, attorneys have the opportunity to gain courtroom experience and learn the basics of bankruptcy practice, while improving the quality of justice in our district.

Types of Cases: This program is only available to litigants in bankruptcy adversary proceedings. An adversary proceeding is civil litigation in the bankruptcy court. The Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and certain Federal Rules of Civil Procedure apply. Adversary proceedings are usually non-jury and are normally completed within six months to a year.

Scope of Representation: The appointed attorney will provide representation throughout the adversary proceeding, unless the court relieves the attorney of the appointment. The appointed attorney will not provide representation for the underlying bankruptcy case, such as for filing bankruptcy petitions, completing schedules, and attending creditors' meetings.

Appointment of Attorney: If the application for pro bono services is granted, the court will enter an order appointing a volunteer attorney to provide representation. The list of volunteer attorneys is maintained by [INSERT]. Generally, appointments from the list will be made on a rotational basis. However, this program is voluntary and no attorney is required to accept representation on a particular matter. Volunteers may decline a request for representation because of a conflict of interest or for any other reason. An attorney may join or leave the volunteer list by writing a letter to [INSERT].

Confidential Mentors: Attorneys with significant bankruptcy experience may also serve the pro bono program by acting as confidential mentors to volunteer attorneys who are less familiar with bankruptcy practice. The identity of confidential mentors will not be known to the pro bono clients.

Relief from Appointment: An attorney who is appointed to represent a litigant through the pro bono program is obligated to provide competent representation throughout the adversary proceeding. An attorney who is appointed may file with the court a motion for relief from the appointment order. The motion must establish good cause and be filed promptly so that the adjudication of the adversary proceeding is not delayed. If a motion for relief is granted, the court will enter another order of appointment

How Participants Are Chosen: Each individual seeking pro bono representation shall submit an application, which can be obtained from the clerk's office. The form requires the applicant to provide complete, accurate, and current information about the applicant's income and assets, as well as other pertinent financial information. The determination will be made by the court. In evaluating the application, the court may, if relevant, examine the applicant's bankruptcy schedules and statement of financial affairs. The court may also require the applicant to provide proof of income or assets, such as recent pay stubs or bank account statements.

Case Costs: Generally, program volunteers may not share in any award that may be received by a pro bono client. However, the court retains the discretion to alter this result in the case of an extraordinary recovery. At present, the court has no ability to defray the costs of litigation. These are the responsibility of the represented party, although pro bono counsel may chose to incur these expenses without repayment as part of the representation if the represented party is unable to meet them.

If you are interested in volunteering for the pro bono program, please complete and submit the attached form to the clerk's office. The Bankruptcy Court for the Eastern District of North Carolina and the members of the pro bono committee thank you for your interest and encourage you to participate in this program.

United States Bankruptcy Court
Eastern District of North Carolina

Volunteer Attorney Questionnaire

1. Name: ______________________________

2. Firm: ______________________________

3. Address: ______________________________

____

4. Office Telephone: ________________ Email: ________________

5. Bar admissions and years: ______________________________

____

6. Type of law practice: ______________________________

____

7. Bankruptcy litigation/other litigation experience: ______________________________

____

____

8. Please check the appropriate box if you have significant bankruptcy law experience and are willing to serve as a confidential mentor to pro bono program lawyers:

☐ I am willing to accept pro bono appointments and serve as a confidential mentor;

☐ I am interested only in serving as a confidential mentor

9. Languages spoken (other than English): ______________________________

10. I will accept appointments in adversary proceedings heard in the following locations:

_____ Fayetteville

_____ New Bern

_____ Raleigh

_____ Wilson

_____Wilmington

11. Please list two attorney references who are familiar with your law practice:

Reference 1:

Name ______________________________

Address: ______________________________

Phone Number: ______________________________

Law Firm/Organization: ______________________________

Reference 2:

Name ______________________________

Address: ______________________________

Phone Number: ______________________________

Law Firm/Organization: ______________________________

Signature: ____________________ Date: ____________________

Please return questionnaire to:

Peggy B. Deans, Clerk of Court
U.S. Bankruptcy Court
1760-A Parkwood Boulevard
Wilson, N.C. 27893-3564

Rev. 1/2004

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ Division

In re: **Bankruptcy Case No.**

Chapter

Debtor(s)*

APPEARANCE OF CHILD SUPPORT CREDITOR* OR REPRESENTATIVE

I certify under penalty of perjury that I am a child support creditor* of the above named debtor, or the authorized representative of such child support creditor, with respect to the child support obligation which is set out below:

Name:
Organization:
Address:

Telephone Number:

______________________ ______________________________________
Date Child Support Creditor* or Authorized Representative

Summary of Child Support Obligation

Amount in arrears:

$ _______________

Amount currently due per week or per month

$ __________ (per week) $ __________ (Per month)

If Child Support has been assigned:

Amount of Support which is owed under Assignment:

$ _________________

Amount owed primary child support creditor (balance not assigned):

$ _________________

**Child support creditor includes both creditor to whom the debtor has a primary obligation to pay child support as well as any entity to whom such support has been assigned, if pursuant to Section 402(a)(26) of the Social Security Act or if such debt has been assigned to the Federal Government or to any State or political subdivision of a state.*

Rev. 9/97

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ **Division**

In re: **Case No.**

Debtor(s)

CERTIFICATION OF MAILING MATRIX
REQUIRED BY E.D.N.C. LBR 1007-2

I hereby certify under penalty of perjury that the attached list of creditors which has been prepared in the format required by the clerk is true and accurate to the best of my knowledge and includes all creditors scheduled in the petition.

Date: _______________

____
Attorney for Debtor

Rev. 9/97

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
__________________ Division

IN RE: **CASE NUMBER:**

DEBTOR(S)

NOTICE OF [MOTION TO] [OBJECTION TO]

__________________________ has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to grant the [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before ____(date)____, unless otherwise ordered, you or your attorney must file with the court, pursuant to Local Rule 9013-1 and 9014-1, a written response, an answer explaining your position, and a request for hearing at:

{address of the bankruptcy clerk's office}

If you mail your {request} {response} to the court for filing, you must mail it early enough so the court will receive it on or before the date stated above.

You must also mail a copy to: {list names and addresses of applicable parties}

movant's attorney, debtor(s), debtor(s) attorney, trustee, Bankruptcy Administrator, and other parties in interest.

If a response and a request for hearing is filed in writing on or before the date set above, a hearing will be conducted on the [motion] [objection] at a date, time and place to be later set and all parties will be notified accordingly.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: ________________ Signature: __________________________
Name:
Address:

COMPUTATION OF RESPONSE TIME

Pursuant to Bankruptcy Rule 9006 the following guidelines are provided to compute the time allowed to respond to a motion or objection.

1. Local Bankruptcy Rule 9014-1(c) provides that a response and accompanying affidavits, if any, to any motion shall be filed within 15 days from the date of the service of the motion, unless otherwise ordered or provided in the Federal Rules of Bankruptcy Procedure or Local Bankruptcy Rules.

2. The designated period of time begins to run by excluding the day of the service but including the last day, unless the last day falls on Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next business day.

3. Bankruptcy Rule 9006 provides for three additional days to perform an act when the period is computed from service, and service is done by mail. Thus if the notice of motion is served by mail (postal or electronic), three days must be added to the period in paragraph 2 before computing the due date. If the last day falls on Saturday, Sunday or a legal holiday, the next business day is the due date.

4. When computing a response time that is reduced by an order, if the period of time for a response is less than 8 days, intermediate Saturdays, Sundays and legal holidays are excluded in the computation.

Computation Example providing 15 days response time:

Service of Motion on June 1 providing 15 days response time plus 3 additional days for service.

Response time period = June 2 through June 20

Response due date = June 20 (unless this date falls on a Saturday, Sunday or legal holiday, then designate the date of the next business day). In this case June 20 falls on Sunday; therefore June 21 is the response due date.

Computation Example providing for less than 8 days response time:

Service of Motion on June 1 providing 7 days response time (Time reduced by Order)

Response time period = June 2 through June 13 (Excluded June 5 -Saturday; June 6 - Sunday)

Response due date = June 10

If an order shortens the response time to a specific date, additional days for service are not added.

Rev. 2/00

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
________________ Division

IN RE: **CASE NUMBER:**

DEBTOR(S)

NOTICE OF OBJECTION TO CLAIM

__________________________ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before __(date)__ you or your attorney must file with the court, pursuant to Local Rule 9014-1, a written response, an answer explaining your position, and a request for hearing at:

{address of the bankruptcy clerk's office}

> If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.
>
> You must also mail a copy to:

{objector's attorney's name and address}
{names and addresses of others to be served}

If a response and a request for hearing is filed in writing on or before the date set above, a hearing will be conducted on the objection to claim at a date, time and place to be later set and all parties will be notified accordingly.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: ____________________ Signature: ______________________________
Name:
Address:

COMPUTATION OF RESPONSE TIME

Pursuant to Bankruptcy Rule 9006 the following guidelines are provided to compute the time allowed to respond to a motion or objection.

1. Bankruptcy Rule 3007 provides that a response and accompanying affidavits, if any, to an objection to claim shall be filed within 30 days from the date of the service of the objection.

2. The designated period of time begins to run by excluding the day of the service but including the last day, unless the last day falls on Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next business day.

3. Bankruptcy Rule 9006 provides for three additional days to perform an act when the period is computed from service, and service is done by mail. Thus if the notice of motion is served by mail (postal or electronic), three days must be added to the period in paragraph 2 before computing the due date. If the last day falls on Saturday, Sunday or a legal holiday, the next business day is the due date.

Computation Example providing 30 days response time:

Service of objection to Claim on June 1

Response time period = June 2 through July 5

Response due date = July 5 (unless this date falls on a Saturday, Sunday or legal holiday, then designate the date of the next business day)

Rev. 2/2000 - for cases filed before October 17, 2005)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ Division

REAFFIRMATION AGREEMENT

Debtor's Name	Bankruptcy Case No.
	Chapter
Creditor's Name and Address	

Instructions:
1) Attach a copy of all court judgments, security agreements, and evidence of their perfection
2) File all the documents by mailing them or delivering them to the Clerk of the Bankruptcy Court

NOTICE TO DEBTOR

This agreement gives up the protection of your bankruptcy discharge for this debt.

As a result of this agreement, the creditor may be able to take your property or wages if you do not pay the agreed amounts. The creditor may also act to collect the debt in other ways.

You may rescind (cancel) this agreement at any time before the bankruptcy court enters a discharge order or within 60 days after this agreement is filed with the court, whichever is later, by notifying the creditor that the agreement is canceled.

You are not required to enter into this agreement by any law. It is not required by the Bankruptcy Code, by any other law, or by any contract (except another reaffirmation agreement made in accordance with Bankruptcy Code § 524(c)).

You are allowed to pay this debt without signing this agreement. However, if you do not sign this agreement and are later unwilling or unable to pay the full amount, the creditor will not be able to collect it from you. The creditor also will not be allowed to take your property to pay the debt unless the creditor has a lien on that property.

If the creditor has a lien on your personal property, you may have a right to redeem the property and eliminate the lien by making a single payment to the creditor equal to the current value of the property, as agreed by the parties or determined by the court.

This agreement is not valid or binding unless it is filed with the Clerk, U. S. Bankruptcy Court. If you were not represented by an attorney during the negotiation of this reaffirmation agreement, the agreement cannot be enforced by the creditor unless: (1) you have attended a reaffirmation hearing in the bankruptcy court, and (2) the agreement has been approved by the bankruptcy court. (Court approval is not required if this is a consumer debt secured by a mortgage or other lien on your real estate.)

REAFFIRMATION AGREEMENT

The debtor and creditor named above agree to reaffirm the debt described in this agreement as follows:

THE DEBT

Total amount of debt when case was filed $__________

Total amount of debt reaffirmed $__________

Above total includes the following:

Interest accrued to date of agreement $__________
Attorney fees $__________
Late fees $__________
Other expenses or costs relating to
the collection of this debt (Describe) $__________

Annual percentage rate (APR) __________ %

Amount of monthly payment $__________

Date payments start __________

Total number of payments to be made __________

Total of Payments if paid according to schedule __________

Date any lien is to be released if paid
according to schedule __________

The debtor agrees that any and all remedies available to the creditor under the security agreement remain available.

All additional terms agreed to by the parties (if any): ______________________________

____

____

____

Payments of this debt (were)(were not) in default on the date on which this bankruptcy case was filed.

This agreement differs from the original agreement with the creditor as follows: ______________

____

____

____

____

CREDITOR'S STATEMENT CONCERNING AGREEMENT AND SECURITY/COLLATERAL (IF ANY)

Description of Collateral. (If applicable, list manufacturer, year and model): ______________

____

____

____

Value $______________

Basis or source for valuation ______________________________

Current location and use of collateral ______________________________

Expected future use of collateral ______________________________

Check applicable boxes:

☐ Any lien described herein is valid and perfected.

☐ This agreement is part of a settlement of a dispute regarding the dischargeability of this debt under section 523 of the Bankruptcy Code (11 U.S.C. § 523) or any other dispute. The nature of dispute is: ______________________________

____

____

____

____

____

____

DEBTOR'S STATEMENT OF EFFECT OF AGREEMENT ON DEBTOR'S FINANCES

My monthly income (take home pay plus any other income received) is $________________.

My current monthly expenses total $________________, not including any payment due under this agreement or any debt to be discharged in this bankruptcy case.
I believe this agreement (will) (will not) impose an undue hardship on me or my dependents.

DEBTOR'S STATEMENT CONCERNING DECISION TO REAFFIRM

I agree to reaffirm this debt because ____
____
____

I believe this agreement is in my best interest because______________________________
____
____

I (considered)(did not consider) redeeming the collateral under section 722 of the Bankruptcy Code (11 U.S.C. § 722). I chose not to redeem because ________________________________
____
____

I (was)(was not) represented by an attorney during negotiations on this agreement.

CERTIFICATION OF ATTACHMENTS

Any documents which created and perfected the security interest or lien (are)(are not) attached. (*If documents are not attached:* The documents which created and perfected the security interest or lien are not attached because____
____
____.)

SIGNATURES

____
Signature of Debtor

Date ______________________

____
Signature of Joint Debtor

Date ______________________

____
Name of Creditor

____
Signature of Creditor Representative

Date ______________________

CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY)

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor(s); (2) this agreement does not impose a hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

Date ______________________ ______________________________
Signature of Debtor's Attorney, (if any)

Form 240A - Reaffirmation Agreement (1/07)
For Cases Filed On or After October 17, 2005

☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
(Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement.)

UNITED STATES BANKRUPTCY COURT
_______________District of_______________

In re ___________________________,
Debtor

Case No. ______________
Chapter ______________

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

☐ Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5)

☐ Part B: Reaffirmation Agreement

☐ Part C: Certification by Debtor's Attorney

☐ Part D: Debtor's Statement in Support of Reaffirmation Agreement

☐ Part E: Motion for Court Approval

[Note: Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. ***Note also:*** *If you complete Part E, you must prepare and file Form 240B - Order on Reaffirmation Agreement.]*

Name of Creditor:_______________________________________

☐ *[Check this box if]* Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: $_______________________

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

--- *And/Or* ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: ________%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$________ @ ________%;
$________ @ ________%;
$________ @ ________%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: ________%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: ________%. If different simple interest rates apply to different balances included in the amount reaffirmed,

the amount of each balance and the rate applicable to it are:
$________ @ ________%;
$________ @ ________%;
$________ @ ________%.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item	Original Purchase Price or Original Amount of Loan

Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of $__________is due on ________(date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

— Or —

Your payment schedule will be: ________(number) payments in the amount of $__________ each, payable (monthly, annually, weekly, etc.) on the ________(day) of each __________(week, month, etc.), unless altered later by mutual agreement in writing.

— Or —

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ''lien'' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

> **NOTE:** When this disclosure refers to what a creditor ''may'' do, it does not use the word "may'' to give the creditor specific permission. The word ''may'' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

____
(Print Name)

____
(Signature)

Date: ______________

Co-borrower, if also reaffirming these debts:

____
(Print Name)

____
(Signature)

Date: ______________

Accepted by creditor:

____
(Printed Name of Creditor)

____
(Address of Creditor)

____
(Signature)

____
(Printed Name and Title of Individual Signing for Creditor)

Date of creditor acceptance:

____

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ *[Check box, if applicable and the creditor is not a Credit Union.]* A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: ______________________________

Signature of Debtor's Attorney: __________________________________

Date: _____________

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

*[Read and complete sections 1 and 2, **OR**, if the creditor is a Credit Union and the debtor is represented by an attorney, read section 3. Sign the appropriate signature line(s) and date your signature. If you complete sections 1 and 2 **and** your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]*

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_______, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_______, leaving $_______ to make the required payments on this reaffirmed debt.

I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ________________________

____

____.

(Use an additional page if needed for a full explanation.)

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: ________________________
(Debtor)

____
(Joint Debtor, if any)

Date: ______________

— Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

3. I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: ________________________
(Debtor)

____
(Joint Debtor, if any)

Date: ______________

PART E: MOTION FOR COURT APPROVAL

[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (*check all applicable boxes)*:

☐ 11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

☐ 11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed:____________________________
(Debtor)

____
(Joint Debtor, if any)

Date: ________________

Rev. 4/2006

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ DIVISION

IN THE MATTER OF: CASE NUMBER:

Debtor(s)

SCHEDULE C-1 - PROPERTY CLAIMED AS EXEMPT

I, ___________________, claim the following property as exempt pursuant to 11 U.S.C. § 522 and the laws of the State of North Carolina, and nonbankruptcy Federal law: **(Attach additional sheets if necessary).**

1. NCGS 1C-1601(a)(1) (NC Const., Article X, Section 2) REAL OR PERSONAL PROPERTY USED AS A RESIDENCE OR BURIAL PLOT (The exemption is not to exceed $18,500; however, an unmarried debtor who is 65 years of age or older is entitled to retain an aggregate interest in the property not to exceed $37,000 in value so long as the property was previously owned by the debtor as a tenant by the entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased, in which case the debtor must specify his/her age and the name of the former co-owner, if a child use initials only, of the property below).

Description of Property and Address	Market Value	Owner (H)Husband (W)Wife (J)Joint	Mortgage Holder or Lien Holder	Amount of Mortgage or Lien	Net Value	Value Claimed as Exempt Pursuant to NCGS 1C-1601(a)(1)

Debtor's Age: ________
Name of former co-owner: ________

VALUE OF REAL ESTATE CLAIMED AS EXEMPT PURSUANT TO NCGS 1C-1601(a)(1): $ .00

2. NCGS 1C-1601(a)(3) MOTOR VEHICLE (The exemption in one vehicle is not to exceed $3,500).

Model, Year Style of Auto	Market Value	Owner (H)Husband (W)Wife (J)Joint	Lien Holder	Amount of Lien	Net Value	Value Claimed as Exempt Pursuant to NCGS 1C-1601(a)(3)

VALUE OF MOTOR VEHICLE CLAIMED AS EXEMPT PURSUANT TO NCGS 1C-1601(a)(3): $ .00

3. NCGS 1C-1601(a)(4) (NC Const., Article X, Section 1) PERSONAL OR HOUSEHOLD GOODS (The debtor's aggregate interest is not to exceed $5,000 plus $1,000 for each dependent of the debtor, not to exceed $4,000 total for dependents). The number of dependents for exemption purposes is ________.

Description of Property	Market Value	Owner (H)Husband (W)Wife (J)Joint	Lien Holder	Amount of Lien	Net Value	Claimed as Exempt Pursuant to NCGS 1C-1601(a)(4)
Clothing & personal						
Kitchen appliances						
Stove						
Refrigerator						
Freezer						
Washing machine						
Dryer						
China						
Silver						
Jewelry						
Living room furniture						
Den furniture						
Bedroom furniture						
Dining room furniture						
Television						
()Stereo ()VCR/DVD						
()Radio ()Video Camera						
Musical Instruments						
()Piano ()Organ						
Air conditioner						
Paintings/Art						
Lawn mower						
Yard tools						
Crops						
Recreational Equipment						
()Computer						

VALUE CLAIMED AS EXEMPT PURSUANT TO NCGS 1C-1601(a)(4) : $ .00

Schedule C - Property Claimed as Exempt

4. NCGS 1C-1601(a)(5) TOOLS OF TRADE (The debtor's aggregate interest is not to exceed $2,000 in value).

Description	Market Value	Owner (H)Husband (W)Wife (J)Joint	Lien Holder	Amount of Lien	Net Value	Value Claimed as Exempt Pursuant to NCGS 1C-1601(a)(5)

VALUE CLAIMED AS EXEMPT PURSUANT TO NCGS-1C-1601(a)(5): $ .00

5. NCGS 1C-1601(a)(6) LIFE INSURANCE (NC Const., Article X, Section 5)

Description	Insured	Last Four Digits of Policy Number	Beneficiary (if child, initials only)	Cash Value

6. NCGS 1C-1601(a)(7) PROFESSIONALLY PRESCRIBED HEALTH AIDS (For Debtor or Debtor's Dependents, no limit on value).

Description

7. NCGS 1C-1601(a)(8) COMPENSATION FOR PERSONAL INJURY, INCLUDING COMPENSATION FROM PRIVATE DISABILITY POLICIES OR ANNUITIES, OR COMPENSATION FOR DEATH OF A PERSON UPON WHOM THE DEBTOR WAS DEPENDENT FOR SUPPORT. COMPENSATION NOT EXEMPT FROM RELATED LEGAL, HEALTH OR FUNERAL EXPENSE.

Description	Source of Compensation, Including Name (If child, initials only) & Last Four Digits of Account Number of any Disability Policy/Annuity

8. NCGS 1C-1601(a)(2) ANY PROPERTY [Debtor's aggregate interest in any property is not to exceed $5,000 in value of any unused exemption amount to which the debtor is entitled under NCGS 1C-1601(a)(1)].

Description of Property and Address	Market Value	Owner (H)Husband (W)Wife (J)Joint	Lien Holder	Amount of Lien	Net Value	Value Claimed as Exempt Pursuant to NCGS 1C-1601(a)(2)

VALUE CLAIMED AS EXEMPT PURSUANT TO NCGS 1C-1601(a)(2) : $ .00

9. NCGS 1C-1601(a)(9) and 11 U.S.C. § 522 INDIVIDUAL RETIREMENT PLANS & RETIREMENT FUNDS, as defined in the Internal Revenue Code, and any plan treated in the same manner as an individual retirement plan, including individual retirement accounts and Roth retirement accounts as described in §§ 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in § 408(b) of the Internal Revenue Code, accounts established as part of a trust described in § 408(c) of the Internal Revenue Code, and funds in an account exempt from taxation under § 401, 403, 408, 408A, 414, 457, or 510(a) of the Internal Revenue Code. For purposes of this subdivision, "Internal Revenue Code" means Code as defined in G.S. 105-228.90.

Type of Account	Location of Account	Last Four Digits of Account Number

10. NCGS 1C-1601(a)(10) FUNDS IN A COLLEGE SAVINGS PLAN, as qualified under § 529 of the Internal Revenue Code, and that are not otherwise excluded from the estate pursuant to 11 U.S.C. §§ 541(b)(5)-(6), (e), not to exceed a cumulative limit of $25,000. If funds were placed in a

college savings plan within the 12 months prior to filing, the contributions must have been made in the ordinary course of the debtor's financial affairs and must have been consistent with the debtor's past pattern of contributions. The exemption applies to funds for a child of the debtor that will actually be used for the child's college or university expenses.

College Savings Plan	Last Four Digits of Account Number	Value	Initials of Child Beneficiary

11. NCGS 1C-1601(a)(11) RETIREMENT BENEFITS UNDER THE RETIREMENT PLANS OF OTHER STATES AND GOVERNMENTAL UNITS OF OTHER STATES (The debtor's interest is exempt only to the extent that these benefits are exempt under the laws of the state or governmental unit under which the benefit plan is established).

Name of Retirement Plan	State Governmental Unit	Last Four Digits of Identifying Number

12. NCGS 1C-1601(a)(12) ALIMONY, SUPPORT, SEPARATE MAINTENANCE, AND CHILD SUPPORT PAYMENTS OR FUNDS THAT HAVE BEEN RECEIVED OR TO WHICH THE DEBTOR IS ENTITLED (The debtor's interest is exempt to the extent the payments or funds are reasonably necessary for the support of the debtor or any dependent of the debtor).

Type of Support	Amount	Location of Funds

13. TENANCY BY THE ENTIRETY. The following property is claimed as exempt pursuant to 11 U.S.C. § 522 and the law of the State of North Carolina pertaining to property held as tenants by the entirety.

Description of Property and Address	Market Value	Lien Holder	Amount of Lien	Net Value

VALUE CLAIMED AS EXEMPT: $ .00

14. NORTH CAROLINA PENSION FUND EXEMPTIONS

a.	North Carolina Local Government Employees Retirement benefits NCGS 128-31	
b.	North Carolina Teachers and State Employees Retirement benefits NCGS 135-9	
c.	Firemen's Relief Fund pensions NCGS 58-86-90	
d.	Fraternal Benefit Society benefits NCGS 58-24-85	
e.	Benefits under the Supplemental Retirement Income Plan for teachers and state employees are exempt from levy, sale, and garnishment NCGS 135-95	
f.	Benefits under the Supplemental Retirement Income Plan for state law enforcement officers are exempt from levy, sale, and garnishment NCGS 143-166.30(g)	

15. OTHER EXEMPTIONS CLAIMED UNDER LAWS OF THE STATE OF NORTH CAROLINA

a.	Aid to the Aged, Disabled and Families with Dependent Children NCGS 108A-36	
b.	Aid to the Blind NCGS 111-18	
c.	Yearly Allowance of Surviving Spouse NCGS 30-15	
d.	Workers Compensation benefits NCGS 97-21	
e.	Unemployment benefits, so long as not commingled and except for debts for necessities purchased while unemployed NCGS 96-17	
f.	Group insurance proceeds NCGS 58-58-165	
g.	Partnership property, except on a claim against the partnership NCGS 59-55	
h.	Wages of debtor necessary for support of family NCGS 1-362	
i.	Benefits under the Separate Insurance Benefits Plan for state and local law enforcement officers are exempt from levy, sale, and garnishment NCGS 143-166.60(h)	
j.	Vested benefits under the North Carolina Public Employee Deferred Compensation Plan are exempt from levy, sale, and garnishment NCGS 147-9.4	

16. FEDERAL PENSION FUND EXEMPTIONS

a.	Foreign Service Retirement and Disability Payments 22 U.S.C. § 4060	
b.	Civil Service Retirement benefits 5 U.S.C. § 8346	
c.	Railroad Retirement Act annuities and pensions 45 U.S.C. § 231m	
d.	Veterans benefits 38 U.S.C. § 5301	
e.	Special pension paid to winners of Congressional Medal of Honor 38 U.S.C. § 1562	
f.	Annuities payable for service in the General Accounting Office 31 U.S.C. 776	

17. OTHER EXEMPTIONS CLAIMED UNDER NONBANKRUPTCY FEDERAL LAW

a.	Social Security benefits 42 U.S.C. § 407	
b.	Injury or death compensation payments from war risk hazards 42 U.S.C. § 1717	
c.	Wages owing a master or seamen, except for support of a spouse and/or minor children 46 U.S.C. § 11109	
d.	Longshoremen and Harbor Workers Compensation Act death and disability benefits 33 U.S.C. § 916	
e.	Crop insurance proceeds 7 U.S.C. § 1509	
f.	Public safety officers' death benefits 42 U.S.C. § 3796. See subsection (g)	
g.	Railroad unemployment insurance 45 U.S.C. § 352. See subsection (e)	

18. RECENT PURCHASES

(a). List tangible personal property purchased by the debtor within ninety (90) days of the filing of the bankruptcy petition.

Description	Market Value	Lien Holder	Amount of Lien	Net Value

(b). List any tangible personal property from 18(a) that is directly traceable to the liquidation or conversion of property that may be exempt and that was not acquired by transferring or using additional property.

Description of Replacement Property	Description of Property Liquidated or Converted that May Be Exempt

19. The debtor's property is subject to the following claims:

a. Of the United States or its agencies as provided by federal law
b. Of the State of North Carolina or its subdivisions for taxes, appearance bonds or fiduciary bonds
c. Of a lien by a laborer for work done and performed for the person claiming the exemption. but only as to the specific property affected
d. Of a lien by a mechanic for work done on the premises, but only as to the specific property affected
e. For payment of obligations contracted for the purchase of specific real property affected.
f. For contractual security interests in specific property affected; provided, that the exemptions shall apply to the debtor's household goods notwithstanding any contract for a nonpossessory, nonpurchase money security interest in any such goods
g. For statutory liens, on the specific property affected, other than judicial liens
h. For child support, alimony or distributive award order pursuant to Chapter 50 of the General Statutes of North Carolina
i. For criminal restitution orders docketed as civil judgments pursuant to G.S. 15A-1340.38
j. Debts of a kind specified in 11 U.S.C. § 523(a)(1) (certain taxes), (5) (domestic support obligations)
k. Debts of a kind specified in 11 U.S.C. § 522(c)

Claimant	Nature of Claim	Amount of Claim	Description of Property	Value of Property	Net Value

None of the property listed in paragraph 18(a), except qualified replacement property under 18(b), has been included in this claim of exemptions.

None of the claims listed in paragraph 19 is subject to this claim of exemptions.

I declare that to the extent any exemptions I have claimed appear on its face to exceed the amount allowed by the applicable statute, I claim only the maximum amount allowed by statute.

UNSWORN DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF INDIVIDUAL TO SCHEDULE C-1 - PROPERTY CLAIMED AS EXEMPT

I, ______________________________________, declare under penalty of perjury that I have read the foregoing Schedule C-1 - Property Claimed as Exempt, consisting of ________ sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on:____________________

____
Debtor

Rev. 4/2006

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
__________ DIVISION

IN THE MATTER OF: CASE NUMBER:

Debtor(s)

SCHEDULE C - 2 - PROPERTY CLAIMED AS EXEMPT

I, ____________________, claim the following property as exempt pursuant to 11 U.S.C. § 522 and the Federal bankruptcy law or the laws of a State other than North Carolina, and nonbankruptcy Federal law: (*Attach additional sheets if necessary*).

☐ Check if debtor claims a homestead exemption that exceeds $125,000.

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemption

I declare that the following are the dates and addresses of my domicile during the 730 days preceding the date of the filing of the bankruptcy petition:

Dates	Addresses

I declare that to the extent that any exemption I have claimed appears on its face to exceed the amount allowed by the applicable statute, I claim only the maximum amount allowed by statute.

UNSWORN DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF INDIVIDUAL TO SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

I, ____, declare under penalty of perjury that I have read the foregoing Schedule -C-2 - Property Claimed as Exempt, consisting of __________ sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on:________________________ ______________________________
Debtor

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

SUBPOENA FOR RULE 2004 EXAMINATION

TO:

[ ] YOU ARE COMMANDED to appear pursuant to a court order issued under Rule 2004, Fed.R.Bankr.P., at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below:

(list documents or objects):	
Place:	Date:
	Time:

Issuing Officer Signature and Title:	Date
Issuing Officer's Name, Address and Phone Number:	

PROOF OF SERVICE		
SERVED	Date	Place

Served on (Print Name)	Manager or Service
Served by (Print Name)	Title

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof Of Service is true and correct.

Executed on ____________________ ____

Signature of Server

____

Address of Server

Rule 45, Fed. R. Civ. P., Parts(c) & (d) made applicable in cases under the Bankruptcy Code by Rule 9016, Fed. R. Bankr. P.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated material or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;
(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and not exception or waiver applies, or
(iv) subjects a person to undue burden

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing the specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Subpoena for Rule 2004 Examination

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ **Division**

IN THE MATTER OF: **CASE NUMBER:**

DEBTOR

SUBPOENA IN A CASE UNDER THE BANKRUPTCY CODE

TO:

[ ] YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below:

(list documents or objects):	
Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises:	Date:
	Time:

Any subpoenaed organization not a party to this proceeding case shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Fed. R. Civ. P. 30(b)(6) made applicable to this proceeding by Rule 7030, Fed. R. Bankr. P. See Rules 1018 and 9014, Fed. R. Bankr. P.

Issuing Officer Signature and Title:	Date
Issuing Officer's Name, Address and Phone Number:	

PROOF OF SERVICE

SERVED	Date	Place
Served on (Print Name)		Manager or Service
Served by (Print Name)		Title

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof Of Service is true and correct.

Executed on ____________________

____
Signature of Server

____
Address of Server

____

Rule 45, Fed. R. Civ. P., Parts(c) & (d) made applicable in cases under the Bankruptcy Code by Rule 9016, Fed. R. Bankr. P.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated material or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;
(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
(iii) requires disclosure of privileged or other protected matter and not exception or waiver applies, or
(iv) subjects a person to undue burden

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing the specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_________________ **Division**

In re: **Bankruptcy Case No.**

Debtor(s)*
Social Security No.
Employer Tax I.D. No.:

SUMMONS TO DEBTOR IN INVOLUNTARY CASE

To the above named debtor:

A petition under the Bankruptcy Code (title 11, of the United States Code) was filed against you on

______________________ in this court, requesting an order for relief under chapter __________
(date)

of the Bankruptcy Code.

YOU ARE SUMMONED and required to submit to the clerk of the bankruptcy court a motion or answer to the petition within 20 days after the service of this summons. A copy of the petition is attached.

Clerk, U.S. Bankruptcy Court, Eastern District of North Carolina
☐ 1760-A Parkwood Blvd., Wilson, NC 27893
☐ 300 Fayetteville Street, P.O. Box 1441, Raleigh, NC 28602-1441

At the same time you must also serve a copy of your motion or answer on petitioner's attorney.

Name and Address of Petitioner's Attorney

If you make a motion, your time to serve an answer is governed by Bankruptcy Rule 1011(c).

If you fail to respond to this summons, the order for relief will be entered.

Peggy B. Deans, Clerk of Court

________________________ By: ____________________________
Date Deputy Clerk

**Set forth all names, including trade names, used by the debtor within the last 6 years. (Bankruptcy Rule 1005). For joint debtors, set forth both social security numbers.*

CERTIFICATE OF SERVICE

I, ______________________________ (name), certify that I am, and at all times during the service of this subpoena was, not less than 18 years of age and not a party to the matter concerning which service of process was made.

I further certify that the service of this summons and a copy of the complaint was made

on ____________ (date) by:

☐ Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to

☐ Personal Service: By leaving the process with defendant or with an officer or agent of defendant at:

☐ Residence Service: By leaving the process with the following adult at:

☐ Publication: The defendant was served as follows: [Describe briefly]

☐ State Law: The defendant was served pursuant to the laws of the State of ____________ (name of state) as follows: [Describe briefly]

Under penalty of perjury, I declare that the foregoing is true and correct.

____________ Date

____________ Signature

Print Name		
Business Address		
City	State	Zip

Rev.2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

JUDGMENT CREDITOR (PLAINTIFF)) ADVERSARY PROCEEDING NUMBER:

V.)

JUDGMENT DEBTOR (DEFENDANT))

BILL OF COSTS

Notice is given that the following Bill of Costs will be presented to the bankruptcy clerk at the following place, date, and time:

Address:	Date
	Time

Judgment was entered in the above entitled action on _______________ against _______________.
(Date)

The clerk of the bankruptcy court is requested to tax the following as costs:

Fee of the clerk	$
Fee for service of summons and complaint	$
Fee of the court reporter for any and all part of the transcript necessarily obtained for use in the case	$
Fees and disbursements for printing	$
Fees for witnesses (itemized on reverse)	$
Fees for exemplifications and copies of papers necessarily obtained for use in this case	$
Docket fees under 28 U.S.C. § 1923	$
Costs incident to taking of depositions	$
Costs as shown on Mandate of appellate court	$
Other costs (Please itemize)	$
	$
TOTAL	$

I, attorney for ______________________________ declare under penalties of perjury that the foregoing costs are correct and were necessarily incurred in this action, that the services for which fees have been charged were actually and necessarily performed, and that a copy of this Bill of Costs was mailed this day with postage fully prepaid to:

Name and Address of Judgment Debtor

____________________ ______________________________
Date Signature of Attorney

COSTS ARE TAXED IN THE FOLLOWING AMOUNT AND INCLUDED IN THE JUDGMENT: $ __________

Peggy B. Deans, Clerk of Court

____________________ By: ______________________________
Date Deputy Clerk

WITNESS FEES (computation, cf. 28 U.S.C. § 1821 for statutory fees)

NAME AND RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		TOTAL COST for Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
					TOTAL		

Bill of Costs

NOTICE

Section 1924, title 28, U.S. Code provides:

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

Section 1920 of title 28 reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Bankruptcy Rules contain the following provisions:

Bankruptcy Rule 7054(b)

"COSTS. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice; on motion served with five days thereafter, the action of the clerk may be reviewed by the court."

Bankruptcy Rule 9006(f)

"ADDITIONAL TIME AFTER SERVICE BY MAIL. When there is a right or requirement to do some act or undertake some proceeding within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period."

Bankruptcy Rule 9021(a) (in part)

"Entry of the judgment shall not be delayed for the taxing of costs."

Rev. 2/01

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
________________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

____

PLAINTIFF(S) ADVERSARY PROCEEDING NUMBER:

V.

DEFENDANT(S)

____

DEPOSITION SUBPOENA IN AN ADVERSARY PROCEEDING

To:

YOU ARE COMMANDED to appear to testify at the taking of a deposition in the above named adversary proceeding at the following place and time:

Date: Time:

Location:

YOU ARE ALSO COMMANDED TO BRING with you the following documents(s) and objects(s): [If not applicable, enter "None"]

Any subpoenaed organization not a party to this adversary proceeding is directed pursuant to Federal Rule of Civil Procedure 30(b)(6), as made applicable to this proceeding by Bankruptcy Rule 7030, to file a designation with the court specifying one or more officers, directors, managing agents or other persons who consent to testify on its behalf, and to set forth, for each person designated, the matters on which each person will testify, and which documents or objects each person will produce. The persons so designated shall testify as to matters known or reasonable to the organization.

Subpoena issued on the request of [Name of Party]:	Inquiries may be addressed to [Attorney's name, address and phone]:

Peggy B. Deans, Clerk of Court

______________ By______________________________

Date Deputy Clerk

CERTIFICATE OF SERVICE

I, ____, certify that I am,
(name)

and at all times during the service of this subpoena was, not less than 18 years of age and not a party to the matter concerning which service of this subpoena was made. I further certify that the service of this subpoena was made on ____________________ by delivering a copy of this subpoena, and tendering the
(date)

attendance fees and mileage allowed by law, to __________________________________,
(name)

a witness in this case, at:

Under penalty of perjury, I declare that the foregoing is true and correct.

______________________ ______________________________

Date Signature

Print Name		
Business Address		
City	State	Zip

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

_________________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

____

PLAINTIFF(S))	ADVERSARY PROCEEDING NUMBER:
V.)	
DEFENDANT(S))	

ENTRY OF DEFAULT

It appears from the record that the following defendant failed to plead or otherwise defend in this case as required by law.

Name:

Therefore, default is entered against the defendant as authorized by Bankruptcy Rule 7055.

Peggy B. Deans, Clerk of Court

_______________ Date

By: ______________________ Deputy Clerk

Rev. 2/01

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

JUDGMENT CREDITOR (PLAINTIFF))

V.) ADVERSARY PROCEEDING NUMBER:

JUDGMENT DEBTOR (DEFENDANT))

MOTION TO CLAIM EXEMPT PROPERTY

I, the undersigned, move to set aside the property claimed below as exempt.

1. I am a citizen and resident of_______________ County, North Carolina.

2. [ ] I am married to _______________
   [ ] I am not married.

3. I live at _______________

   (I own) (I am purchasing) (I rent) (choose one; mark out the other choices) a (house) (trailer) (apartment) (choose one; mark out the other choices).

The following persons live in my household and are in substantial need of my support:

NAME	RELATIONSHIP TO JUDGMENT DEBTOR	AGE

Motion to Claim Exempt Property

4. I (do) (do not) own any other real property. If other real property is owned, list that property on the following lines. If no other real property is owned, mark "not applicable" on the first line.

5. The following persons are, so far as I am able to tell, all of the persons or companies to whom I own money:

6. I wish to claim my interest in the following real or personal property that I use as a residence or my dependent uses as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed $10,000. I understand that I am not entitled to this exemption if I take the homestead exemption provided by the constitution of North Carolina in other property. I understand that if I wish to claim more than one parcel exempt I must attach additional pages setting forth the following information for each parcel claimed exempt.

Property Location:

County________________ Township________________

Street Address________________

Legal Description:

Number by which county tax assessor identifies property________________

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here, or describe the property in as much detail as possible). Attach additional sheets if necessary.

Record Owner(s):

Estimated Value:

Lienholders:

(1) Name________________ Current Balance________________

Address________________

(2) Name______________________________ Current Balance________________

Address____

(3) Name______________________________ Current Balance________________

Address____

(4) Name______________________________ Current Balance________________

Address____

7. I wish to claim the following life insurance policies whose sole beneficiaries are (my wife) (my children) (my wife and children) as exempt:

Name of Insurer	Policy Number	Face Value	Beneficiary(ies)

8. I wish to claim the following items of health care aid necessary for (myself) (my dependents) to work or sustain health:

Item	Purpose	Person Using Item

9. I wish to claim the following implements, professional books, or tools (not to exceed $750), of my trade or the trade of my dependent. I understand that such property purchased within 90 days of this proceeding is not exempt:

Item	Estimated Value

10. I wish to claim the following personal property consisting of household furnishing, household goods, wearing apparel, appliances books, animals, crops or musical instruments as exempt from the claims of my creditors. I affirm, that these items of personal property are held primarily for my personal, family or household use or for such use by my dependents.

I understand that I am entitled to personal property worth the sum of $3,500. I understand that I am also entitled to $750 for each person dependent on me for support, but not to exceed $3,000 for dependents. I further understand that I am entitled to this amount after deduction from the value of the property the amount of any valid lien or purchase money security interest and that property purchased within 90 days of this proceeding is not exempt.

Item (or class) of Property	Amount of Lien or Security Interest	Location	Estimated Value of Judgment Debtor's Interest

11. I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in a motor vehicle worth the sum of $1,500 after deduction of the amount of any valid liens or purchase money security interest. I understand that a motor vehicle purchased within 90 days of this proceeding is not exempt.

Make and Model of Motor Vehicle	Year	Name(s) of Title Owner of Record	Name(s) of Lien Holder(s)of Record	Estimated Value of Judgment Debtor's Interest

12. I wish to claim as exempt the following compensation which I received for the personal injury of myself or a person upon whom I was dependent for support or compensation which I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or heath care charges related to the accident or injury which resulted in the payment of the compensation to me.

(a) amount of compensation:________________________

(b) method of payment: lump sum or installments____________________
(If installments, state amount, frequency and duration of payments)

____

(c) name and relationship to debtor of person(s) injured or killed giving rise to compensation:________________

____

(d) location of compensation if received in lump or installments:____________________

____

(e) unpaid debts arising out of the injury or death giving rise to compensation:

Name and Address	Services Rendered	Amount of Debt

13. I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than $3,500 or I made no claim for a residential exemption under section (6) above, I understand that I am entitled to $3,500 in any property only if I made no claim under section (6) above and that if I make a claim under section (6) above, that I am entitled to $3,500 in any property minus any amount I claimed under section (6). (Examples: claim of $1,000 under section (6), $2,500 allowed here; claim of $3,450 under section (6), $50 allowed here; claim of $3,600 under section (6), no claim allowed here.)

I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or purchase money security interests and that tangible personal property purchased within 90 days of this proceeding is not exempt.

PERSONAL PROPERTY:

Property Location	Amount of Liens or Purchase Money Security Interest	Value of Judgment Debtor's Interest

REAL PROPERTY (I understand that if I wish to claim more than one parcel exempt, I must attach additional pages setting forth the following information for each parcel claimed exempt):

Property Location:

County____________________ Township____________________

Street Address______________________________________

Legal Description:

Number by which county tax assessor identifies property____________________

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here, or describe the property in as much detail as possible). Attach additional sheets I necessary.

____

____

____

____

Record Owner(s):

____

____

____

Estimated Value:

____

Lienholders:

(1) Name____________________ Current Balance____________________

Address______________________________________

(2) Name____________________ Current Balance____________________

Address______________________________________

(3) Name____________________ Current Balance________________

Address____________________________________

(4) Name____________________ Current Balance________________

Address____________________________________

14 I wish to claim my individual retirement accounts, individual retirement annuities, and accounts established as part of a trust.

Account no. __________ Account holder____________________________

Account no. __________ Account holder____________________________

Account no. __________ Account holder____________________________

Account no. __________ Account holder____________________________

15. The following is a complete listing of all of my assets which I have not claimed as exempt under any of the preceding paragraphs:

Item	Location	Estimated Value

16. I certify that the above statements are true and that a copy of this motion was served on the judgment creditor (plaintiff) by [ ] delivering a copy to him personally [ ] delivering a copy to____________________________, the judgment creditor's attorney [ ] depositing a copy of the motion in a postpaid addressed wrapper in a post office, addressed to the judgment creditor (plaintiff) at the address shown on the notice of rights served on me
[ ] depositing a copy of the motion in a postpaid properly addressed wrapper in a post office, addressed to the judgment creditor's (plaintiff's) attorney at the following address:____

____

Dated:

____
Signature of Judgment Debtor (Defendant)

Note to Judgment Debtor: The Clerk of the U.S. Bankruptcy Court cannot fill out this form for you. If you need assistance you should talk with an attorney.

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_____________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

____
JUDGMENT CREDITOR (PLAINTIFF))
)
V.) ADVERSARY PROCEEDING NUMBER:
)
JUDGMENT DEBTOR (DEFENDANT))
______________________________________)

NOTICE OF RIGHT TO HAVE EXEMPTIONS DESIGNATED

A judgment has been entered against you in the case captioned above in which you have been ordered to:

[ ] pay money over to the judgment creditor (Plaintiff).

[ ] turn over various household belongings to the judgment creditor (Plaintiff).

The judgment creditor (person who has the judgment against you) is now seeking to collect this judgment and has asked me to give you notice of your rights. Under the Constitution and laws of North Carolina, you have the right to exempt from the collection of the judgment certain of your property (in other words, to keep it from being taken from you). If you wish to keep your exempt property, you MUST fill out the attached schedule of property and mail or take it to the Clerk at the address listed below. You MUST also mail or take a copy to the judgment creditor (plaintiff) at his address listed below.

It is important that you respond to this notice no later than 20 days after it was served on you because you will lose valuable constitutional and statutory rights if you do nothing. If you do not respond, you will give up your right to exemptions and the judgment creditor (plaintiff) may be able to take any or all of your property to satisfy the judgment. You may wish to consider hiring an attorney to help you with this proceeding to make certain that you receive all the protection to which you are entitled under the North Carolina Constitution and laws.

Judgment Creditor (Plaintiff) or Attorney	Date
Address	Signature
Telephone	Clerk, U.S. Bankruptcy Court, EDNC ☐ 1760-A Parkwood Boulevard, Wilson, NC 27893 ☐ P.O. Box 1441, Raleigh, NC 27602-1441

You may serve this notice and the motion to claim exempt property by mailing a copy of each, registered or certified mail, return receipt requested, addressed to the judgment debtor (defendant). To prove service, you must file an affidavit (notarized by a notary public) with the clerk asserting that (1) a copy of the notice or rights and motion to claim exempt property was deposited in the post office for mailing by registered or certified mail, return receipt requested; (2) it was in fact received as evidenced by the attached registry receipt or other evidence of delivery; and (3) the genuine receipt or other evidence of delivery is attached. You must attach the post office delivery receipt to the affidavit.

Alternatively, you may choose to have this notice and the motion served by the U.S. Marshall. If you select this method, you must pay a service fee. The Marshall's service will be proven by his return.

If your attempted service by certified or registered mail or personal service by the Marshall fails, you may then serve the judgment debtor (defendant) by mailing a copy of notice and motion to him at his last known address. To prove service, you must file a certificate with the clerk that the notice and motion were served indicating why you used such service, the date the notice was mailed and the address to which it was mailed. Remember, you may NOT use service by regular first class mail until you have tried first to serve the judgment debtor (defendant) personally or by certified or registered mail and such service was unsuccessful.

RETURN OF SERVICE BY U.S. MARSHALL

I certify that this notice and a copy of a motion to claim exempt property were received and served as follows:

Date Served	Name of Judgment Debtor (Defendant)

[ ] By delivering to the judgment debtor (defendant) named above a copy of the notice and motion to claim exempt property.

[ ] By leaving a copy of the notice and motion to claim exempt property at the dwelling house or usual place of abode of the judgment debtor (defendant) named above with a person of suitable age and discretion.

Name of person with whom copies left.

Address where copies delivered or left.

[ ] Debtor (Defendant) WAS NOT served for the following reason:

Service Fee Paid	Date Received	Name of U.S. Marshall Making Return:
	Date of Return	Address:

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
______ Division

IN RE: CASE NUMBER:

DEBTOR(S)

JUDGMENT CREDITOR (PLAINTIFF))
)
) ADVERSARY PROCEEDING
) NUMBER:
V.)
)
)
JUDGMENT DEBTOR (DEFENDANT))
)

ORDER DESIGNATING EXEMPT PROPERTY

Upon notice and motion duly made, and for good cause shown, it is ORDERED:

☐ that all property listed in the motion and schedule attached is designated as exempt property.

☐ that the following property belonging to the judgment debtor, of the value as shown, is designated as exempt property

Item	Description	Judgment Debtor's Interest	Exemption Value
Residence			
Burial Plot			
Household goods, furnishings, appliances, etc.			
Interest in Motor Vehicle			
List any other exempt property			

☐ It is further ORDERED as follows:

Dated: ______________________
Clerk of Court

Rev. 2/2001

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
__________________ Division

IN RE:

CASE NUMBER:

DEBTOR(S)

____

PLAINTIFF(S))

ADVERSARY PROCEEDING NUMBER:

V.)

DEFENDANT(S))

____)

SUBPOENA IN AN ADVERSARY PROCEEDING

TO:

[ ] YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below:

(list documents or objects):	
Place:	Date:
	Time:

[ ] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises:	Date:
	Time:

Any subpoenaed organization not a party to this adversary proceeding shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Fed. R. Civ. P. 30(b)(6) made applicable to this proceeding by Rule 7030, Fed. R. Bankr. P.

Issuing Officer Signature and Title:	Date
Issuing Officer's Name, Address and Phone Number:	

PROOF OF SERVICE

SERVED	Date	Place
Served on (Print Name)		Manager or Service
Served by (Print Name)		Title

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof Of Service is true and correct.

Executed on ________________

____
Signature of Server

____
Address of Server

Rule 45, Fed. R. Civ. P., Parts(c) & (d) made applicable in cases under the Bankruptcy Code by Rule 9016, Fed. R. Bankr. P.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated material or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and not exception or waiver applies, or

(iv) subjects a person to undue burden

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing the specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Rev.2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
_______________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

PLAINTIFF(S) ADVERSARY PROCEEDING NUMBER:

V.

DEFENDANT(S)

SUMMONS IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the third-party complaint within 35 days.

Clerk, U. S. Bankruptcy Court, Eastern District of North Carolina
☐ 1760-A Parkwood Blvd., Wilson, NC 27893
☐ 300 Fayetteville St., P.O. Box 1441, Raleigh, NC 28602-1441

At the same time, you must also serve a copy of the motion or answer upon plaintiff's attorney

Name and Address of Plaintiff's Attorney:

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

Peggy B. Deans, Clerk of Court

_______________ By: _______________
Date Deputy Clerk

CERTIFICATE OF SERVICE

I, ____, certify that I am, and at all
(name)
times during the service was, not less than 18 years of age and not a party to the matter concerning which service of process was made. I further certify that the service of this summons and a copy of the complaint was made

on ________________ by:
(date)

☐ Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to:

☐ Personal Service: By leaving the process with defendant or with an officer or agent of defendant at:

☐ Residence Service: By leaving the process with the following adult at:

☐ Publication: The defendant was served as follows: [Describe briefly]

☐ State Law: The defendant was served pursuant to the laws of the State of ____________________
as follows: [Describe briefly] (name of state)

Under penalty of perjury, I declare that the foregoing is true and correct.

______________________ ______________________________________
Date Signature

Print Name		
Business Address		
City	State	Zip

Rev. 2/2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
____________________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

PLAINTIFF) ADVERSARY PROCEEDING NUMBER:

V.)

DEFENDANT(S) AND THIRD-PARTY PLAINTIFF(S))

V.)

THIRD-PARTY DEFENDANT(S))

THIRD-PARTY SUMMONS

YOU ARE SUMMONED and required to submit a motion or answer to the third-party complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its officers and agencies shall submit a motion or answer to the third-party complaint within 35 days.

Clerk U.S. Bankruptcy Court, Eastern District of North Carolina
☐ 1760-A Parkwood Blvd.,, Wilson, NC 27893
☐ 300 Fayetteville St., P.O. Box 1441, Raleigh, NC 28602-1441

At the same time, you must also serve a copy of the motion or answer upon plaintiff's attorney as well as the defendant and third-party plaintiff's attorney.

Name and Address of Plaintiff's Attorney:	Name and Address of Defendant's Attorney and Third-Party Plaintiff's Attorney:

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012. If you are also being served with a copy of the complaint of the plaintiff you have the option of not answering the plaintiff's complaint **unless** this is an admiralty or maritime case subject to the provisions of Federal Rules of Civil Procedures 9(h) and 14(c), in which case you are required to submit a motion or an answer to both the plaintiff's complaint and the third-party complaint, and to serve a copy of your motion or answer upon the appropriate parties.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE THIRD-PARTY COMPLAINT.

Peggy B. Deans, Clerk of Court

____________________ By: ____________________________
Date Deputy Clerk

CERTIFICATE OF SERVICE

I, ____, certify that I am, and at all times
(name)
during the service of this subpoena was, not less than 18 years of age and not a party to the matter concerning which service of process was made. I further certify that the service of this summons and a copy of the complaint was made

on _________________________ by:
(date)

☐ Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to

☐ Personal Service: By leaving the process with defendant or with an officer or agent of defendant at:

☐ Residence Service: By leaving the process with the following adult at:

☐ Publication: The defendant was served as follows: [Describe briefly]

☐ State Law: The defendant was served pursuant to the laws of the State of _________________________
as follows: [Describe briefly] (name of state)

Under penalty of perjury, I declare that the foregoing is true and correct.

_________________________ _______________________________________
Date Signature

Print Name		
Business Address		
City	State	Zip

Rev. 9/97

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
________________ Division

IN RE: CASE NUMBER:

DEBTOR(S)

________________________________)
JUDGMENT CREDITOR (PLAINTIFF)) ADVERSARY PROCEEDING NUMBER:
)
V.)
)
)
JUDGMENT DEBTOR (DEFENDANT))
________________________________)

WRIT OF EXECUTION TO THE UNITED STATES MARSHAL

Name and Address of Judgment Creditor	Amount of Judgment: $__________ Clerk's Fee: $__________
vs.	
Name and Address of Judgment Debtor	Other Costs: $__________ Interest From:__________ $__________ Costs of this writ: $__________

TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NORTH CAROLINA:

You are directed to levy upon the property of the above named judgment debtor to satisfy a money judgment in accordance with the attached instructions.

____________________ ____________________________
Date Clerk of the Bankruptcy Court

UNITED STATES MARSHAL'S RETURN

I received this writ on ________________, and executed the same on ________________.
(date) (date)

____
United States Marshal

By: __________________________

Index to Rules of the United States Bankruptcy Court for the Eastern District of North Carolina

A

ACCOUNTANTS.
Employment by chapter 11 debtor.
Approval of court required, USBank-ED Rule 2014-1.

ADDRESSES FOR GOVERNMENTAL UNITS.
Register of mailing addresses, AdminGuide Appx, USBank-ED Rule 5003-4.

ADEQUATE PROTECTION PAYMENTS.
Chapter 13 case, USBank-ED Rule 3070-1.

ADVERSARY PROCEEDINGS, USBank-ED Rules 7005-1 to 7067-1.
Bill of costs.
Form, AdminGuide Appx.
Deposition subpoena.
Form, AdminGuide Appx.
Discovery, USBank-ED Rule 7026-1.
Dismissal.
Lack of prosecution, USBank-ED Rule 7055-1.
Entry of default.
Form, AdminGuide Appx.
Exempt property.
Motion to claim exempt property.
Form, AdminGuide Appx.
Notice of right to have exemptions designated.
Form, AdminGuide Appx.
Order designating exempt property.
Form, AdminGuide Appx.
Exhibits, requirements, USBank-ED Rule 9070-1.
Final pretrial conference.
Scheduling, notice, preparation by counsel, USBank-ED Rule 7016-1.
Hearings on motions.
Filing, time limits, USBank-ED Rule 7007-1.
Mediated settlement conference, USBank-ED Rule 9019-2.
Motion practice, USBank-ED Rule 7007-1.
Contested matters, USBank-ED Rules 9014-1, 9014-2.
Preliminary pretrial conference.
Scheduling, notice, preparation by counsel, report, disclosures, USBank-ED Rule 7016-1.
Pretrial order.
Stipulations, contentions, exhibits, discovery, pleadings and witnesses, USBank-ED Rule 7016-1.
Pretrial procedures, USBank-ED Rule 7016-1.
Form, AdminGuide Appx.
Registry fund, USBank-ED Rule 7067-1.
Responses to motions.
Filing, time limits, USBank-ED Rule 7007-1.
Service and filing of pleadings and other papers, USBank-ED Rule 7005-1.
Service on trustee and administrator, USBank-ED Rule 9013-1.

ADVERSARY PROCEEDINGS —Cont'd
Subpoena.
Form, AdminGuide Appx.
Summons.
Form, AdminGuide Appx.
Third-party summons.
Form, AdminGuide Appx.
Telephone or video conferences and hearings, USBank-ED Rule 9074-1.
Temporary restraining order and preliminary injunction, USBank-ED Rule 7065-1.
Trial.
Opening statements, witnesses, exhibits, closing argument, USBank-ED Rule 7016-2.
Writ of execution to United States marshal.
Form, AdminGuide Appx.

AGENTS.
Employment by chapter 11 debtor.
Approval of court required, USBank-ED Rule 2014-1.

AGREED ORDERS.
Mediated settlement conference, USBank-ED Rule 9019-2.
Time for submitting, USBank-ED Rule 9019-1.

ALTERNATIVE DISPUTE RESOLUTION.
Mediated settlement conference, USBank-ED Rule 9019-2.

AMENDMENT TO LIST, SCHEDULE OR STATEMENT, USBank-ED Rule 1009-1.

ANSWERS.
Filing paper documents.
Requirements generally, USBank-ED Rules 5005-1 to 5005-3.

APPLICATIONS.
Filing paper documents.
Requirements generally, USBank-ED Rules 5005-1 to 5005-3.

APPRAISERS.
Employment by chapter 11 debtor.
Approval of court required, USBank-ED Rule 2014-1.

ASSIGNMENT OF CASES TO DIVISIONS, USBank-ED Rule 1073-1.

ATTORNEYS.
Admission, USBank-ED Rule 2090-1.
Attorney of record until case closed, USBank-ED Rule 9011-1.
Compensation of attorney employed by chapter 13 debtor, AdminGuide Appx, USBank-ED Rule 2016-1.
Duties, USBank-ED Rule 9011-1.
Employment by chapter 11 debtor.
Approval of court required, USBank-ED Rule 2014-1.
Failure to comply with local rules.
Sanctions, USBank-ED Rule 9011-3.

ATTORNEYS —Cont'd
Fees.
  Additional fees required, USBank-ED Rule 9011-1.
  Attorney employed by Chapter 13 debtor, AdminGuide Appx, USBank-ED Rule 2016-1.
Local rule 83.1.
  Applicability, exceptions, USBank-ED Rule 2090-1.
Mediated settlement conference.
  Attendance required, USBank-ED Rule 9019-2(4).
    Sanctions, failure to attend, USBank-ED Rule 9019-2(5).
Pro hac vice appearance, USBank-ED Rule 2090-1.
Sanctions, USBank-ED Rule 9011-3.
Signatures.
  Requirements, USBank-ED Rule 9011-4.

AUCTIONEERS.
Chapter 11 cases.
  Employment by chapter 11 debtor.
    Approval of court required, USBank-ED Rule 2014-1.
Public sale of estate property.
  Employment, compensation, report, by trustee, by auctioneer, USBank-ED Rule 6005-1.

AUTOMATIC STAY.
Modification, USBank-ED Rule 4001-1.
Motion for continuance or imposition, USBank-ED Rule 4001-1.
Motion for relief, USBank-ED Rule 4001-1.
Tax returns and refunds.
  Treatment in context of, USBank-ED Rule 6070-1.

B

BANKRUPTCY COURT DIVISIONS, AdminGuide Appx, USBank-ED Rule 1071-1.

BRIEFS AND MEMORANDA OF LAW.
Optional unless required by order, USBank-ED Rule 9013-2.

BROKERS.
Employment by chapter 11 debtor.
  Approval of court required, USBank-ED Rule 2014-1.

C

CAPTION OF DOCUMENTS, USBank-ED Rule 9004-2.

CERTIFICATE OF SERVICE, USBank-ED Rule 9013-3.

CHAPTER 7 CASES.
Auctioneers.
  Employment without application.
    Generally, conditions precedent, reports, USBank-ED Rule 6005-1.
Payment coupons or statements of account.
  Creditor's duty to provide, USBank-ED Rule 4001-2.
Service of filings on administrator, USBank-ED Rule 9013-1.

CHAPTER 7 CASES —Cont'd
Statement of intention, USBank-ED Rule 1007-3.
  Compliance with rule, duty, USBank-ED Rule 4002-1.

CHAPTER 11 CASES.
Automatic stay.
  Modification, USBank-ED Rule 4001-1.
Bank to be used as depository.
  Duty to advise administrator, USBank-ED Rule 4002-1.
Books of account.
  Closing, opening new books, USBank-ED Rule 4002-1.
Debtor in possession.
  Notices, USBank-ED Rule 2015-2.
Debtor's duties, USBank-ED Rule 4002-1.
Disputed, contingent or unliquidated claims.
  Debtor's notice, USBank-ED Rule 3002-1.
    Duty of debtor, USBank-ED Rule 4002-1.
Employment of professionals by debtor.
  Approval of court required, USBank-ED Rule 2014-1.
Inquiries by creditors.
  Responding to, duty, USBank-ED Rule 4002-1.
Insurance coverage.
  Proof, filing, debtor's duty, USBank-ED Rule 4002-1.
Inventory.
  Procure physical inventory, duty, USBank-ED Rule 4002-1.
Judicial conference quarterly fee.
  Payment, USBank-ED Rule 4002-1.
Lists, schedules and statements.
  Filing, time limits, USBank-ED Rule 1007-1.
Monthly report.
  Duty to file, USBank-ED Rule 4002-1.
Partners, officers, directors or shareholders.
  Payment to, USBank-ED Rule 4002-1.
Plan and disclosure statement.
  Duty to file, USBank-ED Rule 4002-1.
Pre-petition unsecured debt.
  Payment, USBank-ED Rule 4002-1.
Projected operating statement.
  Filing, USBank-ED Rule 4002-1.
Proof of claim or interest.
  Filing, USBank-ED Rule 3003-1.
Service of filings on trustee or administrator, USBank-ED Rule 9013-1.
Tax accounts.
  Debtor's duties, USBank-ED Rule 4002-1.

CHAPTER 12 CASES.
Automatic stay.
  Modification, USBank-ED Rule 4001-1.
Bank used as depository.
  Advising administrator, USBank-ED Rule 4002-1.
Books of account.
  Closing and opening, USBank-ED Rule 4002-1.
Compensation to partners, officers, directors or shareholders.
  Approval required, USBank-ED Rule 4002-1.
Duties of debtor, USBank-ED Rule 4002-1.
Inquiries of creditors.
  Responding, USBank-ED Rule 4002-1.
Insurance coverage.
  Proof, USBank-ED Rule 4002-1.
Mailing matrix, USBank-ED Rule 1007-2.

CHAPTER 12 CASES —Cont'd
Monthly reports.
  Filing, USBank-ED Rule 4002-1.
Plan.
  Filing, USBank-ED Rule 4002-1.
Pre-petition unsecured debt.
  Payment, USBank-ED Rule 4002-1.
Schedules and statements required, USBank-ED Rule 4002-1.
Tax accounts.
  Duties, USBank-ED Rule 4002-1.

CHAPTER 13 CASES.
Additional credit.
  Obtaining, restrictions, USBank-ED Rule 4002-1.
Adequate protection payments, USBank-ED Rule 3070-1.
Adequate protection to creditors.
  Dismissal prior to confirmation, USBank-ED Rule 4002-1.
Attorney employed by debtor.
  Compensation, AdminGuide Appx, USBank-ED Rule 2016-1.
Automatic stay.
  Relief with respect to surrendered property, USBank-ED Rule 4001-1.
Disposition of non-exempt property, USBank-ED Rule 4002-1.
Filing of claims by debtor or trustee, USBank-ED Rule 3004-1.
Insurance coverage.
  Debtor's and bankruptcy estate's property, USBank-ED Rule 4002-1.
Mailing matrix, USBank-ED Rule 1007-2.
Payment under plan.
  Time to begin, USBank-ED Rule 4002-1.
Return of plan payments to debtor.
  Conversion or dismissal of case, USBank-ED Rule 3070-1.
Schedules and statements required, USBank-ED Rule 4002-1.
Search fees.
  Trustees authorized to charge, USBank-ED Rule 2015-5.
Secured claims paid outside plan.
  Payment, USBank-ED Rule 4002-1.
Small payment to creditors, USBank-ED Rule 3010-1.
Value of creditor's security.
  Recommendation by trustee, objection, USBank-ED Rule 3012-1.

CHILD SUPPORT CREDITOR OR REPRESENTATIVE.
Appearance.
  Form, AdminGuide Appx.

CLAIMS.
Disputed, contingent or unliquidated claims.
  Debtor's notice, USBank-ED Rule 3002-1.
    Chapter 11 debtor's duties, USBank-ED Rule 4002-1.
Filing, USBank-ED Rule 3001-1.
  Chapter 11 cases, USBank-ED Rule 3003-1.
  Chapter 13 cases.
    Debtor or trustee, USBank-ED Rule 3004-1.
  Paper documents, USBank-ED Rule 5005-1.
Notice of objection to claim.
  Form, AdminGuide Appx.

CLERK OF COURT.
Designation of parties to provide notice, USBank-ED Rule 9007-1.
Filing pleading with, USBank-ED Rule 5005-1.
Hours office open for business, USBank-ED Rule 5001-2.
Orders and judgments.
  Authority to enter, USBank-ED Rule 5001-3.

COMPENSATION.
Attorney employed by Chapter 13 debtor, AdminGuide Appx, USBank-ED Rule 2016-1.

COMPLAINTS.
Filing paper documents.
  Requirements generally, USBank-ED Rules 5005-1 to 5005-3.

CONSENT ORDERS.
Mediated settlement conference, USBank-ED Rule 9019-2.
Time for submitting, USBank-ED Rule 9019-1.

CONSULTANTS.
Employment by debtor.
  Approval of court required, USBank-ED Rule 2014-1.

CONTESTED MATTERS.
Exhibits, requirements, USBank-ED Rule 9070-1.
Mediated settlement conference, USBank-ED Rule 9019-2.
Motions, USBank-ED Rule 9014-1.
  Expedited relief, USBank-ED Rule 9014-2.
Telephone or video conferences and hearings, USBank-ED Rule 9074-1.

CONTINGENT CLAIMS.
Debtor's notice, USBank-ED Rule 3002-1.
  Chapter 11 debtor's duties, USBank-ED Rule 4002-1.

CONVERSION OF CHAPTER 13 CASE.
Return of plan payments to debtor, USBank-ED Rule 3070-1.

COPIES OF DOCUMENT FILED.
Number required, USBank-ED Rule 5005-2.

COUNTY CODES.
List, AdminGuide Appx.

CREDITOR'S SECURITY.
Value.
  Recommendation by chapter 13 trustee, objection, USBank-ED Rule 3012-1.

D

DEBTOR IN POSSESSION IN CHAPTER 11 CASE.
Notices, USBank-ED Rule 2015-2.

DEBTOR'S DUTIES, USBank-ED Rule 4002-1.

DISCOVERY.
Adversary proceedings, USBank-ED Rule 7026-1.
  Designation of materials.
    Pretrial order, USBank-ED Rule 7016-1.

DISMISSAL OF ADVERSARY PROCEEDING.
Lack of prosecution, USBank-ED Rule 7055-1.

DISMISSAL OF CHAPTER 13 CASE.
Return of plan payments to debtor, USBank-ED Rule 3070-1.

DISPUTED CLAIMS.
Debtor's notice, USBank-ED Rule 3002-1.
Chapter 11 debtor's duties, USBank-ED Rule 4002-1.

DISPUTE RESOLUTION.
Mediated settlement conference, USBank-ED Rule 9019-2.

DIVISIONS OF COURT, AdminGuide Appx, USBank-ED Rule 1071-1.

E

ELECTRONIC CASE FILING.
Adversary proceedings.
Serving and filing pleadings and other papers, USBank-ED Rule 7005-1.
Assignment to electronic case filing system (ECF), USBank-ED Rule 5005-4(1).
Calculation of deadlines for responses, USBank-ED Rule 5005-4(9).
Certificate of service indicating how service made.
Required, USBank-ED Rule 5005-4(9).
Constitutes filing for all purposes, USBank-ED Rule 5005-4(3).
Conventional service and notice.
Non-consenting parties entitled to, USBank-ED Rule 5005-4(9).
Deadlines unchanged, USBank-ED Rule 5005-4(3).
Effecting service of notice, USBank-ED Rule 5005-4(9).
Eligibility to register as filing user, USBank-ED Rule 5005-4(2).
Exhibits and attachments, USBank-ED Rule 5005-4(5).
Filing required to be electronic, exception, USBank-ED Rule 5005-4(1).
Format, AdminGuide Appx, USBank-ED Rule 5005-4(5).
Official record, USBank-ED Rule 5005-4(3).
Orders, decrees, judgments and proceedings of court.
Filed in accordance with rules, USBank-ED Rule 5005-4(4).
Passwords.
Allowing others to use, USBank-ED Rule 5005-4(8).
Protection of security, AdminGuide Appx, USBank-ED Rule 5005-4(2).
Privacy concerns.
Accessing or downloading inconsistent with, USBank-ED Rule 5005-4(11).
Proofs of claim, USBank-ED Rule 3001-1.
Public access, limitation, USBank-ED Rule 5005-4(11).
Registration as filing users, AdminGuide Appx, USBank-ED Rule 5005-4(2).
Form, AdminGuide Appx.
Sealed documents, USBank-ED Rule 5005-4(6).
Signatures.
Constitutes signature and certification, USBank-ED Rule 5005-4(8).
Judge's signature.
Submission of document, AdminGuide Appx, USBank-ED Rule 5005-4(4).
Original signature, required, retention, USBank-ED Rule 5005-4(7).

ELECTRONIC CASE FILING —Cont'd
Summons issued electronically, USBank-ED Rule 5005-4(4).
Training, AdminGuide Appx.
Trustee and administrator.
Service of filings on, USBank-ED Rule 9013-1.
Untimely filing due to technical error.
Relief, USBank-ED Rule 5005-4(10).
Waivers as to notice and service.
Effect of registration as filing user, USBank-ED Rule 5005-4(2).

ELECTRONIC TRANSMISSION.
Notice by, USBank-ED Rule 9036-1.

E-MAIL.
Notice by electronic transmission, USBank-ED Rule 9036-1.

EMPLOYMENT OF PROFESSIONALS.
Chapter 11 debtor.
Approval of court required, USBank-ED Rule 2014-1.
Chapter 13 debtor.
Compensation of attorney, AdminGuide Appx, USBank-ED Rule 2016-1.

EXAMINATION.
Motion for, reconsideration, USBank-ED Rule 2004-1.
Subpoena for Rule 2004 examination.
Form, AdminGuide Appx.

EXEMPT PROPERTY.
Adversary proceeding.
Motion to claim exempt property.
Form, AdminGuide Appx.
Notice of right to have exemptions designated.
Form, AdminGuide Appx.
Order designating exempt property.
Form, AdminGuide Appx.
Filing claim, objections, extension of time, USBank-ED Rule 4003-1.
Property claimed as exempt, schedule C, AdminGuide Appx.

EXHIBITS AND ATTACHMENTS.
Adversary proceedings.
Pretrial order, USBank-ED Rule 7016-1.
Trial, USBank-ED Rule 7016-2.
Electronic case filing, USBank-ED Rule 5005-4(5).
Excerpted material, USBank-ED Rule 5005-1.
Requirements, USBank-ED Rule 9070-1.
Video conference or hearings.
Exchange of exhibits, USBank-ED Rule 9074-1.

EXPEDITED RELIEF.
Motions, USBank-ED Rule 9014-2.

F

FACSIMILE FILING, USBank-ED Rule 5005-1.
Notice by electronic transmission, USBank-ED Rule 9036-1.

FAX.
Filing by, USBank-ED Rule 5005-1.
Notice by electronic transmission, USBank-ED Rule 9036-1.

FILING CASE.
Electronic filing, USBank-ED Rule 5005-4.

FILING CASE —Cont'd
Place of filing, determination, USBank-ED Rule 1073-1.

FILING CLAIMS, USBank-ED Rule 3001-1.
Chapter 11 cases, USBank-ED Rule 3003-1.
Chapter 13 cases.
  Debtor or trustee, USBank-ED Rule 3004-1.

FILING DOCUMENTS.
Adversary proceedings, USBank-ED Rule 7005-1.
Caption, USBank-ED Rule 9004-2.
Electronic case filing, USBank-ED Rule 5005-4.
Paper documents, USBank-ED Rule 5005-1.
  Copies, number, USBank-ED Rule 5005-2.
  Size of paper, two-sided documents, USBank-ED Rule 5005-3.
Report of sale of estate property.
  Trustee's report, USBank-ED Rule 6004-1.
Service of filings on trustee or administrator, USBank-ED Rule 9013-1.

FILING FEES.
Installment payment.
  Application and petition, USBank-ED Rule 1006-1.

FINAL PRETRIAL CONFERENCE.
Adversary proceedings, USBank-ED Rule 7016-1.

FORMS, USBank-ED Rule 9009-1.
Adversary proceeding.
  Bill of costs, AdminGuide Appx.
  Deposition subpoena, AdminGuide Appx.
  Entry of default, AdminGuide Appx.
  Motion to claim exempt property, AdminGuide Appx.
  Notice of right to have exemptions designated, AdminGuide Appx.
  Order designating exempt property, AdminGuide Appx.
  Subpoena, AdminGuide Appx.
  Summons, AdminGuide Appx.
    Third-party summons, AdminGuide Appx.
  Writ of execution to United States marshal, AdminGuide Appx.
Adversary proceedings.
  Pretrial procedures, AdminGuide Appx.
Child support creditor or representative.
  Appearance, AdminGuide Appx.
Electronic case filing.
  Filing user registration, AdminGuide Appx.
Exempt property.
  Property claimed as exempt, schedule C, AdminGuide Appx.
Mailing matrix.
  Certification, AdminGuide Appx.
Mental health evaluation.
  Application, AdminGuide Appx.
Notice of motion or objection, AdminGuide Appx.
Notice of objection to claim, AdminGuide Appx.
Reaffirmation agreement, AdminGuide Appx.
Subpoena for Rule 2004 examination, AdminGuide Appx.
Subpoena in case under bankruptcy code, AdminGuide Appx.
Summons to debtor in involuntary case, AdminGuide Appx.

FRIVOLOUS AND DELAYING MOTIONS, USBank-ED Rule 9014-1.

I

INJUNCTIONS.
Temporary restraining order and preliminary injunction.
  Adversary proceeding, USBank-ED Rule 7065-1.

INSTALLMENTS.
Payment of filing fees.
  Application and petition, USBank-ED Rule 1006-1.

INSURANCE COMPANY REPRESENTATIVE.
Mediated settlement conference.
  Attendance required, USBank-ED Rule 9019-4(4).

L

LACK OF PROSECUTION.
Dismissal of adversary proceeding, USBank-ED Rule 7055-1.

LISTS, SCHEDULES AND STATEMENTS.
Address for SEC and secretary of treasury, AdminGuide Appx.
Amendment, USBank-ED Rule 1009-1.
Filing, time limits, USBank-ED Rule 1007-1.

M

MAILING ADDRESSES FOR GOVERNMENTAL UNITS.
Register, AdminGuide Appx, USBank-ED Rule 5003-4.

MAILING MATRIX, USBank-ED Rule 1007-2.
Certification.
  Form, AdminGuide Appx.
Register of mailing addresses, preparation, AdminGuide Appx.

MEDIATED SETTLEMENT CONFERENCE, USBank-ED Rule 9019-2.
Attendance.
  Parties required, USBank-ED Rule 9019-2(4).
  Sanctions for failure to attend, USBank-ED Rule 9019-2(5).
Consultation with participant or attorney.
  Mediator, USBank-ED Rule 9019-2(6).
Control of conference.
  Mediator, USBank-ED Rule 9019-2(6).
Costs.
  Payment by parties, USBank-ED Rule 9019-2(4).
Court may require parties to attend, USBank-ED Rule 9019-2.
Date of completion.
  Extension, request, USBank-ED Rule 9019-2(3).
  Order to state, USBank-ED Rule 9019-2(3).
Disclosure of possible bias, prejudice or partiality.
  Mediator, USBank-ED Rule 9019-2(6).
Discovery.
  Holding conference after reasonable time to conduct, USBank-ED Rule 9019-2(3).
Dispense with conference.
  Motion, USBank-ED Rule 9019-2(1).

MEDIATED SETTLEMENT CONFERENCE —Cont'd
Duties of parties, representatives and attorneys, USBank-ED Rule 9019-2(4).
Finalizing agreement, USBank-ED Rule 9019-2(4).
Impasse.
  Mediator declaring, USBank-ED Rule 9019-2(6).
Lienholders.
  Notifying, USBank-ED Rule 9019-2(4).
Location, USBank-ED Rules 9019-2(3), (6).
Mediators.
  Agreement of parties.
    Selection, USBank-ED Rule 9019-2(2).
  Authority, USBank-ED Rule 9019-2(6).
  Court appointment, USBank-ED Rule 9019-2(2).
  Disqualification, USBank-ED Rule 9019-2(2).
  Duties, USBank-ED Rule 9019-2(6).
  Selection, USBank-ED Rule 9019-2(2).
Motions, USBank-ED Rule 9019-2(1).
Orders, USBank-ED Rule 9019-2(1).
Other proceedings not delayed, USBank-ED Rule 9019-2(1).
Recesses, USBank-ED Rule 9019-2(3).
Reporting results of conference.
  Mediator, USBank-ED Rule 9019-2(6).
Sanctions.
  Failure to attend, USBank-ED Rule 9019-2(5).

MEDIATORS.
Mediated settlement conference, USBank-ED Rule 9019-2.

MEETING OF CREDITORS.
Recording.
  Retention and preservation, copies, providing, USBank-ED Rule 2003-1.

MENTAL HEALTH EVALUATION.
Application for court approval of pro bono evaluation, USBank-ED Rule 2014-2.
  Form, AdminGuide Appx.

MOTION PRACTICE.
Adversary proceedings, USBank-ED Rule 7007-1.
Continuance or imposition of automatic stay, USBank-ED Rule 4001-1.
Evidentiary hearing on motion, USBank-ED Rule 9014-1.
Expedited relief, USBank-ED Rule 9014-2.
Frivolous or delaying motions, USBank-ED Rule 9014-1.
Hearing on motion, USBank-ED Rule 9014-1.
Notice of motion, USBank-ED Rule 9014-1.
Relief from automatic stay, USBank-ED Rule 4001-1.
Requirements for motions, USBank-ED Rule 9014-1.
Response to motion, USBank-ED Rule 9014-1.
  Computation of response time.
    Guidelines, AdminGuide Appx.
Service of motion, USBank-ED Rule 9014-1.

N

NOTICE TO CREDITORS AND OTHER PARTIES, USBank-ED Rule 2002-1.
Contingent, disputed or unliquidated claims, USBank-ED Rule 3002-1.
  Chapter 11 debtor's duty, USBank-ED Rule 4002-1.

NOTICE TO CREDITORS AND OTHER PARTIES —Cont'd
Debtor in possession in chapter 11 case, USBank-ED Rule 2015-2.
Designation of parties to provide, USBank-ED Rule 9007-1.
Electronic case filing, USBank-ED Rule 5005-4.
Electronic transmission, USBank-ED Rule 9036-1.
Expedited relief.
  Motions, USBank-ED Rule 9014-2.
Guide to service and notice requirements, AdminGuide Appx.
Motions, USBank-ED Rule 9014-1.
  Expedited relief, USBank-ED Rule 9014-2.
  Notice of motion or objection.
    Form, AdminGuide Appx.
Pretrial conference.
  Adversary proceedings, USBank-ED Rule 7016-1.

P

PAPER DOCUMENTS.
Filing, USBank-ED Rules 5005-1 to 5005-3.

PAYMENT COUPONS.
Creditor's duty to provide.
  Chapter 7 cases, USBank-ED Rule 4001-2.

PLACE OF FILING.
Determination, USBank-ED Rule 1073-1.

PLEADINGS.
Designation.
  Pretrial order.
    Adversary proceedings, USBank-ED Rule 7016-1.
Filing, USBank-ED Rules 5005-1 to 5005-3.
  Electronic case filing, USBank-ED Rule 5005-4.

PRELIMINARY INJUNCTION.
Adversary proceedings, USBank-ED Rule 7065-1.

PRELIMINARY PRETRIAL CONFERENCE.
Adversary proceedings, USBank-ED Rule 7016-1.

PRETRIAL MEDIATED SETTLEMENT CONFERENCE, USBank-ED Rule 3019-2.

PRETRIAL PROCEDURES.
Adversary proceedings, USBank-ED Rule 7016-1.
  Form, AdminGuide Appx.

PROFESSIONALS.
Employment by chapter 11 debtor.
  Approval of court required, USBank-ED Rule 2014-1.
Employment by chapter 13 debtor.
  Compensation of attorney, AdminGuide Appx, USBank-ED Rule 2016-1.

PROOF OF CLAIM OR INTEREST.
Filing, USBank-ED Rule 3001-1.
  Chapter 11 cases, USBank-ED Rule 3003-1.
  Chapter 13 cases, USBank-ED Rule 3004-1.

PROPOSED ORDERS.
Submitted with document requesting relief, USBank-ED Rule 9072-1.

PUBLIC SALE OF ESTATE PROPERTY.
Auctioneer.
Employment, compensation, report, by trustee, by auctioneer, USBank-ED Rule 6005-1.
Trustee's report, USBank-ED Rule 6004-1.

R

REAFFIRMATION AGREEMENT.
Form, AdminGuide Appx.

REGISTER OF MAILING ADDRESSES OF GOVERNMENTAL UNITS, AdminGuide Appx, USBank-ED Rule 5003-4.

REGISTRY FUND.
Adversary proceedings, USBank-ED Rule 7067-1.

RELIEF FROM AUTOMATIC STAY, USBank-ED Rule 4001-1.

REPORT OF SALE OF ESTATE PROPERTY.
Trustee's report, USBank-ED Rule 6004-1.

RETURNED AND UNDELIVERABLE MAIL.
Procedure, USBank-ED Rule 2002-1.

RETURN OF PLAN PAYMENTS TO DEBTOR.
Conversion or dismissal of chapter 13 case, USBank-ED Rule 3070-1.

S

SALE OF ESTATE PROPERTY.
Auctioneer.
Employment, compensation, report, by trustee, by auctioneer, USBank-ED Rule 6005-1.
Report by trustee, USBank-ED Rule 6004-1.

SEALED DOCUMENTS.
Electronic case filing, USBank-ED Rule 5005-4(6).

SEARCH FEES.
Chapter 13 trustees authorized to charge, USBank-ED Rule 2015-5.

SERVICE OF NOTICE, PLEADINGS AND OTHER PAPERS.
Adversary proceedings, USBank-ED Rule 7005-1.
Certificate of service, USBank-ED Rule 9013-3.
Debtor in possession in chapter 11 case.
Duties, USBank-ED Rule 2015-2.
Electronic case filing, USBank-ED Rule 5005-4.
Electronic transmission, USBank-ED Rule 9036-1.
Expedited relief.
Motions, USBank-ED Rule 9014-2.
Guide to service and notice requirements, AdminGuide Appx.
Motions, USBank-ED Rule 9014-1.
Expedited relief, USBank-ED Rule 9014-2.
Notice to creditors and other parties, USBank-ED Rule 2002-1.
Trustee and administrator.
Service of filing on, USBank-ED Rule 9013-1.

SETTLEMENTS AND AGREED ORDERS.
Mediated settlement conference, USBank-ED Rule 9019-2.
Time for submitting agreed or consent order, USBank-ED Rule 9019-1.

SIGNATURES.
Attorneys.
Requirements, USBank-ED Rule 9011-4.
Electronic case filing.
Constitutes signature and certification, USBank-ED Rule 5005-4(8).
Form, USBank-ED Rule 5005-4(8).
Judge's signature.
Submission of document, AdminGuide Appx, USBank-ED Rule 5005-4(4).
Original signature, required, retention, USBank-ED Rule 5005-4(7).

SIZE OF PAPER.
Filing paper documents, USBank-ED Rule 5005-3.

SMALL DIVIDENDS.
Payment by chapter 13 trustee to creditors, USBank-ED Rule 3010-1.

STATEMENT OF INTENTION.
Chapter 7 cases, USBank-ED Rule 1007-3.
Duty of debtor to comply, USBank-ED Rule 4002-1.

STATEMENTS OF ACCOUNT.
Creditor's duty to provide.
Chapter 7 cases, USBank-ED Rule 4001-2.

STIPULATIONS.
Adversary proceedings.
Pretrial order, USBank-ED Rule 7016-1.

SUBPOENA.
Adversary proceeding.
Deposition subpoena.
Form, AdminGuide Appx.
Form, AdminGuide Appx.

SUMMONS.
Adversary proceeding.
Form, AdminGuide Appx.
Third-party summons.
Form, AdminGuide Appx.
Electronically issued, USBank-ED Rule 5005-4(4).
Form, AdminGuide Appx.

T

TAX REFUNDS.
Treatment in context of automatic stay, USBank-ED Rule 6070-1.

TAX RETURNS.
Treatment in context of automatic stay, USBank-ED Rule 6070-1.

TELEPHONE CONFERENCES AND HEARINGS, USBank-ED Rule 9074-1.

TEMPORARY RESTRAINING ORDER.
Adversary proceedings, USBank-ED Rule 7065-1.

TIME LIMITS.
Agreed or consent orders.
Submitting, USBank-ED Rule 9019-1.
Bank used as depository, advising administrator.
Chapter 11 or 12 debtor, USBank-ED Rule 4002-1.
Dismissal of adversary proceeding.
Lack of prosecution, USBank-ED Rule 7055-1.

TIME LIMITS —Cont'd
Electronic case filing.
  Calculation of deadlines for responses, USBank-ED Rule 5005-4(9).
  Deadlines unchanged, USBank-ED Rule 5005-4(3).
  Untimely filing due to technical error.
    Relief, USBank-ED Rule 5005-4(10).
Exempt property.
  Objection to claim, extension of time, USBank-ED Rule 4003-1.
Filing claims by debtor or trustee.
  Chapter 13 cases, USBank-ED Rule 3004-1.
Filing schedules and statements, USBank-ED Rule 1007-1.
Insurance coverage, filing proof.
  Chapter 11 or 12 debtor, USBank-ED Rule 4002-1.
Mediated settlement conference.
  Date of completion.
    Stated in order, extension, request, USBank-ED Rule 9019-2(3).
  Orders and motions, USBank-ED Rule 9019-2(1).
  Reporting results of conference.
    Mediator, USBank-ED Rule 9019-2(6).
Monthly report, filing.
  Chapter 11 or 12 debtor, USBank-ED Rule 4002-1.
Notice of contingent, disputed or unliquidated claims.
  Debtor's notice, USBank-ED Rule 3002-1.
Objection to recommended value of creditor's security.
  Chapter 13 case, USBank-ED Rule 3012-1.
Plan of reorganization and disclosure statement, filing.
  Chapter 11 or 12 debtor, USBank-ED Rule 4002-1.
Pretrial conference.
  Notice.
    Adversary proceedings, USBank-ED Rule 7016-1.

TIME LIMITS —Cont'd
Projected operating statement, filing.
  Chapter 11 debtor, USBank-ED Rule 4002-1.
Responses to motions, USBank-ED Rule 9014-1.
  Computation of response time.
    Guidelines, AdminGuide Appx.
  Filing in adversary proceedings, USBank-ED Rule 7007-1.

TRIAL.
Adversary proceedings, USBank-ED Rule 7016-2.

TRUSTEES' SEARCH FEES.
Authorization to charge, USBank-ED Rule 2015-5.

U

UNLIQUIDATED CLAIMS.
Debtor's notice, USBank-ED Rule 3002-1.
  Chapter 11 debtor's duties, USBank-ED Rule 4002-1.

V

VALUE OF CREDITOR'S SECURITY.
Recommendation by chapter 13 trustee, objection, USBank-ED Rule 3012-1.

VIDEO CONFERENCES AND HEARINGS, USBank-ED Rule 9074-1.

W

WITNESSES.
Adversary proceedings.
  Pretrial order, USBank-ED Rule 7016-1.
  Trial, USBank-ED Rule 7016-2.
Video conference or hearings.
  Exchange of witness lists, USBank-ED Rule 9074-1.

LOCAL RULES OF CIVIL, CRIMINAL, AND BANKRUPTCY PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Revised effective January 17, 2001,
with amendments through July 1, 2008.

Part I. Local Rules of Civil Practice

I. Scope of Rules—One Form of Action

Rule
LR1.1. Scope and purpose of rules.

II. Commencement of Action; Service of Process; Pleadings; Motions and Orders

LR5.1. Additional copies for court use.
LR5.2. Filings within three days of scheduled hearings.
LR5.3. Electronic filing of documents.
LR5.4. Service of electronically filed documents.
LR6.1. Extensions of time and continuances of hearings.

III. Pleadings and Motions

LR7.1. Form of pleadings and papers.
LR7.2. Briefs.
LR7.3. Motion practice.
LR7.4. Ex Parte motions.
LR16.1. Initial pretrial proceedings.
LR16.2. Joint Rule 26(f) report (form).
LR16.3. Rule 26(f) report (form).
LR16.4. Mediated settlement conferences.

IV. Parties

LR17.1. Minors and incompetents as parties.
LR23.1. Class actions.

V. Depositions and Discovery

LR26.1. Differentiated case management and discovery.
LR30.1. Conduct of depositions.
LR37.1. Motions to compel discovery.

VI. Trials

LR40.1. Trial dates and final pretrial preparation.
LR43.1. Trial procedure.
LR47.1. Juries.

VII. Judgment

LR51.1. Jury arguments and instructions.
LR54.1. Taxation of costs.
LR54.2. Award of statutory attorney's fees.
LR56.1. Summary judgment motions.

VIII. Provisional and Final Remedies

LR65.1. Injunctions and temporary restraining orders.
LR65.1.1. Sureties.
Rule
LR67.1. Registry funds.

IX. Special Proceedings

LR72.1. Authority of magistrate judges.
LR72.2. Assignment of matters to magistrate judges.
LR72.3. Stay of order.
LR73.1. Consent to civil trial jurisdiction.

X. District Courts and Clerks

LR77.1. Court schedule and conduct of business.
LR77.2. Orders and judgments grantable by clerk.
LR77.3. Court libraries.
LR79.1. Access to court records.
LR79.2. Release of information by court personnel.
LR79.3. Administrative records in social security cases.
LR79.4. Custody and disposition of trial exhibits, sealed documents, and filed depositions.

XI. Local Civil Rules for Which There Are No Corresponding Federal Rules

LR83.1. Attorneys.
LR83.2. Courtroom practices.
LR83.3. Settlement.
LR83.4. Sanctions.
LR83.5. Disposition of private property.
LR83.6. Claim of unconstitutionality; three-judge courts.
LR83.7. Photographs, recordings, and broadcasts.
LR83.8. Courtroom security.
LR83.9a. Purpose of mediated settlement conferences.
LR83.9b. Selection of cases for mediated settlement conferences.
LR83.9c. Mediators.
LR83.9d. Selection of the mediator.
LR83.9e. Procedures for mediated settlement conferences.
LR83.9f. Completion of the mediated settlement conference.
LR83.9g. Evaluation of the mediation program.
LR83.10a. Purpose of disciplinary rules.
LR83.10b. Attorneys convicted of a crime.
LR83.10c. Discipline imposed by another court or by a state bar.
LR83.10d. Disbarment on consent or resignation in another court or before a state bar.
LR83.10e. Standards for professional conduct.
LR83.10f. Disciplinary proceedings.

Rule
LR83.10g. Disbarment on consent while under disciplinary investigation or prosecution.
LR83.10h. Reinstatement.
LR83.10i. Attorneys specially appearing.
LR83.10j. Service of papers and other notices.
LR83.10k. Appointment of counsel.
LR83.10l. Duties of the clerk.
LR83.10m. Jurisdiction.

Part II. Local Rules of Criminal Practice

I. Scope, Purpose and Construction

II. Preliminary Proceedings

III. Indictment and Information

IV. Arraignment and Preparation for Trial

LCrR12.1. Pretrial motions in criminal cases.
LCrR16.1. Discovery motions.

V. Venue

LCrR24.1. Juries.
LCrR26.1. Documents, other than exhibits, used at trial.

VI. Trial

VII. Judgment

LCrR32.1. Sentencing recommendations by probation officers.
LCrR32.2. Motion for extension of time to file notice of appeal.

VIII. Stay of Execution

IX. Supplementary and Special Proceedings

X. General Provisions

LCrR44.1. Representation of certain defendants.
LCrR50.1. Prompt disposition of criminal cases.

XI. Local Criminal Rules for Which There are No Corresponding Federal Rules

LCrR57.1. Incorporation of certain local rules of civil practice.
LCrR57.2. Fair trial directives.
LCrR57.3. Sanctions.
LCrR58.1. Payment of fixed sum in lieu of appearance in certain misdemeanor cases.

Part III. Local Rules of Bankruptcy Practice

LBR1002-1. Petition — General.
LBR1004-1. Petition — Partnership.
LBR1006-1. Fees — Installment payments.
LBR1007-1. Lists, schedules, and statements.
LBR1007-2. Mailing — List or matrix.
LBR1009-1. Amendments to lists and schedules.
LBR1015-1. Joint Administration/Consolidation.
LBR1019-1. Conversion/Dismissal — Procedure following.

Rule
LBR2002-1. Notice to creditors and other interested parties.
LBR2004-1. Depositions & Examinations.
LBR2007.1-1. Trustees and examiners (Ch. 11).
LBR2016-1. Compensation of professionals.
LBR2072-1. Notice to other courts.
LBR2090-1. Attorneys — Admission to practice.
LBR2090-2. Attorneys — Discipline and Disbarment.
LBR3001-1. Claims and equity security interests — General.
LBR3003-1. Chapter 11 claims.
LBR3007-1. Claims — Objections.
LBR3018-1. Ballots — Voting on plans.
LBR4001-1. Automatic stay — Relief from.
LBR4003-1. Exemptions.

V. Courts and Clerks

LBR5005-1. Filing papers — Requirements.
LBR5005-4. Electronic case filing.
LBR5005-4(1). Assignment to system and filing requirements.
LBR5005-4(2). Eligibility, registration and passwords.
LBR5005-4(3). Consequences of electronic filing; deadlines.
LBR5005-4(4). Entry of court orders.
LBR5005-4(5). Format; attachments and exhibits.
LBR5005-4(6). Sealed documents.
LBR5005-4(7). Original signatures and retention requirements.
LBR5005-4(8). Signatures and certification.
LBR5005-4(9). Service of documents by electronic or conventional means; calculation of response time.
LBR5005-4(10). Notice and service of court orders.
LBR5005-4(11). Technical failures.
LBR5010-1. Reopening cases.
LBR5011-1. Withdrawal of reference.
LBR5020-1. Corporate disclosure.
LBR5071-1. Continuance.
LBR5073-1. Photography, recording devices and broadcasting.
LBR7007-1. Motion practice (in adversary proceedings).
LBR7055-1. Default — Failure to prosecute.
LBR7056-1. Summary Judgment.
LBR9004-1. Papers — Requirements of form.
LBR9006-1. Time periods.
LBR9007-1. General notice and service provisions.
LBR9011-2. Pro se parties.
LBR9011-4. Signatures.
LBR9013-1. Motion practice.
LBR9015-1. Jury trial.
LBR9019-2. Mediated settlement conference.

Appendix

Index follows Rules.

THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

CHIEF JUDGE
James A. Beaty, Jr.
United States District Court
Middle District of North Carolina
251 N. Main St
Winston-Salem, NC 27101

DISTRICT JUDGE
N. Carlton Tilley, Jr.
P.O. Box 3443
Greensboro, NC 27402

DISTRICT JUDGE
William L. Osteen, Sr.
P.O. Box 3485
Greensboro, NC 27402

******

MAGISTRATE JUDGE
Russell A. Eliason
Suite 224, Federal Building
Winston-Salem, NC 27101

MAGISTRATE JUDGE
P. Trevor Sharp
P.O. Box 3195
Greensboro, NC 27402

MAGISTRATE JUDGE
Wallace W. Dixon
323 East Chapel Hill Street
Durham, NC 27702

******

CLERK
John S. Brubaker
324 West Market Street, Suite 401
Greensboro, NC 27401

THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CHIEF JUDGE
William L. Stocks
P.O. Box 3603
Greensboro, NC 27402

******

BANKRUPTCY JUDGE
Catharine R. Carruthers
P.O. Box 805
Winston-Salem, NC 27101-805

******

BANKRUPTCY JUDGE
Thomas W. Waldrep, Jr.
P.O. Box 26100
Greensboro, NC 27420-6100

******

******

CLERK
Reid Wilcox
P.O. Box 26100
Greensboro, NC 27420-6100

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF LOCAL) RULES OF CIVIL AND) CRIMINAL PRACTICE IN) THIS COURT)	ORDER ADOPTING LOCAL RULES OF CIVIL AND CRIMINAL PRACTICE

For good cause appearing to the Court,

IT IS ORDERED that:

1. The following Local Rules of Civil and Criminal Practice in the United States District Court for the Middle District of North Carolina be and they hereby are adopted, effective at 12:01 a.m, on the 1st day of July, 1997. At that time these local rules shall supersede local rules therefore in effect and shall apply to all pending cases, unless the Court finds that their application in a specific case would result in injustice or hardship.

2. These rules are adopted in compliance with and pursuant to the authority of Rule 83, Fed.R.Civ.P.; Rule 57, Fed.R.Crim.P.; and other federal rules and statutes providing for district court local rules.

3. These rules conform to the uniform numbering system prescribed by the Judicial Conference of the United States. Each local rule is numbered according to its corresponding Federal Rule. Local rules for which there are no corresponding Federal Rules are correlated with the respective Federal Rule on local rulemaking. (Fed.R.Civ.P. 83; Fed.R.Crim.P. 57)

4. Pursuant to Bankruptcy Rule 9029, the Court authorizes the Bankruptcy Judges of this district to adopt Local Rules of Practice and Procedure for the Bankruptcy Court.

5. The Clerk is directed to make appropriate arrangements to see that these rules are published promptly and that copies of the rules are made available for distribution to the bar and the public.

This the 4th day of June, 1977.

s/Frank W. Bullock, Jr. Chief United States District Judge	s/N. Carlton Tilley, Jr. United States District Judge
s/William L. Osteen United States District Judge	s/James A. Beaty, Jr. United States District Judge
s/Hiram H. Ward Senior United States District Judge	s/Richard C. Erwin Senior United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN RE)
) ORDER
Local Bankruptcy Rules)

It appearing that local bankruptcy rules would facilitate the administration of bankruptcy cases in this district and would assist the court in the management and orderly disposition of contested matters and adversary proceedings; and

It further appearing that Rule 9029 of the Federal Rules of Bankruptcy Procedure permits the United States District Court to authorize bankruptcy judges to make and amend local rules of practice and procedure for the bankruptcy court which are consistent with Acts of Congress and the Federal Rules of Bankruptcy Procedure; and

It further appearing that by order of the United States District Court for the Middle District, dated June 4, 1997, the bankruptcy judges of this district are authorized, subject to the requirements of Rule 83 of the Federal Rules of Civil Procedure, to make and amend local rules of practice and procedure not inconsistent with Acts of Congress and the Federal Rules of Bankruptcy Procedure; and

It further appearing that appropriate public notice and an opportunity to comment regarding the rules attached hereto has been given; now, therefore

IT IS ORDERED that the local bankruptcy rules attached hereto are hereby adopted and shall be effective from and after June 4, 1997, with respect to all cases and proceedings before the United States Bankruptcy Court for the Middle District of North Carolina. Such rules shall be referred to as Local Bankruptcy Rules, Middle District of North Carolina.

This the 4th day of June, 1997.

s/William L. Stocks
Chief Bankruptcy Judge
s/Catherine L. Carruthers
Bankruptcy Judge

Adoption of Interim Bankruptcy Rules. — On September 19, 2005, the United States Bankruptcy Court for the Middle District of North Carolina adopted Interim Bankruptcy Rules amending the Federal Rules of Bankruptcy Procedure to implement the substantive and procedural changes mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pursuant to 28 U.S.C.S. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 9029 of the Federal Rules of Bankruptcy Procedure, the Interim Rules were adopted in their entirety without change by a majority of the judges of the court, effective October 17, 2005, and shall remain in effect until further order of the court. For cases and proceedings not governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court for the Middle District of North Carolina, other than the Interim Rules, shall apply.

The Interim Bankruptcy Rules may be viewed at the website for the United States Bankruptcy Court for the Middle District of North Carolina located at **www.ncmb.uscourts.gov/bkreform2005.php.**

PART I. LOCAL RULES OF CIVIL PRACTICE

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule LR1.1. Scope and purpose of rules.

These rules govern practice in the District Court for the Middle District of North Carolina consistent with the Federal Rules of Civil Procedure. These rules shall be interpreted and applied to foster civility in the practice of law before this Court, and to promote the just and prompt determination of all proceedings.

Editor's note. — For website, see **www.ncmd.uscourts.gov.**

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS; PLEADINGS; MOTIONS AND ORDERS

Rule LR5.1. Additional copies for court use.

A paper copy of the following documents shall be delivered to the clerk for use by the court within a reasonable time after the original is filed:

(1) A brief.
(2) Proposed findings of fact and conclusions of law.
(3) Requests for jury instructions.

Rule LR5.2. Filings within three days of scheduled hearings.

A party who files documents which relate to a matter noticed for hearing within the next three business days shall so advise the clerk.

Rule LR5.3. Electronic filing of documents.

Documents may be filed, signed and verified by electronic means to the extent and in the manner authorized by the court's Standing Order regarding Electronic Case Administrative Policies and Procedures and the ECF User Manual. A document filed by electronic means in compliance with this Local Rule constitutes a written document for the purposed of applying these Local Rules, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Rule LR5.4. Service of electronically filed documents.

Documents may be served through the court's transmission facilities by electronic means to the extent and in the manner authorized by the court's Standing Order regarding Electronic Case Administrative Policies and Procedures and the ECF User Manual. Transmission of the Notice of Electronic Filing (NEF) constitutes service of the filed document upon each party in the case who is registered as a Filing User. Any other party or parties shall be served documents according to these Local Rules, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Rule LR6.1. Extensions of time and continuances of hearings.

(a) *Motions for an extension of time to perform an act.* All motions for an extension of time to perform an act required or allowed to be done within a specified time must comply with Fed.R.Civ.P. 6(b) and show prior consultation with opposing counsel and the views of opposing counsel.

(b) *Motions for continuance.* All motions to continue a pretrial conference, hearing on a motion, or the trial of an action must be filed reasonably in advance of the hearing date and must reflect the views of opposing counsel.

CASE NOTES

Applied in Sutton v. Cree, Inc., 386 F. Supp. 2d 600, 2005 U.S. Dist. LEXIS 24912 (M.D.N.C. June 22, 2005).

Excusable neglect. — Software company's motion to extend the time to respond to telecommunication company's motion for summary judgment beyond the expiration of the previously granted extension of time, and its motion for leave to file an over-long response brief was denied because, there was no excusable neglect,as required by Fed. R. Civ. P. 6(b) and U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R. 6.1(a), in the software company's failure to timely file its opposition brief, during the time for extension, counsel refused to consult with the district court or opposing counsel about the delay, and when the brief was filed, it was vastly over the 20-page limit. Madison River Mgmt. Co. v. Business Mgmt. Software Corp., 387 F. Supp. 2d 521, 2005 U.S. Dist. LEXIS 26267 (M.D.N.C. Aug. 31, 2005).

III. PLEADINGS AND MOTIONS

Rule LR7.1. Form of pleadings and papers.

(a) *Form.* Pleadings, motions, briefs, and other papers submitted for filing must be typewritten, printed, or legibly handwritten on letter size paper. The pages shall be single-sided and shall be unfolded and bound at the top and numbered at the bottom, without manuscript cover. The margin at the top of each page shall not be less than one and one-quarter inches, and bottom, left and right margins shall be set at not less than one inch. Typewritten documents should be double spaced. Mechanically reproduced copies which bear an original signature will be accepted by the court as originals.

All pleadings, motions and other original papers filed with the Clerk shall be in a fixed-pitch type size no smaller than ten characters per inch or in a proportional font size no smaller than 13 point. There shall be no more than 27 lines of regularly spaced text on a page.

(b) *Personal Data Identifiers.* In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

(1) *Social Security Numbers.* If the individual's social security number must be included in a pleading, only the last four digits of that number should be used.

(2) *Names of minor children.* If the involvement of a minor child must be mentioned in a pleading, only the initials of that child should be used.

(3) *Dates of birth.* If the individual's date of birth must be included in a pleading, only the year should be used.

(4) *Financial account numbers.* If financial account numbers are relevant and must be included in a pleading, only the last four digits of the financial account number should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted version of the document under seal, or file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The court may, however, still require a redacted copy for the public file. The redacted version of the document or the reference list shall be retained by the court as part of the record and disposed of in accordance with Local Rule 79.4. Counsel who file personal identifier data under seal should be mindful that the confidentiality of sealed documents transferred to the General Services Administration for holding after the case is closed cannot be assured.

The responsibility for redacting these personal identifiers rests solely with counsel and parties. The Clerk will not review each pleading for compliance with this rule.

(c) *Identification of Documents.* All papers submitted for filing shall follow the heading format set out in the Appendix of Forms, Fed.R.Civ.P.

(d) *Telephone numbers and addresses.* Parties or attorneys signing papers submitted for filing must state their telephone numbers, mailing addresses, e-mail addresses and the N.C. State Bar number of attorneys who are admitted to practice before this court.

(e) *Exhibits to pleadings or papers.* Bulky or voluminous materials should not be submitted for filing with a pleading or paper, or incorporated by reference therein, unless such materials are essential. The court may order any pleading or paper stricken if filed in violation of this rule.

(f) *Civil rights actions by prisoners, 42 U.S.C. § 1983.* All *pro se* complaints filed by state prisoners seeking relief under 42 U.S.C. § 1983 shall be filed with the clerk in compliance with the instructions of the clerk and on appropriate forms which are available without charge in the clerk's office. In each action, an original and one copy of the complaint for the court and one copy of the complaint for each defendant must be provided by the plaintiff. (Amended effective May 1, 2003; Amended effective November 1, 2004; Amended effective November 1, 2006.)

Rule LR7.2. Briefs.

(a) *Contents.* All briefs filed with the court shall contain:

(1) A statement of the nature of the matter before the court.

(2) A concise statement of the facts. Each statement of fact should be supported by reference to a part of the official record in the case.

(3) A statement of the question or questions presented.

(4) The argument, which shall refer to all statutes, rules and authorities relied upon.

(b) *Citation of published decisions.* For purposes of these rules, published decisions include decisions published in widely used reports and electronic databases, specifically including Westlaw and LEXIS. The preferred form of citation is in accordance with The Bluebook, a Uniform System of Citation.

(c) *Citation of unpublished decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the brief is filed. Unpublished decisions should be cited as follows: *Wise v. Richardson,* No. C-70-191-S (M.D.N.C., Aug. 11, 1971).

(d) *Citation of decisions not appearing in certain published reports.* Decisions published only in reports other than the West Federal Reporter System, Westlaw, LEXIS, the official North Carolina reports and the official United States Supreme Court reports (e.g., C.C.H. Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited only if the decision is furnished to the court and to opposing parties or their counsel when the brief is filed.

Rule LR7.3. Motion practice.

(a) *Form.* All motions, unless made during a hearing or at trial, shall be in writing and shall be accompanied by a brief except as provided in section (i) of this rule. Each motion shall be set out in a separate pleading.

(b) *Content.* All motions shall state with particularity the grounds therefor, shall cite any statute or rule of procedure relied upon, and shall set forth the relief or order sought.

(c) *Decided on motion papers and briefs.*

(1) Motions shall be considered and decided by the court on the pleadings, admissible evidence in the official court file, and motion papers and briefs, without hearing or oral argument, unless otherwise ordered by the court. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the court's attention in the motion or response.

(2) The clerk shall give at least five days' notice of the date and place of oral argument. The court, however, for good cause shown may shorten the five-day notice period.

(d) *Limitations on length of briefs.* Briefs in support of motions and responsive briefs are limited in length to 20 pages, and reply briefs are limited to 10 pages.

(e) *Movant's supporting documents and briefs.* When allegations of facts not appearing of record are relied upon to support a motion, affidavits, parts of depositions, and other pertinent documents then available shall accompany the motion. If supporting documents are not then available, the party may move for an extension of time in accordance with section (g) of this rule.

(f) *Response to motion and brief.* The respondent, if opposing a motion, shall file a response, including brief, within 20 days after service of the motion (30 days if the motion is for summary judgment; see LR56.1(d)). If supporting documents are not then available, the respondent may move for an extension of time in accordance with section (g) of this rule. For good cause appearing therefor, a respondent may be required to file any response and supporting documents, including brief, within such shorter period of time as the court may specify.

(g) *Extension of time for filing supporting documents and briefs.* Upon proper motion accompanied by a proposed order, the Court may enter an ex parte order, specifying the time within which supporting documents and briefs may be filed pursuant to sections (e) and (f), if it is shown in writing that such documents are not available or cannot be filed contemporaneously with the motion or response. The time allowed to an opposing party for filing a response shall not run during any such extension. If good cause to grant the motion is not apparent upon the face of the motion, the Court may direct that the motion be served upon the opposing party, who shall be allowed 10 days to respond.

(h) *Reply brief.* A reply brief may be filed within 10 days after service of the response. A reply brief is limited to discussion of matters newly raised in the response.

(i) *Suggestion of subsequently decided authority.* As an addendum to a brief, response brief, or reply brief, a suggestion of subsequently decided controlling authority, without argument, may be filed at any time prior to the court's ruling and shall contain only the citation to the case relied upon, if published, or a copy of the opinion if the case is unpublished.

(j) *Motions not requiring briefs.* No brief is required by either movant or respondent, unless otherwise directed by the court, with respect to the following motions: (1) discovery motions in which the parties have agreed to the expedited procedures described in LR37.1(b); (2) for extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed or as extended by previous orders; (3) to continue a pretrial conference, hearing, or the trial of an action; (4) to add parties; (5) to amend the pleadings; (6) to file supplemental pleadings; (7) to appoint a next friend or guardian *ad litem*; (8) for substitution of parties; and (9) to stay proceedings to enforce judgment. The above motions, while not required to be accompanied by a brief, must state good cause therefor and cite any applicable rule, statute, or other authority justifying the relief sought. These motions must be accompanied by a proposed order.

(k) *Failure to file and serve motion papers.* The failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect. A motion unaccompanied by a required brief may, in the discretion of the court, be summarily denied. A response unaccompanied by a required brief may, in the discretion of the court, be disregarded and the pending motion may be considered and decided as an uncontested motion. If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice.

CASE NOTES

Brief in Opposition to Motion. — Even if the opposition is futile and the motion to amend must be granted, subsection (a) allows defendant to file a brief in opposition to the motion if it so chooses. Fulk v. Hartford Life Ins. Co., 839 F. Supp. 1181 (M.D.N.C. 1993).

Reply Brief Violated Rule. — Because defendant energy corporation's reply brief violated U.S. Dist. Ct., M.D. N.C., R. 73(h), by raising new arguments rather than responding to new material raised by plaintiff government, the court did not consider the brief. United States v. Duke Energy Corp., 218 F.R.D. 468, 2003 U.S. Dist. LEXIS 19212 (M.D.N.C. 2003).

In an employment discrimination case, a 36-page table set out by the employee in her response to the employer's motion for summary judgment was stricken because the table set out facts that were material and in dispute, and thus, the material should have been included within the summary judgment response brief and kept within the page limit specified in U.S. Dist. Ct., M.D.N.C., R. 7.3(d). Youse v. Duke Energy Corp., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26573 (M.D.N.C. Dec. 15, 2003).

Length of Briefs. — Plaintiff's statement of specific facts greatly exceeded the applicable page limit mandated by Local Rules of the United States District Court for the Middle District of North Carolina and did not set forth facts that were not otherwise available in the record; thus, the statement violated U.S. Dist. Ct., M.D. N.C., R. 7.3(d), 56.1(c), and 56.1(e), and lacked any utility that would justify exempting it from the Local Rules. It was therefore stricken from the record. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., 243 F. Supp. 2d 386, 2003 U.S. Dist. LEXIS 1354 (M.D.N.C. 2003).

Combination Memorandum Inappropriate. — Where defendant combined a reply memorandum with a response memorandum in what appeared to be an attempt to circumvent subsection (g), this tactic appeared to violate the spirit, if not the letter, of the rule and counsel for defendant was cautioned against similar future actions. Fulk v. Hartford Life Ins. Co., 839 F. Supp. 1181 (M.D.N.C. 1993).

Pro Se Status of Plaintiffs. — Where plaintiffs failed to respond to defendants' motion for summary judgment, under this rule and rule 56.1(e), the Court could find the motion to be uncontested and grant it without further notice, but because of plaintiffs' pro se status, the Court acted with an abundance of caution and examined the motion closely on its merits. Baraukas v. Danek Med., Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5122 (M.D.N.C. Jan. 13, 2000).

Where borrowers, who were proceeding pro se, failed to file a response to the bank's motion to dismiss, the court could consider the motion as uncontested and grant the dismissal without further notice, but the court chose to address the merits of the borrowers' case because they were proceeding pro se. Davis v. Dillard Nat'l Bank, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 9420 (M.D.N.C. June 4, 2003).

Failure to Respond. — Where an employee failed to timely file a response to the employer's motion for summary judgment, the court considered the failure a waiver of the right to file, especially where the employee did not provide a showing of excusable neglect. Shoaf v. Kimberly-Clark Corp., 294 F. Supp. 2d 746, 2003 U.S. Dist. LEXIS 22302 (M.D.N.C. 2003).

Even when a motion for summary judgment is unopposed, the court must still review the motion and determine whether the moving party is entitled to judgment as a matter of law; where plaintiff failed to respond to defendant's motion for summary judgment, the court proceeded to review the motion on its merits. Carter v. Gilbarco/Marconi, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11863 (M.D.N.C. June 25, 2004).

Pursuant to U.S. Dist. Ct., M.D. N.C., R. 7.3(k) and Fed. R. Civ. P.6(b), a postal employee was deemed to have waived his right to respond to a Fed. R. Civ. P. 12(b)(6) dismissal motion because he had not filed a response within 30 days as required by U.S. Dist. Ct., M.D. N.C., R. 7.3, his counsel failed to seek leave to file an untimely response despite three inquiries from the court concerning the matter, the Postmaster General, who was sued in the action, was prejudiced by the delay, and the employee could not establish excusable neglect to justify the granting of an extension of time to respond. Daye v. Potter, 380 F. Supp. 2d 718, 2005 U.S. Dist. LEXIS 14716 (M.D.N.C. 2005).

Although the court could simply grant a Fed. R. Civ. P. 12(b)(6) dismissal motion, because it was deemed uncontested under U.S. Dist. Ct., M.D.N.C., R. 7.3(k) after a postal employee failed to timely respond to the motion, the court nevertheless exercised its discretion, considered the substance of the employee's complaint, and determined that he had failed to state actionable Family Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et. seq., and Title VII of the Civil Rights Act of 1964 claims. Daye v. Potter, 380 F. Supp. 2d 718, 2005 U.S. Dist. LEXIS 14716 (M.D.N.C. 2005).

Excusable Neglect. — In an employment discrimination suit, the court struck the employees' summary judgment response because they failed to demonstrate that their late filing resulted from excusable neglect; their lone statement as to the cause of the delay merely indicated a lack of preparedness, where counsel needed additional time due to the large volume of material and counsel's other cases. Luallen v. Guilford Health Care Ctr., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 23241 (M.D.N.C. Dec. 18, 2003).

As plaintiffs, who filed suit pro se claiming Employee Retirement Income Security Act, 29 U.S.C.S. § 1001 et seq., violations, did not file a signed response to defendants' motions to dismiss until after the time the court allowed for filing a proper response had expired and did not show excusable neglect, the court struck the untimely response and granted the motions to dismiss; however, in the interests of justice the court reviewed the motions on the merits and granted the motions in the alternative on that basis. McRae v. Rogosin Converters, Inc., 301 F. Supp. 2d 471, 2004 U.S. Dist. LEXIS 1712 (M.D.N.C. 2004).

Argument on Cited Case. — Pursuant to U.S. Dist. Ct., M.D.N.C., R. 7.3(i), an employee's motion to strike the city's and city officials' filing that argued a subsequent North Carolina Supreme Court decision that undermined the employee's position on a state law breach of contract claim was granted, but the court did not ignore the decision because it clarified a point of state law that was highly relevant to the employee's wrongful termination claim. Disher v. Weaver, 308 F. Supp. 2d 614, 2004 U.S. Dist. LEXIS 3849 (M.D.N.C. 2004).

Plaintiff's response to defendants' suggestion of subsequently decided authority exceeded the scope of U.S. Dist. Ct. M.D. N.C. R. 7.3(i) and therefore defendants' Fed. R. Civ. P. 12(f) motion to strike plaintiff's response was granted because Local Rule 7.3(i) did not allow a plaintiff to respond to defendants' suggestion of subsequently decided authority. Richmond v. Indalex Inc., 308 F. Supp. 2d 648, 2004 U.S. Dist. LEXIS 3851 (M.D.N.C. 2004).

Applied in Barbee v. Coble, 208 F.R.D. 549, 2002 U.S. Dist. LEXIS 15888 (M.D.N.C. 2002); Butler v. Sears Roebuck & Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 24229 (M.D.N.C. Dec. 12, 2002); Phillips v. Wood, 341 F. Supp. 2d 576, 2004 U.S. Dist. LEXIS 22894 (M.D.N.C. 2004); Sutton v. Cree, Inc., 386 F. Supp. 2d 600, 2005 U.S. Dist. LEXIS 24912 (M.D.N.C. June 22, 2005).

Cited in Esau v. Victor, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 4535 (M.D.N.C. Mar. 21, 2003); Ameira Corp. v. United States, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 6894 (M.D.N.C. Apr. 21, 2003); Alston v. N.C. A&T State Univ., 304 F. Supp. 2d 774, 2004 U.S. Dist. LEXIS 1725 (M.D.N.C. 2004); Allen v. IBM, 308 F. Supp. 2d 638, 2004 U.S. Dist. LEXIS 3850 (M.D.N.C. 2004); Clement v. UNC Hosps., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 3852 (M.D.N.C. Feb. 26, 2004).

Rule LR7.4. Ex Parte motions.

Unless the related case is already under seal, an ex parte motion shall only be sealed upon specific order of the court. A motion requesting permission to file an ex parte motion under seal shall include the ex parte motion as an attachment. The clerk shall treat the motion to seal and attachment as sealed pending order of the court.

Rule LR16.1. Initial pretrial proceedings.

(a) *Requirement for initial pretrial order.* There shall be an initial pretrial order entered pursuant to the provisions of Fed.R.Civ.P. 16(b) and 26(f) in every civil case, except in:

(1) Social Security cases and other actions for review of administrative decisions;
(2) Prisoner petitions;
(3) Summons or subpoena enforcement proceedings;
(4) Bankruptcy appeals;
(5) Government collection cases and forfeiture proceedings; and
(6) Cases brought by *pro se* plaintiffs.

The above categories of cases are exempted from the timing-and-sequence-of-discovery provisions of Rule 26(d), and the meeting of parties described in Rule 26(f). Category (1), (2), (3), and (4) cases require no pretrial management and are ready for adjudication on the pleadings of the parties, unless the court orders otherwise.

Category (5) cases (government collections and forfeitures) shall be governed by a 90-day period of discovery from the filing of answer or other response, with dispositive motions due in accordance with LR56.1. Category (6) cases (brought by *pro se* plaintiffs) shall be governed by a scheduling order entered by the court after an initial pretrial conference, unless the Court determines, in its discretion, that no conference is necessary.

(b) *Meeting of the parties.* Within the time set by Fed.R.Civ.P. Rule 16(b), the clerk shall schedule an initial pretrial conference and give at least thirty (30) days notice thereof. The parties must hold their Fed.R.Civ.P. 26(f) meeting at least 14 days before the scheduled initial pretrial conference and submit to the court their report within 10 days thereafter. The parties may not stipulate out of the Rule 26(f) meeting but must meet to discuss a proposed discovery plan. At the Rule 26(f) meeting, the parties shall discuss:

(1) All matters identified in Rules 16(b) and (c) and 26(f),

(2) The possibility of settlement,

(3) The proper management track for the case under LR26.1,

(4) The timing of any mediated settlement conference under LR16.4 and LR83.9a-g, and the identity of any agreed-upon mediator,

(5) The nature of the documents and information believed necessary for the case,

(6) Issues of burden and relevance and the discoverability of different types of documents,

(7) A preliminary schedule for depositions, to be updated at reasonable intervals upon communication between the parties, and

(8) The decision of each party whether or not to consent to the trial jurisdiction of a magistrate judge.

The parties shall jointly prepare a Rule 26(f) Report (LR16.2) if they are in agreement concerning a discovery plan for the case. If they do not agree, each shall file a separate Rule 26(f) Report (LR16.3), setting forth its position on disputed matters. The Reports must be filed with the court within 10 days of the Rule 26(f) meeting.

(c) *Initial pretrial order by conference.* If the parties are unable to reach agreement on a discovery plan and therefore submit separate Rule 26(f) Reports (LR16.3), they shall appear for the scheduled initial pretrial conference. Each party shall personally appear or be represented by an attorney who has full authority to bind the party on the matters for discussion at the conference. After hearing from the parties, the court will enter an initial pretrial order that will control the conduct of the litigation.

(d) *Initial pretrial order upon the Joint Rule 26(f) report.* If the parties reach agreement on a discovery plan and submit a joint Rule 26(f) Report, the court will enter an order on the basis of the proposed plan as submitted or as modified by the court. The court may, on its own motion, modify the plan if it finds in its discretion that the plan provides for an excessive amount of discovery or the parties' selection of a case management track under LR26.1 is unreasonable. The scheduled initial pretrial conference is automatically canceled upon the submission to the court of the joint Rule 26(f) Report.

(e) *Discovery with respect to expert witnesses.* The initial pretrial order, whether based upon a joint Rule 26(f) Report or a conference following the filing of separate reports, shall provide that discovery with respect to experts be conducted within the discovery period established in the case. The order shall set the date on which disclosure of expert information under Fed.R.Civ.P. 26(a)(2) must be made. (Amended effective March 5, 2002; amended effective September 1, 2003; amended effective November 1, 2006.)

Rule LR16.2. Joint Rule 26(f) report (form).

If the parties are in agreement concerning a discovery plan, they shall file a joint report in substantially the following form:

Joint Rule 26(f) Report

1. Pursuant to Fed.R.Civ.P. 26(f) and LR16.1(b), a meeting was held on __date__ at __place__ and was attended by ________ for Plaintiff(s), and ________ for Defendant(s).

2. Discovery Plan. The parties propose to the court the following discovery plan: Discovery will be needed on the following subjects:

__(brief descriptions)________________.

Discovery shall be placed on a case-management track established in LR26.1. The parties agree that the appropriate plan for this case (with any stipulated modification by the parties as set out below) is that designated in LR26.1(a) as:

Standard ______________
Complex ______________
Exceptional ______________
The date for the completion of all discovery (general and expert) is: __________.
Stipulated modifications to the case management track include: __________.

Reports from retained experts under Rule 26(a)(2) are due during the discovery period:

From Plaintiff(s) by __________
From Defendant(s) by __________

Supplementations under Rule 26(e) are due: (time[s] or interval[s]).

3. Mediation. [For cases selected for mediation under LR16.4 and LR 83.9a-g *et seq.*]

Mediation should be conducted [early] [midway] [late] in the discovery period, the exact date to be set by the mediator after consultation with the parties. The parties agree that the mediator shall be (identity) .

(If the parties report no agreement, the clerk will select a mediator from the court's panel of mediators.)

4. Preliminary Deposition Schedule. Preliminarily, the parties agree to the following schedule for depositions: ______________________________.

The parties will update this schedule at reasonable intervals.

5. Other items.

Plaintiff(s) should be allowed until date to request leave to join additional parties or amend pleadings.

Defendant(s) should be allowed until date to request leave to join additional parties or amend pleadings.

After these dates, the court will consider, *inter alia*, whether the granting of leave would delay trial.

The parties have discussed special procedures for managing this case, including reference of the case to a magistrate judge on consent of the parties under 28 U.S.C. § 636(c), or appointment of a master:

(Report any agreements on these matters) ________.

Trial of the action is expected to take approximately ____ days. A jury trial [has] [has not] been demanded.

Date: ______________

Signature of parties or counsel
Signature of parties or counsel

Rule LR16.3. Rule 26(f) report (form).

If the parties are unable to agree on a discovery plan, each party shall file a separate report in substantially the following form:

Rule 26(f) Report

1. Pursuant to Fed.R.Civ.P. 26(f) and LR16.1(b), a meeting was held on date at place and was attended by ________ for Plaintiff(s), and ________ for Defendant(s).

2. Discovery Plan. The undersigned party proposes to the court the following discovery plan:

Discovery will be needed on the following subjects:

(brief descriptions) ________.

Discovery shall be placed on a case-management track established in LR26.1. The undersigned party proposes that the appropriate plan for this case is that designated in LR26.1(a) as:

Standard ______________
Complex ______________
Exceptional ______________
The date for the completion of all discovery (general and expert) is: __________.
Stipulated modifications to the case management track include: __________.

Reports from retained experts under Rule 26(a)(2) are due during the discovery period:

From Plaintiff(s) by ______________

From Defendant(s) by ______________

Supplementations under Rule 26(e) should be due: (time[s] or interval[s]).

3. Mediation. [For cases selected for mediation under LR16.4 and LR 83.9a-g, *et seq.*]

Mediation should be conducted [early] [midway] [late] in the discovery period, the exact date to be set by the mediator after consultation with the parties. The parties agree that the mediator shall be (identity).

(If the parties report no agreement, the clerk will select a mediator from the court's panel of mediators.)

4. Preliminary Deposition Schedule. The undersigned proposes the following schedule for depositions: ______________________________.

The parties will update this schedule at reasonable intervals.

5. Other items.

Plaintiff(s) should be allowed until date to request leave to join additional parties or amend pleadings.

Defendant(s) should be allowed until date to request leave to join additional parties or amend pleadings.

After these dates, the court will consider, *inter alia*, whether the granting of leave would delay trial.

The parties have discussed special procedures for managing this case, including reference of the case to a magistrate judge on consent of the parties under 28 U.S.C. § 636(c), or appointment of a master:

(Report any agreements on these matters) ______________.

Trial of the action is expected to take approximately ____ days. A jury trial [has] [has not] been demanded.

Date: ______________

Signature of parties or counsel

Rule LR16.4. Mediated settlement conferences.

(a) *Mediated settlement conferences during discovery.* In selected civil cases (see section [b] for a description of cases automatically selected for mediation) there shall be conducted a mediated settlement conference in accordance with LR83.9a-g. The conference may be set for any time during the discovery period, as agreed by the parties. In appropriate cases, the parties may wish to schedule the mediation early in the discovery period, after a first round of depositions or other discovery. In other cases, the parties may choose to set the conference near the end of the discovery period after all, or substantially all, discovery is complete. The parties shall discuss the timing of the mediated settlement conference during the Rule 26(f) meeting of the parties.

(b) *Automatic selection by these rules.* Several categories of civil cases are automatically selected for mediated settlement conferences, without specific order by the court. These categories include, according to the nature of suit designations made in opening the case in CM/ECF or as listed within the court forms appearing at www.ncmd.uscourts.gov, (1) contract [categories 110-140 and 160-195, specifically excluding 150-153], (2) tort [all categories, 310-385], (3) civil rights [all categories, 440-444], (4) labor [all categories, 710-791], (5) property rights [all categories, 820-840], (6) antitrust [category 410], (7) banks and banking [category 430],(8) securities/commodities/exchange [category 850] and (9) environmental matters [category 893]. The parties to these actions shall discuss mediation plans at the fed.R.Civ.P. 26(f) meeting of the parties and report such plans in their Rule 26(f) Report in preparation for the entry of an initial pretrial order. See LR16.1(b)(c) and (d). Cases wherein the United States is a party or the plaintiff appears pro se are not included within this automatic selection for mediation.

(c) *Exemption from mediated settlement conference.* Any party, or parties jointly, may move for exemption from the requirement for a mediated settlement conference. The court will grant such a request only for good cause. A general assertion that settlement is unlikely or only a remote possibility does not serve as good cause for exemption.

CASE NOTES

Where *pro se* plaintiff had not made any attempt to settle the dispute and failed to show that defendant's proposed settlement was unfair, the court would deny her motion to compel, due to her failure to follow this rule, without prejudice to her filing a new motion within 15 days. Barlow v. Esselte Pendaflex Corp., 111 F.R.D. 404 (M.D.N.C. 1986), aff'd, 838 F.2d 1209 (4th Cir.), cert. denied, 488 U.S. 843, 109 S. Ct. 116, 102 L. Ed. 2d 90 (1988) (decided prior to the 1993 amendment).

IV. PARTIES

Rule LR17.1. Minors and incompetents as parties.

(a) *Capacity to sue or be sued.* Minors and incompetent persons may sue or defend only by their general or testamentary guardians within this state or by guardians *ad litem* appointed by this court.

(b) *Appointment of guardian ad litem.*

(1) Application for the appointment of a guardian *ad litem* to sue on behalf of a minor or incompetent may be made by motion submitted contemporaneously with a complaint. The complaint may be filed when the appointment is made by a judge.

(2) Application for the appointment of a guardian *ad litem* to defend on behalf of a minor or incompetent person may be filed after service of summons and complaint and before time has expired to answer or otherwise to respond.

(3) Applications for the appointment of a guardian *ad litem* by this court must:

(i) set out facts requiring such appointment,

(ii) suggest a natural person suitable for appointment,

(iii) contain information about that person, including willingness to serve, upon which the court can judge his or her qualifications, and

(iv) be accompanied by a proposed order of appointment.

(c) *Termination of actions; Court hearing and approval.*

(1) No civil action or proceeding in which a minor or incompetent person is a party may be compromised, settled, dismissed, or otherwise terminated without the approval of the court.

(2) In order to obtain court approval, a party must file a motion setting forth reasons justifying the termination and explaining its effect upon the rights of the minor or incompetent person.

(3) The court will conduct a hearing to determine whether the termination is fair, reasonable, and in the best interest of the minor or incompetent. The following persons must be present at the hearing unless excused by the court:

(i) attorneys for all parties,

(ii) the minor or incompetent party,

(iii) the guardian *ad litem* or other legal representative, and

(iv) a parent or other person in *loco parentis.*

(4) At the hearing the parties must establish to the satisfaction of the court:

(i) the facts giving rise to the cause of action and the contentions of the parties with respect to liability and damage;

(ii) the facts concerning the nature and extent of any injury or damage suffered by the minor or incompetent person, supported by medical records and reports in personal injury cases;

(iii) medical and hospital expenses, if any, incurred or likely to be incurred;

(iv) the concurrence of the attorney, guardian *ad litem* or other legal representative that the proposed settlement is fair, reasonable, and in the best interest of the minor or incompetent person;

(iv) the facts with respect to any related claims or liens, including separate claims of parents for expenses, and the disposition or status of such other claims.

(5) Ordinarily, the requirements of section (c)(4) of this rule may be satisfied by summaries made by the parties or their attorneys. In every case, the parties may present sworn testimony of witnesses, affidavits or documentary evidence, and the court reserves the right to call for such evidence at any time.

(d) *Fees.* At the hearing, the court will consider requests for counsel fees and a fee for services by the guardian *ad litem* or other legal representative and may make appropriate orders relating to payment of fees.

(e) *Consent judgments approving settlement.*

(1) Before a judgment approving a compromise settlement of claims of a minor or incompetent is presented to the court, it shall be consented and agreed to by counsel for the parties to the action and by the guardian *ad litem* or other legal representative of the minor or incompetent.

(2) The judgment presented should provide, *inter alia,* that the parties have agreed to a settlement of all matters in controversy between them, and the amount of the settlement; that the court has conducted a hearing on the matter; that the court has found that the proposed compromise settlement is fair, reasonable, and in the best interest of the minor or incompetent; and that the court has approved the compromise settlement agreement.

(f) *Payment of judgment.* The amount of the judgment shall be paid into the office of the clerk of this court, and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in this state in which the minor or incompetent resides. If the minor or incompetent does not reside within this state, the balance shall be paid to a legal guardian approved by the court.

CASE NOTES

Applied in Aldridge v. Oxford Apparel, Inc., 348 F. Supp. 2d 574, 2004 U.S. Dist. LEXIS 25399 (M.D.N.C. 2004).

Rule LR23.1. Class actions.

(a) *Class action complaint.* The complaint shall bear next to its caption the legend, "Complaint — Class Action." The complaint shall contain under a separate heading, styled "Class Action Allegations":

(1) A reference to the portion or portions of Rule 23, Fed.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(2) Appropriate allegations claimed to justify class treatment, including, but not necessarily limited to:

(i) the size and definition of the alleged class,

(ii) the basis upon which the plaintiff claims

(A) to be an adequate representative of the class, or

(B) if the class is comprised of defendants, that those named as parties are adequate representatives of the class,

(iii) the alleged questions of law or fact claimed to be common to the class, and

(iv) for actions sought to be maintained under Rule 23(b)(3), Fed.R.Civ.P., allegations thought to support the findings required by that subdivision.

(b) *Motion for class action determination.* Within 90 days after the filing of a complaint in a class action, unless this period is extended by court order, the plaintiff shall file a separate motion for a determination under Rule 23(c)(1), Fed.R.Civ.P., as to whether the case may be maintained as a class action. If a party wishes to present oral testimony to support or oppose the class action motion, the party must so inform the court in its motion or opposition. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion.

(c) *Class action counterclaims or cross-claims.* The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross-claim alleged to be brought for or against a class.

(d) *Burden of proof; Notice.* The burden shall be upon any party seeking to maintain a case as a class action to present an evidentiary basis to the court showing that the action is properly maintainable as such. If the court determines that an action may be maintained as a class action, the party obtaining that determination shall initially bear the expenses of and be responsible for giving such notice as the court may order to members of the class.

V. DEPOSITIONS AND DISCOVERY

Rule LR26.1. Differentiated case management and discovery.

(a) *Differentiated case management.* Every case in which an initial pretrial order is entered pursuant to LR16.1(b)-(d) shall be assigned, by agreement of the parties (if adopted by the court) or by order of the court, to one of three case-management tracks. (See LR16.2 and 16.3 for forms of the Fed.R.Civ.P. 26(f) report wherein parties advise the court regarding case management tracks.) The three tracks are defined as follows:

(1) *Standard.* Discovery (including all discovery with respect to experts) in cases assigned to this track shall be completed within four (4) months from the date of the initial pretrial order. Presumptively, subject to stipulation of the parties or order of the court on good cause shown, interrogatories (including subparts) and requests for admission are limited to 15 in number by each party. Depositions are presumptively limited to four (4) depositions (including any experts) by the plaintiffs, by the defendants, and by third-party defendants.

(2) *Complex.* Discovery (including all discovery with respect to experts) in cases assigned to this track shall be completed within six (6) months from the date of the initial pretrial order, subject to agreement of the parties for a larger discovery period, if approved by the court. Presumptively, subject to stipulation of the parties or order of the court on good cause shown, interrogatories (including subparts) and requests for admission are limited to 25 in number by each party. Depositions are presumptively limited to seven (7) depositions (including any experts) by the plaintiffs, by the defendants, and by third-party defendants.

(3) *Exceptional.* Discovery (including all discovery with respect to experts) in cases assigned to this track shall be completed within nine (9) months from the date of the initial pretrial order. Presumptively, subject to stipulation of the parties or order of the court on good cause shown, interrogatories (including subparts) and requests for admission are limited to 30 in number by each party. Depositions are presumptively limited to 10 depositions (including any experts) by the plaintiffs, by the defendants, and by third-party defendants. This management track is reserved for cases of exceptional complexity. It is not to be used for ordinary federal cases even though such cases have some complexity and require significant discovery.

(b) *Discovery procedures and materials.*

(1) The court expects counsel to conduct discovery in good faith and to cooperate and be courteous with each other in all phases of the discovery process. As a part of their Rule 26(f) Report, the parties must formulate a preliminary deposition schedule. They must continue to communicate throughout the discovery period to update the schedule.

(2) Interrogatories, requests for production of documents, or requests for admission shall be numbered consecutively by each party regardless of the number of sets into which they are divided.

(3) Initial disclosures, disclosures of expert testimony, depositions and deposition notices, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless the court so orders or unless the court will need such documents in a pretrial proceeding. All discovery papers must be served on other counsel or parties. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court when needed or ordered. Any party seeking to compel discovery or other pretrial relief based upon discovery material which has not been filed with the clerk must identify the specific portion of the material which is directly relevant and ensure that it is filed as an attachment to the application for relief.

(c) *Completion of discovery.* The requirement that discovery be completed within a specified time means that adequate provisions must be made for interrogatories and requests for admission to be answered, for documents to be produced, and for depositions to be held within the discovery period.

(d) *Extension of the discovery period or request for more discovery.* Motions seeking an extension of the discovery period or permission to take more discovery than is permitted under the initial pretrial order must be made or presented prior to the expiration of the time within which discovery is required to be completed. They must set forth good cause justifying the additional time and will be granted or approved only upon a showing that the parties have diligently pursued discovery. The court will permit additional depositions only on a showing of exceptional good cause.

(e) *Trial preparation after the close of discovery.* For good cause appearing therefor, the physical or mental examination of a party may be ordered at anytime prior to trial. Ordinarily, the deposition of a material witness not subject to subpoena should be taken during discovery. However, the deposition of a material witness who agrees to appear at trial, but who later becomes unable or refuses to attend,may be ordered at any time prior to trial.

CASE NOTES

Rule required that all discovery be filed so that the answers were due within the discovery period; plaintiff's discovery requests, therefore, were untimely, and were denied for this reason as well. Bennett v. Prime TV, LLC, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 7994 (M.D.N.C. May 9, 2003).

Motion to Compel Denied Where Party Not in Compliance with Rule. — Plaintiff's motion to compel should not have been filed because no certificate had been filed, and diligent attempts had not been made to resolve differences between plaintiff and the non-party; timely compliance with the Local Rule was not only mandatory, but essential to the discovery process in order to avoid unnecessary burden to the non-party and the court, and plaintiff failed to offer any excuse for its conduct, except the advancement of its legal position. Medical Components Inc. v. Classic Med., Inc., 210 F.R.D. 175, 2002 U.S. Dist. LEXIS 19170 (M.D.N.C. 2002).

Completion of Discovery. — District court denied a plaintiff's motion to compel responses to written deposition questions because, under Fed. R. Civ. P. 31(a)(4), defendants' responses to the questions could not have been due until after the expiration of discovery; thus, the discovery was untimely under the provisions of U.S. Dist. Ct., M.D.N.C., R. 26.1(f). Summerville v. Local 77, 369 F. Supp. 2d 648, 2005 U.S. Dist. LEXIS 6889 (M.D.N.C. 2005), aff'd, dismissed, 369 F. Supp. 2d 648 (M.D.N.C. 2005).

Applied in MCI Constr., LLC v. Hazen & Sawyer, P.C., 211 F.R.D. 290, 2002 U.S. Dist. LEXIS 22996 (M.D.N.C. 2002); In re Cree, Inc. Sec. Litig., 220 F.R.D. 443, 2004 U.S. Dist. LEXIS 5442 (M.D.N.C. 2004).

Rule LR30.1. Conduct of depositions.

Depositions shall be conducted in accordance with the following guidelines:

(1) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

(2) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct, stating the basis of the objection and nothing more.

(3) Counsel and their witness-clients shall not engage in private, off-the-record conferences while the deposition is proceeding in session, except for the purpose of deciding whether to assert a privilege. Counsel may confer with their clients during mid-morning, lunch, mid-afternoon, or overnight breaks in the deposition. However, counsel for a deponent may not request such a break while a question is pending or while there continues a line of questioning that may be completed within a reasonable time preceding such scheduled breaks.

(4) Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

Rule LR37.1. Motions to compel discovery.

(a) *Conference of attorneys with respect to motions and objections relating to discovery.* The court will not consider motions and objections relating to discovery unless moving counsel files a certificate that after personal consultation and diligent attempts to resolve differences the parties are unable to reach an accord. The certificate shall set forth the date of the conference, the names of the participating attorneys, and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference and, in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court location where the initial pretrial conference was convened or, in the absence thereof, nearest to Greensboro. Alternatively, at any party's request, the conference may be held by telephone.

(b) *Expedited resolution of some discovery disputes.* If, after a LR37.1(a) conference, the parties agree that a discovery dispute can be ruled upon in a telephone conference of no more than 30 minutes, the magistrate judge will schedule such a conference and rule on the dispute without briefing by the parties. Alternatively, if the parties agree that the dispute can be ruled upon in an in-court hearing of no more than one hour, without briefing, the magistrate judge will schedule an early hearing. The fact that these proceedings are expedited and without briefing does not alter the application of Fed.R.Civ.P. 37(a)(4) and subsection (e) of this rule regarding the imposition of sanctions in discovery motions.

VI. TRIALS

Rule LR40.1. Trial dates and final pretrial preparation.

(a) *Establishment of trial date.* While the case is in discovery, the clerk shall establish a trial date and give at least 4 months' notice thereof to the parties. The case may be set on a trial calendar of the assigned judge or placed on a master calendar to be called by one or more district judges. A magistrate judge may assist with the master calendar, although no case may be referred to the magistrate judge for trial unless the parties consent to the magistrate judge's trial jurisdiction.

(b) *Continuance of trial.* The court will consider a request to continue a trial date only if the request is signed by both the party and counsel for the party.

(c) *Final pretrial preparation.* The parties shall comply in all respects with Fed.R.Civ.P. 26(a)(3) regarding final pretrial disclosure, including the time requirements set out therein. Additionally, no later than 20 days before trial, each party shall file a trial brief, along with proposed instructions on the issues (jury cases) or findings of fact and conclusions of law (non-jury cases). Any party, or the court on its own motion, may request a pretrial hearing or telephone conference to address matters relating to final pretrial preparation or settlement of the case. At any settlement conference, the court may require the attendance of parties and insurers.

Rule LR43.1. Trial procedure.

(a) *Opening statement in civil actions.* At the commencement of the trial of civil actions, the party with the burden of proof may, without argument, state his cause of action and the evidence by which he expects to sustain his claim. The adverse party may then, without argument, state his defense and the evidence by which he expects to sustain his defense. If the trial is to a jury, the opening statement shall be made immediately after the jury is sworn. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as may be imposed by the court.

(b) *Documents, other than exhibits, used at trial.* When counsel expects to examine or cross-examine a witness concerning a document which will not be offered as an exhibit, counsel shall have at trial a copy of the document for use by the judge.

(c) *Absence during return of verdict.* In a jury trial, if a party or counsel is voluntarily absent from the courtroom prior to the return of the verdict, it shall be conclusively presumed that such party or counsel waived presence.

Rule LR47.1. Juries.

(a) *Examination of jurors.*

(1) The court will conduct the examination of prospective jurors.

(2) When the court's examination is completed, attorneys and parties appearing pro se may request that the court ask additional questions to the prospective jurors.

(b) *Contacts prohibited.*

(1) All parties, witnesses, and attorneys shall avoid any extra-judicial contact or communication with a grand juror or member of a petit jury venire or panel who has been or may be selected in a case in which that person is involved. No person may have any extra-judicial contact or communication, either directly or indirectly, with a grand juror, member of a petit jury venire or panel which may reasonably have the effect of influencing, or which is intended to influence, the grand juror, potential petit juror, or sitting petit juror.

(2) Attorneys for parties shall inform their clients and witnesses of this rule.

(3) No person shall approach a juror, either directly or through any member of his immediate family, in an effort to secure information concerning the juror's background.

(4) No provision of this rule is intended to prohibit communication with a petit juror after the juror has been dismissed from further service, so long as the communication does not tend to harass, humiliate, or intimidate the juror in any fashion.

(c) *Disclosure of names and addresses of prospective jurors.*

(1) The names of prospective jurors for any session of court or for a specific case may not be disclosed prior to their reporting for duty except in compliance with instructions of the court. The clerk will make available to counsel for the parties, and to any parties appearing *pro se,* a list which sets forth the name, general address, and occupation of each potential juror when court is opened for the session for which the jurors have been summoned.

(2) The names, address, and telephone numbers of persons who have served as jurors may not be disclosed by the clerk's office without court permission.

VII. JUDGMENT

Rule LR51.1. Jury arguments and instructions.

(a) *Jury arguments.* In the trial of civil actions the party having the burden of proof shall have the right to open and close the jury argument, without regard to whether the defendant has offered evidence. If each of the parties has the burden of proof on one or more issues, the court, in its discretion, shall determine the order of arguments. All arguments shall be subject to such time limitations as may be imposed by the court.

(b) *Instructions to jury.* In all cases tried to a jury, a party who desires the jury to be instructed on a particular point must set it out in writing and furnish it to the court before jury arguments commence.

Rule LR54.1. Taxation of costs.

(a) *Filing bill of costs.*

(1) A prevailing party may request the clerk to tax allowable costs in a civil action as a part of a judgment or decree by filing a bill of costs, on a form available in the clerk's office, within 30 days.

(i) after the expiration of time allowed for appeal of a final judgment or decree, or

(ii) after receipt by the clerk of an order terminating the action on appeal.

(2) The original of the bill of costs shall be filed with the clerk, with copies served on adverse parties.

(3) The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

(b) *Objections to bill of costs.*

(1) If an adverse party objects to the bill of costs or any item claimed by a prevailing party, that party must state objection in a motion for disallowance with a supporting brief within 10 days after the filing of the bill of costs. Within five days thereafter, the prevailing party may file a response and brief. Unless a hearing is ordered by the clerk, a ruling will be made by the clerk on the record.

(2) A party may request review of the clerk's ruling by filing a motion within five days after the action of the clerk. The court's review of the clerk's action will be made on the existing record unless otherwise ordered.

(c) *Taxable costs.*

(1) Items normally taxed include, without limitation:

(i) Those items specifically listed on the bill of costs form. The costs incident to the taking of depositions (when allowable as necessarily obtained for use in the litigation) normally include only the reporter's attendance fee and charge for one transcript of the deposition.

(ii) Premiums on required bonds.

(iii) Actual mileage, subsistence, and attendance allowances for necessary witnesses at actual cost, but not to exceed the applicable statutory rates, whether they reside in or out of this district.

(iv) One copy of the trial transcript for each party represented by separate counsel.

(2) Items normally not taxed include, without limitation:

(i) Witness fees, subsistence, and mileage for individual parties, real parties in interest, parties suing in representative capacities, and the officers and directors of corporate parties.

(ii) Daily copy of trial transcripts, unless prior court approval has been obtained.

(d) *Costs in settlements.* The court will not tax costs in any action terminated by compromise or settlement. Settlement agreements must resolve any issue relating to costs. In the absence of specific agreement, each party will bear its own costs.

(e) *Payment of costs.* Costs are to be paid directly to the party entitled to reimbursement, who must file a certificate of satisfaction within 20 days of receipt of payment.

CASE NOTES

Generally. — In litigation that resulted in two groups of plaintiffs, those who settled and those who did not settle, non-settling plaintiffs were not responsible for costs of depositions where it was uncertain whether those depositions were needed in defendants' case against non-settling plaintiffs. Luallen v. Guilford Health Care Ctr., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11866 (M.D.N.C. June 25, 2004).

Request For Costs Premature Where Unsuccessful Party Files Timely Motion For New Trial. — Prevailing party's request for costs, although otherwise appropriately filed after the entry of judgment on a jury verdict, is premature under U.S. Dist. Ct., M.D. N.C., R. 54.1(a)(1)(ii) where the unsuccessful party files a timely motion for a new trial of judgment as a matter of law, since the time allowed for appeal does not begin to run until the motion is decided. Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC, 336 F. Supp. 2d 552, 2004 U.S. Dist. LEXIS 19181 (M.D.N.C. 2004).

Intermediate weekends and holidays should be excluded from the 10-day period of U.S. Dist. Ct., M.D. N.C., R. 54.1(b)(1) as provided in Fed. R. Civ. P. 6(a), but not from the three-day period provided in Rule 6(e). Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC, 336 F. Supp. 2d 552, 2004 U.S. Dist. LEXIS 19181 (M.D.N.C. 2004).

Applied in AM Props. v. Town of Chapel Hill, 202 F. Supp. 2d 451, 2002 U.S. Dist. LEXIS 8888 (M.D.N.C. 2002); Eberhart v. Gettys, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 9334 (M.D.N.C. June 3, 2003).

Cited in Basnight v. Diamond Developers, Inc., 178 F. Supp. 2d 589, 2001 U.S. Dist. LEXIS 23826 (M.D.N.C. 2001).

Rule LR54.2. Award of statutory attorney's fees.

The court will not consider a motion to award statutory attorney's fees until moving counsel shall first advise the court in writing that after consultation the parties are unable to reach an agreement in regard to the fee award. The statement of consultation shall set forth the date of the consultation, the names of the participating attorneys, and the specific results achieved.

Within 60 days after the entry of final judgment, (i) the parties shall file an appropriate stipulation and request for an order if they have reached an agreement on an award of statutory attorney's fees; or (ii) if the parties have not reached such an agreement, the moving party shall file the statement of consultation required by this rule and a motion, supported by affidavits, time records, or other evidence, setting forth the factual basis for each criterion which the court will consider in making such an award.

CASE NOTES

Time Limitation. — Where the plaintiff filed a fee petition more than 60 days after the date the appellate court's opinion was issued, but fewer than 60 days after the issuance of the appellate court's mandate, there was no error in the denial of the defendant's request to strike the petition. Mercer v. Duke Univ., 401 F.3d 199, 2005 U.S. App. LEXIS 3441 (4th Cir. 2005).

Consultation Requirement. — Following remand of a removed state action by former employees and their spouses against a financial advisor and its employees, and an award of costs and fees to the former employees and spouses, the parties were ordered, pursuant to U.S. Dist. Ct., M.D. N.C., Civ. R. 54.2, to consult and attempt to agree on the amount of the just costs and expenses incurred by the former employees and spouses as a result of the second removal, which would include only those costs and expenses, including reasonable attorneys' fees, associated with the second removal. McPhatter v. Sweitzer, 401 F. Supp. 2d 468, 2005 U.S. Dist. LEXIS 29840 (M.D.N.C. 2005).

Cited in Basnight v. Diamond Developers, Inc., 178 F. Supp. 2d 589, 2001 U.S. Dist. LEXIS 23826 (M.D.N.C. 2001); Williams v. PPG Indus., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 8927 (M.D.N.C. May 22, 2003).

Rule LR56.1. Summary judgment motions.

(a) *Notice of dispositive motion.* Any party who intends to file a motion for summary judgment, or any other dispositive motion, must file and serve notice of intention to file a dispositive motion within 10 days following the close of the discovery period.

(b) *Filing of dispositive motions.* All dispositive motions and supporting briefs must be filed and served within 30 days following the close of the discovery period.

(c) *Limitations of length of briefs.* The page limitations for briefs on all motions, established by LR7.3(d), apply to summary judgment briefs. Principal briefs are limited to 20 pages, and reply briefs are limited to 10 pages.

(d) *Form of briefs — Summary judgment motion by claimant.* A party requesting summary judgment on its claim shall set out a statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party shall also set out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of those elements.

In a responsive brief the opposing party may, within 30 days after service of the summary judgment motion and brief, set out the statements required by LR7.2(a)(1)-(3) and also set out the elements that the claimant must prove (with citations to supporting authority), and either identify any element as to which evidence is insufficient (and explain why the evidence is insufficient), or point to specific, authenticated facts existing in the record or set forth in accompanying affidavits that show a genuine issue of material fact, or explain why some rule of law (e.g., an applicable statute of limitations) would defeat the claim. The failure to file a response may cause the court to find that the motion is uncontested.

In a reply brief the claimant may, within 10 days of service of the response, address matters newly raised in the response.

(e) *Form of briefs — Summary judgment motion by defending party.* A party moving for summary judgment upon an opposing party's claim shall set out a statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party shall also set out the elements that the claimant must prove (with citations to supporting authority), and explain why the evidence is insufficient to support a jury verdict on an element or elements, or why some other rule of law would defeat the claim.

In a responsive brief the party having made the challenged claim may, within 30 days after service of the summary judgment motion and brief, file with the court a response that sets out the statements required by LR7.2(a)(1)-(3) and also sets out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of the disputed elements. The failure to file a response may cause the court to find that the motion is uncontested.

In a reply brief the defending party may, within 10 days of service of the response, address matters newly raised in the response.

(f) *Summary judgment motions and trial dates.* The pendency of summary judgment motions will not serve to delay trial on the date set by the court in accordance with LR40.1. If by the time set for trial, the court has been unable to reach any pending summary judgment motion, the case will nonetheless be reached according to the trial calendar. The court will rule on the motion at the outset of trial.

(g) *Failure to timely file dispositive motions.* A dispositive motion which is not noticed and filed within the prescribed time will not be reached by the court prior to trial unless the court determines that its consideration will not cause delay to the proceedings.

CASE NOTES

Length of Briefs. — Plaintiff's statement of specific facts greatly exceeded the applicable page limit mandated by Local Rules of the United States District Court for the Middle District of North Carolina and did not set forth facts that were not otherwise available in the record; thus, the statement violated U.S. Dist. Ct., M.D. N.C., R. 7.3(d), 56.1(c), and 56.1(e), and lacked any utility that would justify exempting it from the Local Rules. It was therefore stricken from the record. Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc., 243 F. Supp. 2d 386, 2003 U.S. Dist. LEXIS 1354 (M.D.N.C. 2003).

In an employment discrimination case, a 36-page table set out by the employee in her response to the employer's motion for summary judgment was stricken because the table set out facts that were material and in dispute, and thus, the material should have been included within the summary judgment response brief and kept within the page limits specified in U.S. Dist. Ct., M.D.N.C., R. 56.1(c) and U.S. Dist. Ct., M.D.N.C., R. 7.3(d). In re Moore, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

Software company's motion to extend the time to respond to a telecommunication company's motion for summary judgment beyond the expiration of the previously granted extension of time and its motion for leave to file an over length response brief was denied because (1) pursuant to Fed. R. Civ. P.6(b) and U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R. 6.1(a), the district court could find no excusable neglect in the software company's failure to timely file its opposition brief because, although defense counsel was aware of the deadlines, his noncompliance, and its ramifications, he chose not to comply with the district court's deadlines; (2) during the time for extension, counsel refused to consult with the district court or opposing counsel about the delay; and (3) when the brief was filed, it was vastly over the 20-page limit imposed by U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R.56.1(c), despite having notice that the district court was not keen on lengthy briefs because of its previous denial of telecommunications company's motion. Madison River Mgmt. Co. v. Business Mgmt. Software Corp., 387 F. Supp. 2d 521, 2005 U.S. Dist. LEXIS 26267 (M.D.N.C. Aug. 31, 2005).

Exhibits That Are Not Authenticated and Lack Proper Foundation Do Not Qualify as Summary Judgment Evidence. — Some of a taxpayer's exhibits were not attached to depositions or affidavits and were not identified by the deponent or affiant; therefore, the exhibits had not been authenticated and lacked a proper foundation to qualify as summary judgment evidence. Cmty. Residential Servs. v. United States, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 7754 (M.D.N.C. May 7, 2003).

Where plaintiffs failed to respond to defendants' motion for summary judgment, under Local Rules 7.3(k) and this rule, the Court could find the motion to be uncontested and grant it without further notice, but because of plaintiffs' pro se status, the Court acted with an abundance of caution and examined the motion closely on its merits. Baraukas v. Danek Med., Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5122 (M.D.N.C. Jan. 13, 2000).

In an employee's national origin discrimination suit against the employer, where the employee failed to respond to the employer's summary judgment motion as required by U.S. Dist. Ct., M.D.N.C., R. 56.1(d), despite receiving a letter explaining the effect of the employee's failure to respond, the court treated the motion as uncontested. Sosa v. Advance Auto Parts, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 7798 (M.D.N.C. Apr. 30, 2004).

Movant's Claim Not Sufficiently Specific to Support Summary Judgment. — Defendant's claim that plaintiff had no proper admissible evidence of damages allegedly caused by defendant was not sufficiently specific to support summary judgment, where defendant did not provide the court with the elements of each of the torts at issue or explain how evidence of damages was essential to each claim, or provide any authority indicating that lack of evidence of damages was a blanket defense to all of the claims. MCI Constructors v. Hazen & Sawyer, P.C., 405 F. Supp. 2d 621, 2005 U.S. Dist. LEXIS 30537 (M.D.N.C. 2005).

VIII. PROVISIONAL AND FINAL REMEDIES

Rule LR65.1. Injunctions and temporary restraining orders.

(a) *Form of application.* A prayer for a temporary restraining order or preliminary injunction set forth in a pleading will not bring the issue before the court prior to the time of trial. If a ruling before trial is desired, a party must separately file a motion and brief.

(b) *Hearing.* A motion seeking a preliminary injunction will be considered and determined on the official court file including affidavits, briefs and other documents filed in support thereof without oral argument or testimony unless otherwise ordered by the court. A request for leave to present oral argument or testimony in support of or in opposition to such motion must be included in the motion or response.

Rule LR65.1.1. Sureties.

(a) *Surety.* Except as otherwise provided by law or by order of the court, all bonds, guaranties, and undertakings must be secured by:

(1) Deposit of cash, certified check, certificate of deposit, bank draft, Post Office money order, negotiable bond, note of the United States as defined in 6 U.S.C. § 15, or other bond or note of the United States with the agreement provided for in 6 U.S.C. § 15;

(2) Undertaking of guaranty of a company holding a certificate of authority from the U.S. Department of Treasury as an acceptable surety on federal bonds; which company has filed with the clerk the designation of a resident of this district as agent, dated not more than three years earlier than the date of the undertaking, upon whom process may be served; and which company is otherwise qualified by having met all requirements of the law of North Carolina and of 6 U.S.C. §§ 6-13; or

(3) Undertaking of individual surety or sureties who are residents of North Carolina and own property within the state worth double the amount of the bond or undertaking over all exemptions, debts, liabilities and other obligations.

(b) *Individual sureties.*

(1) An individual surety must execute an affidavit of justification giving full name, occupation, residence address, business address, and facts showing his financial qualification to act as surety.

(2) A husband and wife are considered as one surety.

(3) Members of the bar, officers and employees of this court, and employees of the Department of Justice serving in this district may not serve as sureties in any suit, action, or proceeding in this court.

(c) *Approval.* All bonds, guaranties, undertakings, and individual sureties must be approved by a judge or the clerk. Individual sureties who justify on the basis of ownership of real or personal property may be required to provide proof of ownership such as a certificate of title, and a title search conducted by an attorney other than the attorney representing the party on whose behalf the bond is being posted, and give security in the form of a proper security instrument or deed of trust.

Rule LR67.1. Registry funds.

(a) *Deposit with the Treasury.* Unless otherwise ordered by the court, the clerk shall deposit registry funds in the Treasury of the United States.

(b) *Investments in income-earning account.* Upon motion or upon consent of the parties, the court may order the clerk to invest certain registry funds in an income-earning account. The order may issue upon a consent request of the parties or upon motion by an interested party, in accordance with the following procedures:

(1) A consent request must demonstrate the assent of all interested and potentially interested parties. The agreement must demonstrate that the investment will be in compliance with applicable provisions of the law regulating the investment of public monies, provide for proper disposition of future earnings, and set out with particularity the following information:

(i) the form of deposit;

(ii) the amount to be invested;

(iii) the type of investment to be made by the clerk of court; i.e., passbook savings, insured money fund, CD, etc.;

(iv) the name and address of the private institution where the deposit is to be made;

(v) the rate of interest at which the deposit is to be made, if possible;

(vi) the length of time the money should be invested, whether it should automatically be reinvested, etc., keeping in mind that some investments include a penalty for early withdrawal;

(vii) the name and address of the designated beneficiary or beneficiaries;

(viii) the form of additional collateral to be posted by the private institution in the event that the standard F.D.I.C. coverage is insufficient to insure the total amount of deposit; and

(ix) such other information that may be deemed appropriate under the facts and circumstances of the particular case.

The consent request shall be accompanied by a proposed order directing the clerk to proceed with the investment.

(2) A motion may be filed *ex parte* by an interested party, and the court may enter an order in advance of the filing of any response thereto. The motion must set forth the showings required in subsection (b)(1) concerning the investment and must include a proposed order. The motion must be served on all known interested parties who do not join therein. The court may determine the motion upon the record or may, in its discretion, call for a hearing on the matter. If an order is entered prior to the filing of a response in opposition, the motion will be reconsidered by the court.

(3) When an order is issued to invest or reinvest registry funds into some form of interest-bearing account or accounts, the party presenting the order shall deliver a copy of said order either personally, or by certified mail, return receipt requested, to the Clerk, or in his absence, the Chief Deputy Clerk or the Financial Deputy. Further, it shall be incumbent upon the presenting party to confirm that the appropriate action has been accomplished by the Clerk in accordance with the provisions of the particular order.

(4) The clerk of court shall deduct from the income earned the fee specified in 28 U.S.C. § 1914 for deposit to the credit of the Judiciary, without order of the court.

IX. SPECIAL PROCEEDINGS

Rule LR72.1. Authority of magistrate judges.

(a) *Designation to conduct trials and to perform other duties.*

(1) Magistrate judges are authorized and designated to exercise the powers and authority and to perform the duties enumerated in 28 U.S.C. § 636(b)(1) and (2).

(2) Magistrate judges serving this court are specially designated to:

(i) exercise civil jurisdiction to conduct any or all proceedings in jury or non-jury cases and order the entry of judgment in any case referred to them for that purpose, pursuant to 28 U.S.C. § 636(c), and

(ii) exercise jurisdiction to try persons accused of, and sentence persons convicted of, criminal misdemeanors.

(b) *Authority to perform additional duties.* Pursuant to 28 U.S.C. § 636(b)(3), magistrate judges are authorized to perform additional functions and duties, including the following:

(1) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings;

(2) Conduct calendar and status calls for civil and criminal calendars, and determine motions to expedite or postpone the trial of cases;

(3) Conduct arraignments in cases not triable by the magistrate judge to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or *nolo contendere* and ordering a presentence report in appropriate cases;

(4) Conduct *voir dire* and select petit juries for the court;

(5) Accept petit jury verdicts in civil cases in the absence of a district judge;

(6) Conduct preliminary proceedings relating to the potential revocation of probation;

(7) Issue subpoenas, writs of *habeas corpus ad testificandum* or *habeas corpus ad prosequendum,* or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;

(8) Order the exoneration or forfeiture of bonds;

(9) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(10) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;

(11) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;

(12) Conduct such hearings as are necessary or appropriate, and submit to a district judge proposed findings of fact and recommendations for disposition of applications for judgment by default pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, or motions to set aside judgments by default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure;

(13) Consider an application by complainant pursuant to 42 U.S.C. § 2000e-5(f)(1), and in such circumstances as may be deemed just, appoint an attorney for such complainant, and authorize the commencement of an action without payment of fees, costs, or giving security therefor;

(14) Issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States Government;

(15) Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184;

(16) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782;

(17) Require compliance with local rules with regard to *pro se* petitions under 42 U.S.C. § 1983;

(18) Issue orders of withdrawal from the court registry of funds pursuant to 28 U.S.C. § 2042; and

(19) Perform any additional duty which is not inconsistent with the Constitution and laws of the United States.

Rule LR72.2. Assignment of matters to magistrate judges.

Duties and cases may be assigned or referred to a magistrate judge by a court order entered in the action or by the clerk in compliance with standing orders or the instructions of a district judge.

Rule LR72.3. Stay of order.

Application for stay of a magistrate judge's order pending review of objections made thereto must first be made to the magistrate judge.

Rule LR73.1. Consent to civil trial jurisdiction.

(a) *Consent to exercise of civil trial jurisdiction.*

(1) The consent of a party to the exercise of civil trial jurisdiction authorized in 28 U.S.C. § 636(c)(1) may be communicated to the clerk by letter, or by a form available in the clerk's office, signed by the party or the party's attorney, or by any other manner provided for by law.

(2) The consent of a party will be placed in the public court file only when the court has ordered the case referred to a magistrate judge.

(b) *Withdrawal of consent.* After a case has been referred, the consent of the parties to the exercise of a magistrate judge's jurisdiction may not be withdrawn without the approval of the district judge who signed the order of reference.

(c) *Reference discretionary.* Reference of a case to a magistrate judge after consent of all parties is within the discretion of the court.

X. DISTRICT COURTS AND CLERKS

Rule LR77.1. Court schedule and conduct of business.

(a) *Headquarters.* The headquarters of the court shall be located in Greensboro. All paper documents submitted for filing shall be delivered to the clerk in Greensboro, except that papers may be filed in open court in any court location when permitted by a judge.

(c) *Scheduling.* Conferences, hearings, and trials will be scheduled by the court or by the clerk at the court's direction. All sessions of court will commence at 9:30 a.m. unless otherwise announced.

(c) *Naturalization.* Petitions for naturalization will be considered by the court at Greensboro, North Carolina, on Fridays after the third Mondays in February, May, August, and on the Friday before Thanksgiving in November. In its discretion, the court may at other times consider petitions for naturalization when made by members of the armed services, seamen on merchant vessels registered under the laws of the United States, members of the immediate families and dependents of such personnel, or other persons in exceptional circumstances.

Rule LR77.2. Orders and judgments grantable by clerk.

(a) *Orders and judgments.* The clerk is authorized to grant the following orders and judgments without direction by the court:

(1) Upon a showing of good cause, consent orders in civil actions for extending for not more than 30 days (plus an additional 30 days in exceptional circumstances) the time within which to answer or otherwise plead.

(2) Upon a showing of good cause, consent orders in social security administrative review cases for extending for not more than 30 days (plus an additiona 30 days in exceptional circumstances) the time within which to file dispositive motions.

(b) *Clerk's action reviewable.* The actions of the clerk may be suspended, altered, or rescinded by the court upon cause shown.

Rule LR77.3. Court libraries.

The court's libraries are maintained for the exclusive use of the judges and the clerk.

Rule LR79.1. Access to court records.

(a) *Access.* The public records of the court are available for examination in the clerk's office during normal business hours.

(1) No file, pleading, paper, or index card may be removed from the clerk's office without the approval of a judge.

(2) When removal of a file or document is authorized, the clerk will set a date for its return and will require a written receipt for its release.

(b) *Copies.* The clerk will make and furnish copies of official court records upon request and upon payment of prescribed fees. The official court record for documents filed prior to March 1, 2005 consists of items filed on the right side of the case folder; items filed on the left side of the case folder, while available for public examination, may not be copied without the written approval of a judge. Requests for copies of items filed on the left side of the case folder must be submitted in writing to the clerk of court, who will refer the matter to the appropriate judge and advise the requester of the judge's decision. For documents filed on or after March 1, 2005, the CM/ECF electronic documents are the official court record.

Rule LR79.2. Release of information by court personnel.

All court personnel, including, among others, the United States Marshal and deputies, the clerk of court and deputies, the chief probation officer and officers, the chief pretrial services officer and officers, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Rule LR79.3. Administrative records in social security cases.

Administrative records and transcripts in Social Security cases and transcripts or voluminous exhibits in other administrative proceedings will be returned to counsel at conclusion of action.

Rule LR79.4. Custody and disposition of trial exhibits, sealed documents, and filed depositions.

(a) *Custody with the clerk.* Unless otherwise directed by the court, all trial exhibits admitted into evidence in criminal and civil actions shall be placed in the custody of the clerk, except as provided in section (b) below.

(b) *Custody with the offering party.* All exhibits not suitable for filing and transmission to the court of appeals as a part of a record on appeal shall be retained in the custody of the party offering them, subject to the orders of the court. Such exhibits shall include, but not be limited to, the following types of bulky or sensitive exhibits: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight.

At the conclusion of a trial or proceeding, the party offering such exhibits shall retain custody of them and be responsible to the court for preserving them in their condition as of the time admitted until any appeal is resolved or the time for appeal has expired. The party retaining custody shall make such exhibits available to opposing counsel for use in preparation of an appeal and be responsible for their safe transmission to the appellate court, if required.

(c) *Disposition of exhibits, sealed documents, and filed depositions by clerk.* Any exhibit, sealed document, disk, or filed deposition in the clerk's custody more than 30 days after the time for appeal, if any, has expired, or an appeal has been decided and mandate received, may be returned to the parties or destroyed by the clerk. Complaints, answers, motions, responses and replies, whether sealed or not, must be forwarded to the General Services Administration for permanent storage. The confidentiality of sealed documents cannot be assured after the case file is transferred to the General Services Administration for records holding.

(d) *Depositions.* Depositions read into the court record are considered exhibits for which the parties shall be responsible as provided in section (b) above. Depositions on file admitted into evidence but not read into the record shall be retained in the clerk's custody and disposed of as authorized in section (c) of this rule.

XI. LOCAL CIVIL RULES FOR WHICH THERE ARE NO CORRESPONDING FEDERAL RULES

Rule LR83.1. Attorneys.

(a) *Roll of attorneys.* The bar of this court shall consist of those attorneys admitted to practice before this court.

(b) *Eligibility and admission.* To be eligible for admission to the bar of the court, a person must be admitted to the practice of law in this state and in good standing with the Supreme Court of North Carolina. A judge will consider a request for admission only upon motion made in open court by a member of the bar of this court. Prior to being admitted to practice, an attorney must certify, on the application for admission to practice form provided for use in this court, that the attorney has read and is familiar with the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Local Rules of this Court, and the North Carolina Code of Professional Responsibility. Attorneys seeking admission to practice in this court must take an oath or make an affirmation in a form approved by the court and pay the filing fee required by the Administrative Office of the United States Courts for admission to practice in this district. When the application form prescribed for use by this court is completed and the appropriate filing fee has been paid to the Clerk of Court of this court, a judge or magistrate judge of the Eastern or Western Districts of North Carolina, upon being presented evidence that the above-mentioned application has been filed and that the requisite fees have been paid, may admit an attorney who is qualified according to these rules to practice before this court. Attorneys already admitted to the bars of either the United States District Court for the Eastern District of North Carolina or the United States District Court for the Western District of North Carolina may be admitted to the bar of this court upon tendering the application and fees required by this rule, together with a copy of the order admitting the attorney to practice in either of the aforementioned districts.

(c) *Litigants must be represented by a member of the bar of this court.*

(1) Litigants in civil and criminal actions and parties in bankruptcy proceedings before this court, except parties appearing *pro se*, must be represented by at least one attorney who is a member of the bar of this court. Federal government attorneys representing the interests of the United States are not required to secure local counsel. The service of all pleadings and papers permitted by the Federal Rules of Civil and Criminal Procedure shall be sufficient if made upon such attorney.

(2) All pleadings and papers presented to the clerk for filing, except by attorneys representing governmental agencies or parties appearing *pro se,* shall be signed by a member of the bar of this court.

(d) *Special appearance.*

(1) Attorneys who are members in good standing of the bar of the highest court of any state or the District of Columbia may practice in this court for a particular case in association with a member of the bar of this court. By entering an appearance, an attorney agrees that:

(i) the attorney will be responsible for ensuring the presence of an attorney who is familiar with the case and has authority to control the litigation at all conferences, hearings, trials and other proceedings; and that

(ii) the attorney submits to the disciplinary jurisdiction of the court for any misconduct in connection with the litigation for which the attorney is specially appearing.

(2) A member of the bar of this court who accepts employment in association with a specially appearing attorney is responsible to this court for the conduct of the litigation or proceeding and must sign all pleadings and papers, except for certificates of service. Such member must be present during pretrial conferences, potentially dispositive proceedings, and trial.

(e) *Withdrawal of appearance.* No attorney who has entered an appearance in any civil or criminal action shall be permitted to withdraw an appearance, or have it stricken from the record, except on order of the court or when the attorney has provided notice of substitution of counsel by an attorney who is a member of the withdrawing attorney's law firm.

Rule LR83.2. Courtroom practices.

(a) *Addressing the court.* Attorneys or litigants shall rise when addressing the court, and shall make all statements to the court from behind the counsel table or the lectern facing the court. They shall not approach the bench, except upon the permission of the court.

(b) *Questioning witnesses.* While questioning witnesses, attorneys or *pro se* litigants shall remain seated or standing behind the counsel table or standing at the lectern.

They shall not approach the witness except for the purpose of examining the witness with respect to an exhibit. Only one attorney for each party may participate in the examination or cross-examination of a witness.

Rule LR83.3. Settlement.

Attorneys or *pro se* litigants shall immediately notify the clerk of an agreement in principle reached by the parties which resolves the litigation as to any or all parties. Whenever any civil action scheduled for a jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, all jury costs, including any marshal's fees, mileage and per diem, may be assessed equally against the parties or otherwise assessed as determined by the court, unless the clerk's office is notified at least one full business day prior to the date on which the action is scheduled for trial or in sufficient time to notify jurors that their presence will not be required.

Rule LR83.4. Sanctions.

(a) *Imposition of sanctions.* If an attorney or a party fails to comply with a local rule of this court, the court may impose sanctions against the attorney or party, or both. The court may make such orders as are just under the circumstances of the case, including the following:

(1) an order that designated matters or facts shall be taken as established for purposes of the action;

(2) an order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;

(3) an order striking out pleadings or parts thereof, or staying proceedings until the rule is complied with, or dismissing the action or any part thereof, or rendering a judgment by default against the failing party;

(4) an order imposing costs, including attorney's fees, against the party, or the party's attorney, who has failed to comply with a local rule.

(b) *Sanctions within the discretion of the court.* The imposition of sanctions for violation of a local rule is discretionary with the court. In considering the imposition of sanctions, the court may consider whether a party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate.

CASE NOTES

Disqualification Sanction Not Necessary. — Ethical violations of plaintiff's out-of-state law firm were relatively minor, inasmuch as not all ex parte contacts with defendant's employees were improper and defendants did not suffer any harm; therefore, the disqualification sanction was not necessary to vindicate the public interest in preventing over-reaching by counsel or to restore public confidence. McCallum v. CSX Transp., Inc., 149 F.R.D. 104 (M.D.N.C. 1993).

Rule LR83.5. Disposition of private property.

(a) *Disposition.* Whenever, during the course of an investigation, a trial of any action, or any other proceeding in this court, money, contraband, or other private property comes into the possession or custody of a law enforcement officer or an officer of the court, which will require an order of this court to determine its ownership or proper disposition, it is the responsibility of the attorney representing the party having original custody or control of such property to apply to the court for an order determining its ownership and directing its disposition.

(1) This application must be made before the conclusion of responsible the litigation while all parties are before the court in person or through their attorneys.

(2) If the court cannot determine ownership or the proper disposition on the basis of the record or information from the parties before it, application must be made for an order providing for temporary custody pending institution of appropriate civil proceedings to determine final ownership or disposition.

(b) *Sanctions.* The court may impose sanctions as provided in LR83.4 against any party or attorney whose failure to comply with this rule necessitates a subsequent hearing or court proceeding which would otherwise not have been necessary.

Rule LR83.6. Claim of unconstitutionality; three-judge courts.

(a) *Notification.* If at any time prior to the trial of an action to which (1) neither the United States nor any of its officers, agencies, or employees is a party and a party draws in question the constitutionality of an act of Congress affecting the public interest, or (2) neither the state nor any of its agencies, officers, or employees is a party and a party draws in question the constitutionality of any statute of that state affecting the public interest, that party, to enable the court to comply with 28 U.S.C. § 2403, shall notify the court. The notice shall be in writing, stating the title of the action, the statute in question, and the respects in which it is claimed the statute is unconstitutional, and a copy shall be served upon the Attorney General of the United States and the United States Attorney in this district or the North Carolina Attorney General, as applicable.

(b) *Additional copies.* In any action or proceeding required by act of Congress to be heard and determined by a district court of three judges, all pleadings, papers, and documents filed subsequent to the designation of the court, as provided in 28 U.S.C. § 2284(a), shall be filed in triplicate, original and two copies, with the clerk. The clerk shall make timely distribution of these documents to the designated judges.

Rule LR83.7. Photographs, recordings, and broadcasts.

Radio or television broadcasting and the use of photographic, electronic, or mechanical reproduction or recording equipment without court permission is prohibited in courtrooms or their environs. "Environs" is defined to mean the courtrooms, the offices of the judges, clerk, probation officers, or any corridor connecting or adjacent thereto. Ceremonial proceedings such as the administration of oaths of office to appointed officials of the court, naturalization, and presentation of portraits, may be photographed in or broadcast from the courtroom under the supervision of the court. This rule does not apply to courtroom proceedings by other government agencies.

Rule LR83.8. Courtroom security.

The United States Marshal or a Court Security Officer shall be present at all proceedings held in open court, unless otherwise ordered by the court.

Rule LR83.9a. Purpose of mediated settlement conferences.

These rules govern reference of selected civil actions for mediated settlement conferences. Their purpose is to provide for an informal process conducted by a mediator with the objective of helping the parties reach a mutually acceptable settlement of their dispute. The rules are not intended to force settlement upon any party. The rules shall be construed to secure the speedy, fair, and economical resolution of controversies while preserving the right of all parties to a conventional trial.

CASE NOTES

Legal analysis in deciding Rule 15 motions should not be materially different merely because a case involves court-annexed arbitration from which the parties may seek a trial de novo. R.J. Reynolds Tobacco Co. v. Southern Ry., 110 F.R.D. 95 (M.D.N.C. 1986) (decided prior to the 1993 amendments).

In ruling on a motion to amend the pleadings made immediately before an arbitration hearing, the court should consider, with slightly reduced rigor, the factors of delay and prejudice, as are appropriate to a trial setting. R.J. Reynolds Tobacco Co. v. Southern Ry., 110 F.R.D. 95 (M.D.N.C. 1986) (decided prior to the 1993 amendments).

Rule LR83.9b. Selection of cases for mediated settlement conferences.

(a) *Automatic selection by these Rules.* Several categories of civil cases are automatically selected for mediated settlement conferences, without specific order by the court. These categories include, according to the nature of suit designations made in opening the case in CM/ECF or as listed within the court forms appearing at www.ncmd.uscourts.gov, (1) contract [categories 110-140 and 160-195, specifically excluding 150-153], (2) tort [all categories, 310-385], (3) civil rights [all categories, 440-444], (4) labor [all categories, 710-791], (5) property rights [all categories, 820-840], (6) antitrust [category 410], (7) banks and banking [category 430], (8) securities/commodities/exchange [category 850], and (9) environmental matters [category 893]. The parties to these actions shall discuss mediation plans at the Fed.R.Civ.P. 26(f) meeting of the parties and report such plans in their Rule 26(f) Report in preparation for the entry of an initial pretrial order. *See* LR16.1(b)(c) and (d). Cases wherein the United States is a party or the plaintiff appears *pro se* are not included within this automatic selection for mediation.

(b) *Discretionary selection by the court.* In its discretion, the court may order a mediated settlement conference in any action not automatically selected under section (a), above. After entry of such an order, the parties shall have 20 days to file a statement identifying an agreed-upon mediator.

(c) *Stipulated selection by the parties.* In any case where selection for a mediated settlement conference is not automatic under section (a) of this rule, the parties may file a stipulation for mediation. In such stipulation, the parties may state any agreements they have reached regarding the identity of the mediator, the timing of the conference, and any modification of the procedures described by these rules.

(d) *Exemption from mediation.* Any party, or parties jointly, may file a motion for exemption from mediation. Such a motion will be granted only on a showing of good cause. A general assertion that a case is not likely to settle or that settlement possibilities are remote does not constitute good cause.

Rule LR83.9c. Mediators.

(a) *Certification.* The clerk shall maintain a list of mediators who have agreed to serve under these rules. The list shall identify areas of subject matter expertise of each mediator according to the categories identified in LR83.9b(a) and include such biographical information as each mediator may wish to provide. Attorneys who have been certified as mediators pursuant to the rules of the North Carolina Supreme Court and who have at least 8 years of civil trial practice or membership on the faculty of an accredited law school may serve on the panel of mediators. Further, attorneys who were on the court's panel of arbitrators as of December 1, 1993 may serve on the panel of mediators. Appointment to the list does not guarantee any mediator that he or she will be appointed to serve in any case before the court.

(b) *Compensation of mediators.* All mediators under these rules, whether agreed upon by the parties or selected by the clerk, shall be compensated by the parties at the hourly rate set by the Chief Judge, except that the court may permit a higher compensation rate to an agreed-upon mediator on joint application by the parties and a showing that the case involves extraordinary complexities. The parties shall make payment directly to the mediator at the termination of the mediated settlement conference, whether or not the case is settled. The mediator shall be compensated for up to 2 hours of preparation time and for the time expended in the conference. The only compensable expense of the mediator is travel mileage at the ordinary government rate. The mediator's fee and travel expense shall be paid in one equal share by the plaintiff (or plaintiffs), one equal share by the defendant (or defendants), and one equal share by any third party (or parties), unless otherwise agreed by all parties or ordered by the court in the interest of fairness.

(c) *Compensation of mediators when a party is unable to pay.* If a party contends it is unable to pay its share of the mediator's fee, that party shall, before the conference, file a motion with the court to be relieved of the obligation to pay. The motion shall be accompanied by an affidavit of financial standing. The mediated settlement conference should proceed without payment by the moving party, and the court will rule on the motion upon completion of the case. The court will take into consideration the outcome of the case, whether by settlement or judgment, and may relieve the party of its obligation to pay the mediator if payment would cause a substantial financial hardship. If the party is relieved of its obligation, the mediator shall remain uncompensated as to that portion of his or her fee, a circumstance that reflects the mediator's duty of *pro bono* service.

Rule LR83.9d. Selection of the mediator.

(a) *Selection by agreement.* The parties are encouraged to select their own mediator by agreement. If, within 20 days of the initial pretrial order, the parties file with the clerk a statement identifying an agreed-upon mediator, such statement shall be effective to select the mediator, and the clerk will notify the mediator of his or her selection. The parties may select an agreed-upon mediator who is not on the clerk's list of certified mediators, but any such mediator must, prior to service, agree to be bound by all provisions of these rules.

(b) *Selection by the clerk.* If no timely statement pursuant to section (a) of this rule is filed, the clerk shall appoint a mediator from the certified list. The appointment is within the discretion of the clerk, who may consider subject matter expertise in making the appointment. The clerk shall give notice of the appointment to the mediator and the parties.

(c) *Disqualification.* On motion made to the court not later than 20 days before a scheduled mediated settlement conference, a mediator may be disqualified by the court for bias or prejudice as provided in 28 U.S.C. §144. Further, a mediator shall disqualify himself or herself if the mediator could be required to do so under 28 U.S.C. § 455 if he or she were a justice, judge, or magistrate judge.

(d) *Copies of the pleadings.* On request of the mediator, the clerk shall furnish to the mediator a copy of the complaint, answer, and any third-party pleadings in the action.

Rule LR83.9e. Procedures for mediated settlement conferences.

(a) *Time period for the mediated settlement conference.* The mediated settlement conference shall be held during the discovery period unless the court specifically orders otherwise.

(b) *Scheduling the mediated settlement conference.* The mediated settlement conference shall ordinarily be held in the office of the mediator, but may be held at any other place agreed to by the parties and the mediator. Because of space limitations, the federal courthouses are not available for mediated settlement conferences. After conferring with the attorneys for the parties regarding scheduling matters, the mediator shall determine the place and time of the conference (within the period established by these rules), and give notice to the parties.

(c) *Submission of position papers to mediator.* No later than five (5) business days before the scheduled date of the mediated settlement conference, any party may submit a confidential position paper to the mediator. The position paper shall be limited in length to five (5) pages, double-spaced, and may be accompanied by up to five (5) pages of exhibits. Position papers are confidential, shall be held so by the mediator, and need not be served on other parties. The purpose of these submissions is to help the mediator become familiar with the assertions of the parties, and the parties may agree to the submission of additional information if they believe the information will facilitate the mediated settlement conference.

(d) *Duties of parties, representatives, and attorneys.* The following persons shall be physically present at the entire mediated settlement conference unless excused by the mediator:

(1) Individual parties; an officer, manager, or director of a corporate or entity party, such representative to have full authority to negotiate on behalf of the entity and to approve or recommend a settlement;

(2) At least one attorney of record for each represented party; and

(3) A representative of the insurance carrier for any party against whom a claim is made. The representative must have full authority to settle the claim and must be a person other than the carrier's outside counsel.

Upon reaching a settlement agreement at a mediated settlement conference, the parties shall forthwith reduce the agreement to writing and prepare a stipulation of dismissal or consent judgment for presentation to the court.

(e) *Authority of the mediator.* The mediator is authorized by these rules to exercise control over the mediated settlement conference and to direct all proceedings therein. The mediator is specifically authorized to meet or consult privately with any party or their counsel during the conference. The mediator may report in writing to the court, with copies to the parties, any conduct of any party that may be in violation of these rules for mediated settlement conferences.

(f) *Duties of the mediator.* At the beginning of the mediated settlement conference, the mediator shall describe the following matters to the parties:

(1) The process of mediation,

(2) The differences between mediation and other forms of conflict resolution,

(3) The costs of the mediated settlement conference,

(4) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement,

(5) The circumstances under which the mediator may meet alone with either of the parties or any other person,

(6) The conditions under which communications with the mediator will be held in confidence during the conference,

(7) The inadmissibility of negotiating statements and offers at trial,

(8) The fact that the court will not permit parties in other litigations to conduct discovery regarding the mediation in this case,

(9) The duties and responsibilities of the mediator and the parties, and

(10) The fact that any agreement reached will be reached by mutual consent of the parties.

The mediator may recess or suspend the conference at any time and set a schedule for reconvening. It is the duty of the mediator to determine if an impasse has been reached or mediation should for any reason be terminated. He shall then inform the parties that mediation is terminated.

(g) *Agreements to modify mediation procedures.* By agreement filed with the court, the parties, with the consent of the mediator, may modify the mediation procedures described in these rules, except that the parties may not alter time limitations set by these rules or order of the court.

(h) *Sanctions for failure to appear.* If a person fails to attend a mediated settlement conference without good cause, the court may impose on that person (or any associated party) any lawful sanction, including, but not limited to, the imposing of the cost of attorney's fees, mediator's fees, and expenses of persons incurred in attending the conference.

CASE NOTES

Sanctions for Failure to Appear. — Where plaintiff failed to attend a scheduled mediation and blamed her attorney, the court declined to grant sanctions because it was not clear from the record why plaintiff missed the mediation. Carter v. Gilbarco/Marconi, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11863 (M.D.N.C. June 25, 2004).

Cited in Ashley Furn. Indus., Inc. v. SanGiacomo N.A. Ltd., 187 F.3d 363 (4th Cir. 1999).

Rule LR83.9f. Completion of the mediated settlement conference.

When the mediated settlement conference is completed, the mediator shall immediately submit to the clerk a report of the status of the case, on a form supplied by the clerk. If the case is resolved, it is the duty of the parties to file a stipulation of dismissal or consent judgment. If the case is not resolved, it proceeds without further order of the court in accordance with the local rules of the court.

Rule LR83.9g. Evaluation of the mediation program.

The mediation program established by these rules is experimental in nature and will be periodically reviewed by the court. For purposes of evaluation of the program, the mediator, the attorneys, and the litigants may be requested to complete confidential evaluation reports at the completion of the mediation. These reports shall be kept confidential by the clerk and shall be maintained in a file separate and apart from the case file. The clerk shall compile information from the evaluation reports to assist the court in determining the effectiveness of the mediation program.

Rule LR83.10a. Purpose of disciplinary rules.

The court, in furtherance of its inherent power and responsibility to supervise attorneys who practice before it, adopts these rules of disciplinary enforcement.

Rule LR83.10b. Attorneys convicted of a crime.

(a) *Suspension upon filing of judgment.* Upon the filing of a certified copy of a judgment of conviction demonstrating that any attorney practicing before the court has been convicted in any court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States, of a serious crime as herein defined, the court may enter an order immediately suspending that attorney from practice until final disposition of a disciplinary proceeding before this court, or until final disposition is made by the appropriate state bar.

(b) *Definition of serious crime.* "Serious crime" shall include any felony and also any other crime which involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy of solicitation of another to commit a "serious crime."

(c) *Conviction of serious crime.* Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court may refer the matter to counsel for institution of a disciplinary proceeding before the court, providing that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded. Alternatively, the court may refer the matter to the appropriate state bar.

(d) *Conviction of other crime.* Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a "serious crime," the court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court. Alternatively, the court may refer the matter to the appropriate state bar. The court is not restricted from taking such other disciplinary action as is within the inherent authority of the court.

(e) *Reinstatement after suspension.* An attorney suspended under the provisions of this rule will be reinstated immediately upon the filing of a certificate demonstrating that the conviction of a serious crime has been reversed, but the reinstatement will not terminate any disciplinary proceeding then pending, the disposition of which shall be determined by the court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

Rule LR83.10c. Discipline imposed by another court or by a state bar.

(a) *Duty to inform the clerk.* Any attorney practicing before this court shall, upon being subjected to public discipline by any court or by the state bar of any state, promptly inform the clerk of such action.

(b) *Show cause order.* Upon the filing of a certified copy of a judgment or order demonstrating that an attorney has been disciplined by another court or by a state bar, this court shall forthwith issue a notice containing a copy of the judgment or order and an order to show cause directing that the attorney inform this court within 20 days why imposition of the identical discipline by this court would be unwarranted and the reasons therefor.

(c) *Imposition of discipline.* Upon expiration of 20 days from service of the show cause order, this court will presume the misconduct to have been established and will impose the identical discipline unless the attorney demonstrates that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(1) that the attorney was deprived of due process; or

(2) that there was such an infirmity of proof that this court could not accept as final the conclusion on that subject; or

(3) that the imposition of the same discipline by this court would result in grave injustice; or

(4) that the misconduct established is deemed by this court to warrant substantially different discipline. Where this court determines that any of said elements exist, it shall enter such order as it deems appropriate. The grant of a stay of discipline by the other jurisdiction shall constitute grounds for a similar grant by this court.

Rule LR83.10d. Disbarment on consent or resignation in another court or before a state bar.

Any attorney practicing before this court who shall be disbarred on consent or resign from the bar of any court or state while an investigation into allegations of misconduct is pending, shall promptly inform the clerk, and upon the filing with this court of a certified copy of the judgment or order accepting such disbarment on consent or resignation, shall cease to be permitted to practice before this court.

Rule LR83.10e. Standards for professional conduct.

(a) *Disciplinary enforcement.* For misconduct defined in these rules, and after notice of an opportunity to be heard, any attorney practicing before this court may be disbarred, suspended from practice, reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

(b) *Standards for conduct.* Acts or omissions by an attorney practicing before this court which violate the Code of Professional Responsibility adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of North Carolina, as amended from time to time by that state court, except as otherwise provided by a specific rule of this court.

Rule LR83.10f. Disciplinary proceedings.

(a) *Referral of complaints to counsel or to a state bar.* When allegations of misconduct by an attorney practicing before this court come to the attention of a judge of this court, whether by complaint or otherwise, the judge may refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate. Alternatively, the judge may refer the matter to the appropriate state bar. The court is not restricted from taking such other disciplinary action as is within the inherent authority of the court.

(b) *Recommendation by counsel.* Should counsel conclude after investigation that a formal disciplinary proceeding should not be initiated against the attorney, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, or deferral and shall set forth the reasons for such recommendation.

(c) *Initiation of disciplinary proceedings.* To initiate formal disciplinary proceedings, counsel shall obtain an order of the court upon a showing of probable cause requiring the attorney to show cause within 20 days after service of the order why the attorney should not be disciplined.

(d) *Hearing.* Upon the attorney's answer to the order to show cause, if any issue of fact is raised or the attorney wishes to be heard, the court shall set the matter for prompt hearing.

Rule LR83.10g. Disbarment on consent while under disciplinary investigation or prosecution.

(a) *Consent to disbarment.* Any attorney practicing before this court who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment by delivering to this court an affidavit stating that the attorney desires to consent to disbarment and that:

(1) the attorney's consent is freely given,

(2) the attorney is aware of the pending investigation or proceeding,

(3) the attorney acknowledges the material facts of misconduct, and

(4) the attorney consents because the attorney knows that he or she could not defend successfully against charges of misconduct.

(b) *Order of disbarment.* Upon receipt of the required affidavit, this court shall enter an order disbarring the attorney.

(c) *Record.* The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of this rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

Rule LR83.10h. Reinstatement.

(a) *Automatic reinstatement; Reinstatement by order.* An attorney suspended for 3 months or less shall be automatically reinstated at the end of the period of suspension upon filing with the court an affidavit of compliance with the provisions of the suspension order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of this court.

(b) *Time for petition.* An attorney who has been disbarred after hearing or by consent may not petition for reinstatement until the expiration of at least 5 years from the effective date of disbarment.

(c) *Procedure.* Petitions for reinstatement by a disbarred or suspended attorney under this rule shall be filed with the court. Upon receipt of the petition, the chief judge shall assign the matter for a prompt hearing before a judge (or judges) of the court and may, in the chief judge's discretion, refer the petition to counsel for investigation. The judge assigned to the matter shall schedule a hearing at which petitioner shall have the burden of demonstrating by clear and convincing evidence that the attorney has the moral qualifications, competency, and learning of the law required for admission to practice law before this court, and that the attorney's resumption of the practice of law will not be detrimental to the integrity and standing of the Bar or the administration of justice or subversive of the public interest. In all proceedings upon a petition for reinstatement, cross-examination of the witnesses of the attorney and the submission of evidence, if any, in opposition to the petition shall be conducted by counsel if the matter has been referred to counsel by the court.

(d) *Costs.* Petitions for reinstatement under this rule shall be accompanied by an advanced cost deposit in an amount to be set from time to time by the court to cover anticipated costs of the reinstatement proceeding.

(e) *Order of reinstatement.* If the petitioner is found to be unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found to be fit to resume the practice of law, the judgment shall reinstate the petitioner, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further that if the petitioner has been suspended or disbarred for 5 years or more, reinstatement may be conditioned, in the discretion of the judge, upon the furnishing of proof of competency and learning in the law, which proof may include certification by the bar examiners of North Carolina of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

(f) *Successive petitions.* No petition for reinstatement under this rule shall be filed within 1 year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

Rule LR83.10i. Attorneys specially appearing.

Whenever an attorney appears for purposes of a particular proceeding, the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of or in preparation for such proceeding.

Rule LR83.10j. Service of papers and other notices.

Service of an order to show cause instituting a formal disciplinary proceeding shall be made by personal service or by registered or certified mail addressed to the attorney. Service of any other papers or notices required by these rules shall be deemed to have been made if such paper or notice is addressed to the attorney or to the attorney's counsel and is posted by regular mail.

Rule LR83.10k. Appointment of counsel.

Whenever counsel is to be appointed by these rules to investigate allegations of misconduct or to prosecute disciplinary proceedings or in conjunction with a reinstatement petition, the court may appoint as counsel the disciplinary agency of the Supreme Court of North Carolina or any other disciplinary agency having jurisdiction. Alternatively, the court may appoint as counsel one or more members of the Bar, provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or who has been engaged as an adversary of the respondent-attorney in any manner. Counsel, once appointed, may not resign unless permission to do so is given by the court. Nothing in this rule limits the court's authority to refer any matter to the appropriate state bar for investigation, prosecution of disciplinary proceedings, or reinstatement.

Rule LR83.10l. Duties of the clerk.

(a) *Obtaining certificate of conviction.* Upon being informed that an attorney practicing before this court has been convicted of any crime, the clerk shall determine whether the clerk of the court in which such conviction occurred has forwarded a certificate of such conviction to this court. If certificate has not been so forwarded, the clerk shall promptly obtain a certificate and file it with this court.

(b) *Obtaining certificate of disciplinary judgment or order.* Upon being informed that an attorney practicing before this court has been subjected to discipline by another court or a state bar, the clerk shall determine whether a certified copy of the disciplinary judgment or order has been filed with this court, and, if not, the clerk shall promptly obtain a certified copy of the disciplinary judgment or order and file it with this court.

(c) *Clerk to inform other jurisdictions.* Whenever it appears that any attorney convicted of any crime, disbarred, suspended, censured, or disbarred on consent by this court is admitted to practice law in any other jurisdiction or before any other court, the clerk shall, within 10 days of that conviction, disbarment, suspension, censure, or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction, or for such other court, a certificate of the conviction or a certified copy of the judgment or order of disbarment, suspension, censure, or disbarment on consent, as well as the last known office and residence addresses of the attorney.

(d) *Clerk to inform the National Discipline Data Bank.* The clerk shall, likewise, promptly notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney practicing before this court.

Rule LR83.10m. Jurisdiction.

Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure or other sanctions under the Federal Rules of Civil Procedure or these Local Rules.

PART II. LOCAL RULES OF CRIMINAL PRACTICE

I. SCOPE, PURPOSE AND CONSTRUCTION

II. PRELIMINARY PROCEEDINGS

III. INDICTMENT AND INFORMATION

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule LCrR12.1. Pretrial motions in criminal cases.

(a) *Time for filing.* The time for filing pretrial motions and responses thereto shall be set by the court at arraignment in all cases in which a defendant pleads not guilty.

(b) *Extensions of time for filing.* Motions for an extension of time to file pretrial motions must be made within the time set for the filing of motions and will be granted only upon a showing of good cause for delay.

(c) *Motions adopting other motions.* Motions adopting motions filed by codefendants must clearly identify by character and date of filing the motions adopted. General adoptions which do not identify specifically the motions adopted may be summarily denied by the court.

Rule LCrR16.1. Discovery motions.

Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has fully reviewed the government's case file before bringing the motion or a statement that such file is not available for counsel's review. The filing of a discovery motion which does not include such certification may cause the court to deny the motion, to disapprove payment to court-appointed counsel in regard to a motion made unnecessary by examination of the file, or to impose other sanctions under LCrR57.3 in the discretion of the court.

V. VENUE

Rule LCrR24.1. Juries.

(a) *Examination of jurors.*

(1) The court will conduct the examination of prospective jurors.

(2) When the court's examination is completed, attorneys and parties appearing pro se may request that the court ask additional questions to the prospective jurors.

(b) *Contacts prohibited.*

(1) All parties, witnesses, and attorneys shall avoid any extra-judicial contact or communication with a grand juror or member of a petit jury venire or panel who has been or may be selected in a case in which that person is involved. No person may have any extra-judicial contact or communication, either directly or indirectly, with a grand juror, member of a petit jury venire or panel which may reasonably have the effect of influencing, or which is intended to influence, the grand juror, potential petit juror, or sitting petit juror.

(2) Attorneys for parties shall inform their clients and witnesses of this rule.

(3) No person shall approach a juror, either directly or through any member of his immediate family, in an effort to secure information concerning the juror's background.

(4) No provision of this rule is intended to prohibit communication with a petit juror after the juror has been dismissed from further service, so long as the communication does not tend to harass, humiliate, or intimidate the juror in any fashion.

(c) *Disclosure of names and addresses of prospective jurors.*

(1) The names of prospective jurors for any session of court or for a specific case may not be disclosed prior to their reporting for duty except in compliance with instructions of the court. The clerk will make available to counsel for the parties, and to any parties appearing *pro se,* a list which sets forth the name, general address, and occupation of each potential juror when court is opened for the session for which the jurors have been summoned.

(2) The names, address, and telephone numbers of persons who have served as jurors may not be disclosed by the clerk's office without court permission.

Rule LCrR26.1. Documents, other than exhibits, used at trial.

When counsel expects to examine or cross-examine a witness concerning a document which will not be offered as an exhibit, counsel shall have at trial a copy of the document for use by the judge.

VI. TRIAL

VII. JUDGMENT

Rule LCrR32.1. Sentencing recommendations by probation officers.

Any sentencing recommendation made to the court by a probation officer is for the judge's use only and shall not be disclosed to the parties at any time.

Rule LCrR32.2. Motion for extension of time to file notice of appeal.

The filer of a motion to extend the time to file a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(b)(4) shall ensure that a notice of appeal has been filed or will be filed contemporaneously with the filing of the motion to extend time.

VIII. STAY OF EXECUTION

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

X. GENERAL PROVISIONS

Rule LCrR44.1. Representation of certain defendants.

The Court's Plan for Furnishing Representation and Services to defendants who are financially unable to obtain an adequate defense, pursuant to the Criminal Justice Act of 1964, as amended, is a public document available through the office of the clerk of this court. The court's plan as it now exists and as it is hereinafter amended shall have the same force and effect as a local rule of this court. When deemed appropriate by the court, the court may appoint an attorney to represent a defendant even though such attorney's name does not appear on the panel of attorneys drawn pursuant to the plan.

Rule LCrR50.1. Prompt disposition of criminal cases.

The Court's *Plan for Prompt Disposition of Criminal Cases* in compliance with the Speedy Trial Act of 1974 (18 U.S.C. § 3161, *et seq.*), and the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5036, 5037), as approved by the Judicial Council, is a public document available through the office of the clerk of this court. The Court's Plan for the Prompt Disposition of Criminal Cases as it now exists and as it is hereafter amended and approved by the Judicial Council shall have the same force and effect as a local rule of this court.

XI. LOCAL CRIMINAL RULES FOR WHICH THERE ARE NO CORRESPONDING FEDERAL RULES

Rule LCrR57.1. Incorporation of certain local rules of civil practice.

Local Rules of Civil Practice 1.1, 5.3, 5.4, 6.1, 7.1, 7.2, 65.1.1, 72.1, 77.1, 77.3, 79.1, 79.2, 79.4, 80.1, 83.1, 83.2, 83.5, 83.7, 83.8, and 83.9a-m shall apply fully to criminal proceedings, and shall be interpreted consistent with the Federal Rules of Criminal Procedure and other Local Rules of Criminal Practice.

Rule LCrR57.2. Fair trial directives.

(a) *Prohibited statements; Attorney's obligations.*

(1) An attorney participating in or associated with a grand jury or other investigation of a criminal matter shall not make or participate in making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication and which does more than state without elaboration:

(i) Information contained in a public record.

(ii) That the investigation is in progress.

(iii) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(iv) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(v) A warning to the public of any dangers.

(2) An attorney associated with the prosecution or defense of a criminal case to be tried by a jury shall not make or participate in making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication which relates to:

(i) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(ii) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(iii) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement

(iv) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(v) The identity, testimony, or credibility of a prospective witness.

(vi) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(3) Section (a)(2) above does not preclude an attorney from announcing:

(i) The name, age, residence, occupation, and family status of the accused.

(ii) Any information necessary to aid in the apprehension of an accused or to warn the public of any dangers.

(iii) A request for assistance in obtaining evidence.

(iv) The identity of the victim of the crime.

(v) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(vi) The identity of investigating and arresting officers or agencies and the length of the investigation.

(vii) The nature, substance, or text of the charge.

(viii) Quotations from or references to public records of the court in the case.

(ix) The scheduling or result of any step in the judicial proceedings.

(x) That the accused denies the charges.

(4) The foregoing provisions of this rule do not preclude an attorney from replying to charges of misconduct publicly made against the attorney or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(b) *Attorney's employees and associates.* An attorney must exercise reasonable care to prevent employees and associates from making any extrajudicial statement which the attorney would be prohibited from making under this rule.

Rule LCrR57.3. Sanctions.

(a) *Imposition of sanctions.* If an attorney or a party fails to comply with a local rule of this court, the court may impose sanctions against the attorney or party, or both. The court may make such orders as are just under the circumstances of the case, including the following:

(1) an order that designated matters or facts shall be taken as established for purposes of the action;

(2) an order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;

(3) an order striking out pleadings or parts thereof, or staying proceedings until the rule is complied with, or dismissing the action or any part thereof, or rendering a judgment by default against the failing party;

(4) an order imposing costs, including attorney's fees, against the party, or the party's attorney, who has failed to comply with a local rule.

(b) *Sanctions within the discretion of the court.* The imposition of sanctions for violation of a local rule is discretionary with the court. In considering the imposition of sanctions, the court may consider whether a party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate.

Rule LCrR58.1. Payment of fixed sum in lieu of appearance in certain misdemeanor cases.

Pursuant to Fed. R. Crim.P. 58(d) and in the interest of justice and good court administration, collateral may be posted in lieu of the appearance of an offender for certain misdemeanors under federal statutes and regulations or state statutes made applicable by the Assimilative Crimes Statute (18 U.S.C. § 13). There shall be maintained in the office of the clerk a list of the misdemeanors and fines applicable thereto for which forfeiture of collateral security may be posted.

The posting of collateral signifies that the defendant does not contest the charge nor request a trial. Such collateral shall be administratively forfeited to the United States. Forfeiture of collateral in lieu of personal appearance is not permitted for any listed offense denominated a "mandatory appearance" offense, for an aggravated or major offense, or for multiple offenses arising out of the same facts or sequence of events.

The clerk shall certify the record of any forfeiture of collateral for a traffic violation to the proper state authority.

PART III. LOCAL RULES OF BANKRUPTCY PRACTICE

Adoption of Interim Bankruptcy Rules. — On September 19, 2005, the United States Bankruptcy Court for the Middle District of North Carolina adopted Interim Bankruptcy Rules amending the Federal Rules of Bankruptcy Procedure to implement the substantive and procedural changes mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pursuant to 28 U.S.C.S. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 9029 of the Federal Rules of Bankruptcy Procedure, the Interim Rules were adopted in their entirety without change by a majority of the judges of the court, effective October 17, 2005, and shall remain in effect until further order of the court. For cases and proceedings not governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court for the Middle District of North Carolina, other than the Interim Rules, shall apply.

The Interim Bankruptcy Rules may be viewed at the website for the United States Bankruptcy Court for the Middle District of North Carolina located at **www.ncmb.uscourts.gov/bkreform2005.php.**

Rule LBR1002-1. Petition — General.

(a) *The Petition Will Be Dismissed Without a Hearing If:*

(1) The petition is not signed by the debtor(s);

(2) The party filing the petition neither pays the prescribed filing fee with the petition nor files with the petition an application to pay the required filing fee in installments or an application to proceed in forma pauperis, if eligible to do so;

(3) The debtor does not file the master mailing matrix with the petition;

(4) A chapter 11 debtor does not file the list of twenty (20) largest unsecured creditors with the petition; or

(5) The petition is submitted by a person who under an order of the court may not be a debtor at the time of the submission of the petition.

(b) *Petition pursuant to a Power of Attorney.*

(1) When a petition is signed on behalf of the debtor by a person pursuant to a power of attorney the following is required:

(A) The power of attorney must be:

(i) A general power of attorney authorizing the attorney-in-fact to take action which the debtor could take; or

(ii) A special power of attorney specifically authorizing the attorney-in-fact to file the petition;

(B) The power of attorney must be valid under applicable non-bankruptcy law; and

(C) A copy of the power of attorney must be filed with the petition.

Editor's note. — For website, see **www.ncmb.uscourts.gov.**

NOTE

See also LBR5005-1 for return of "Filed" stamped copies of documents.

Rule LBR1004-1. Petition — Partnership.

Evidence of general partner's consent. Within 15 days of the filing of the petition, a written consent to the petition, which is signed by all general partners, shall be filed with the clerk's office.

NOTE

See also Federal Bankruptcy Rule 1004 for requirement that general partners consent to the petition.

Rule LBR1006-1. Fees — Installment payments.

(a) *Chapter 13 cases.* In a chapter 13 case, a meeting of creditors called pursuant to 11 U.S.C. § 341 shall not be concluded until the entire filing fee is paid.

(b) *Chapter 7 cases.* In a chapter 7 case, a debtor shall not receive a discharge until the entire filing fee is paid unless an order has been entered allowing the debtor to proceed in forma pauperis.

Rule LBR1007-1. Lists, schedules, and statements.

(a) *Corporate resolution.* Within fifteen days of the filing of a voluntary bankruptcy petition by a corporation, the debtor shall file the original or a certified copy of the resolution of the debtor's board of directors authorizing the filing of the bankruptcy petition.

(b) *Schedule of creditors.* Any Schedule of Creditors containing more than five creditors should be alphabetized.

NOTE

See also LBR1007-2 for mailing matrix requirements.

Rule LBR1007-2. Mailing — List or matrix.

(a) *Matrix required upon filing.* As a requirement of filing, all voluntary chapter 7, 11, 12 and 13 petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties-in-interest, including the creditors, appropriate governmental agencies, and the taxing authority for each parcel of real estate in which the debtor holds an interest.

(b) *Matrix required upon Chapter 13 conversion.* As a requirement of conversion by the debtor of a chapter 13 case to any other bankruptcy relief chapter, the debtor must file, at the time of filing the motion for conversion, an alphabetized matrix containing the names and addresses of any additional creditors to be included in the bankruptcy case and/or any creditors not included under the chapter 13 plan.

Rule LBR1009-1. Amendments to lists and schedules.

(a) *Service of amendment to petition, list, schedule or statement in Chapter 7 and 11 cases.* Any amendment to a petition, list, schedule (including Exemption Form 91-C) or statement in a chapter 7 or 11 case shall be accompanied by a certificate of service in the form of a statement of the date and manner of service, and of the names and addresses of the persons served, certified by the person who made the service. All creditors and other parties in interest shall be notified of any amendment to the claim for property exemptions.

(b) *Amendments to schedules or matrix to add new creditors.* If an amendment adds additional creditors, the filer shall serve a copy of the Notice of Creditors' Meeting on all new creditors.

NOTE

Refer to the Bankruptcy Court Fee Schedule or contact the Bankruptcy clerk's office to determine the amount of fee due for amending the schedule of creditors.

Rule LBR1015-1. Joint Administration/Consolidation.

The estates of spouses filing a joint petition will be deemed consolidated for administrative purposes under 11 U.S.C. § 302(b) unless otherwise ordered on the motion of a party in interest made within thirty (30) days after the conclusion of the meeting of creditors held under 11 U.S.C. § 341.

Rule LBR1019-1. Conversion/Dismissal — Procedure following.

(a) *Disposition of Funds by Chapter 12 Trustee upon Conversion of Case.*

(1) Upon the conversion of a case under chapter 12 of the Bankruptcy Code, the trustee will disburse funds in the following manner:

(A) If there is a confirmed plan in the case, the trustee will disburse any funds received before the conversion of the case pursuant to the terms of the plan. All funds received thereafter shall be disbursed to the debtor.

(B) Unless otherwise ordered by the Court, if there is neither a confirmed plan nor an order directing otherwise, the trustee, after paying the balance of any noticing fees, will disburse any remaining funds to the debtor without regard to when the funds were received.

(2) Notwithstanding paragraphs (A) and (B), if there is a conversion and the trustee is holding funds from the liquidation of any asset, the trustee will disburse such funds to any subsequent trustee after payment of any balance remaining due on the filing fee.

(b) *Disposition of Funds by Chapter 13 Trustee upon Conversion of Case.*

(1) Upon the conversion of a case under chapter 13 of the Bankruptcy Code, the trustee will disburse funds in the following manner:

(A) If there is a confirmed plan in the case, the trustee will disburse any funds received before the conversion of the case pursuant to the terms of the plan. All funds received thereafter shall be disbursed to the debtor.

(B) Unless otherwise ordered by the Court, if there is neither a confirmed plan nor an order directing otherwise, the trustee, after paying the balance of any noticing fees, will disburse any remaining funds to the debtor without regard to when the funds were received.

(2) Notwithstanding paragraphs (A) and (B), if there is a conversion and the conversion is determined to be in bad faith, the trustee will disburse funds on hand in the case at the time of the conversion to the subsequent trustee after payment of any balance remaining due on the filing fee.

(c) *Disposition of Funds by Chapter 12 or Chapter 13 Trustee upon Dismissal of Case.*

(1) Upon the dismissal of a case under chapter 12 or chapter 13 of the Bankruptcy Code, the trustee will disburse funds in the following manner, unless otherwise ordered by the court:

(A) If there is a confirmed plan in the case, the trustee will disburse any funds received before the dismissal of the case pursuant to the terms of the plan. All funds received thereafter shall be disbursed to the debtor.

(B) If there is neither a confirmed plan nor an order directing otherwise, the trustee, after paying the balance of any noticing fees, will disburse any remaining funds to the debtor without regard to when the funds were received.

Rule LBR2002-1. Notice to creditors and other interested parties.

(a) *Notice and hearing or period of objection.* The period of notice and hearing or period for objection shall be not less than ten (10) days, unless Rule 2002 of the Federal Rules of Bankruptcy Procedure, other Bankruptcy Rule, or the court, for cause, otherwise provides.

Rule LBR2004-1. Depositions & Examinations.

(a) *Service of motions for examination under Rule 2004.* Motions for examination under Rule 2004 of the Federal Rules of Bankruptcy Procedure shall be served upon the debtor, trustee (if any), the party whose examination is requested, and any other party required to be served by the Federal Rules of Bankruptcy Procedure.

(b) *Use of videotape for recording examinations.* Only upon the consent of all parties will a motion for the use of videotape as the sole method for recording an examination be considered by the court.

NOTE

See also Local Bankruptcy Guide Section 6.5 for guidelines on 2004 examinations.

Rule LBR2007.1-1. Trustees and examiners (Ch. 11).

Election of trustee in a Chapter 11 case.

(a) *Request for an election.* A request to convene a meeting of creditors for the purpose of electing a trustee in a Chapter 11 case shall be filed and transmitted to the bankruptcy administrator in accordance with Rule 5005 of the Federal Rules of Bankruptcy Procedure within the time prescribed by 11 U.S.C. § 1104(b). Pending approval of the person elected, a person appointed trustee under 11 U.S.C. § 1104(d) shall serve as trustee.

(b) *Manner of election and notice.* An election of a trustee under 11 U.S.C. § 1104(b) shall be conducted in the manner provided in Rules 2003(b)(3) and 2006 of the Federal Rules of Bankruptcy Procedure. Notice of the meeting of creditors convened under 11

U.S.C. § 1104(b) shall be given in the manner and within the time provided for notices under Rule 2002(a) of the Federal Rules of Bankruptcy procedure. A proxy for the purposes of voting in the election may be solicited by a committee appointed under 11 U.S.C. § 1102 and by any other party entitled to solicit a proxy under Rule 2006 of the Federal Rules of Bankruptcy Procedure.

(c) *Resolution of disputes.* If it is necessary to resolve a dispute regarding the election, the bankruptcy administrator shall promptly file a report informing the court of the dispute. If no motion for the resolution of the dispute is filed within ten (10) days after such report is filed, the bankruptcy administrator will file a motion to approve the appointment of a trustee.

Rule LBR2016-1. Compensation of professionals.

Chapter 11 quarterly fee applications. Any professional employed in a Chapter 11 case under 11 U.S.C. § 327 may file a motion to allow the filing of quarterly statements for interim allowance. Unless the court orders otherwise, the quarterly statements shall be filed on or before the 20th day of the month following the end of the calendar quarter for services rendered for the previous quarter. Absent court order, any late filed statements shall be processed in the succeeding quarter.

Rule LBR2072-1. Notice to other courts.

Notice to Other Courts with Pending Actions. The debtor or other party filing a bankruptcy case must promptly send notice of the bankruptcy filing to the following persons:

(a) The clerk of any court where the debtor is a party to a pending civil action;

(b) All parties of record to any pending civil action and to which the debtor is also a party unless (i) the debtor files a statement with the court, identifying the other parties and describing the details of the pending action, and certifies that the interests of the other parties to whom the debtor has not sent the required notice will not be affected by the filing of the bankruptcy case; and (ii) the court shall not otherwise determine that such notice should be sent;

(c) if a pending civil action in which the debtor is a party has been referred to a designated judge, such judge; and

(d) if debtor is a party to an arbitration, to the arbitrator or arbitration panel, as applicable.

Rule LBR2090-1. Attorneys — Admission to practice.

(a) *Attorneys licensed in this judicial district.* Except as otherwise provided herein, only those persons who are admitted to practice before the United States District Court for this judicial district will be allowed to practice before the Bankruptcy Court.

(b) *Pro Hac Vice* appearance.

(1) Any attorney who is a member in good standing of the bar of any District Court of the United States other than the Middle District of North Carolina, may, in the discretion of the Bankruptcy Court, appear and participate *pro hac vice* in any case or proceeding without general admission before this Bankruptcy Court if:

(A) such privilege is not abused by frequent or regular appearances in separate cases to such a degree as to constitute the maintenance of a regular practice of law in the Middle District and the movant requesting to appear *pro hac vice* files a written motion containing the following:

1. The movant's name, residence, office address and telephone number, and state bar number;
2. The courts to which the movant has been admitted to practice and the respective dates of admission;
3. A statement by the movant of the good standing to practice before the courts to which the movant has been admitted;
4. Whether the movant has been disciplined by any court or administrative body, and if disciplinary proceedings are pending, the details of such proceedings, and whether the movant resigned while disciplinary proceedings were pending;
5. A list of case name and numbers for the three years preceding the application in which the movant has filed for permission to appear *pro hac vice* before any court within the state of North Carolina;

6. A statement certifying that the movant has read and is familiar with the Local Bankruptcy Rules, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence;

7. A statement that the attorney submits to the disciplinary jurisdiction of the Bankruptcy Court for any misconduct in connection with the matters for which the attorney is specially appearing; or

(B) such attorney appears with a local counsel admitted to the bar of the United States District Court for the Middle District of North Carolina.

(2) Any attorney seeking to be admitted to practice pursuant to the provisions of section (b)(1)(A) of this Rule shall attach a proposed order to the application and shall specifically provide therein that "this order shall not be considered admission to practice generally before this Bankruptcy Court or the United States District Court."

(3) Any member of the bar of the United States District Court for the Middle District of North Carolina who accepts employment in association with an attorney appearing specially pursuant to section (b)(1)(B) of this Rule is responsible to this court for the conduct of the litigation or proceeding and must sign all pleadings and papers, except for certificates of service. Such member must be present during pre-trial conferences, evidentiary hearings, dispositive proceedings, and trial.

(c) *Attorney representation of debtor.* Any attorney who represents a debtor in a bankruptcy case shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters in the case until the case is closed or the attorney is relieved from representation upon motion and court order. An attorney who represents a debtor shall perform the following services in each case:

(1) Analysis of the financial situation, and rendering advice and assistance to the debtor in determining whether to file a petition under Title 11 of the United States Code;

(2) Preparation and filing of the petition, schedules and statement of affairs and other documents required by the court, including any amendments to the schedules;

(3) Representation of the debtor at the meeting of creditors;

(4) To the extent reasonable and necessary, representation in core matters before the court, including motions to avoid non-purchase money security interests and judicial liens, redemption actions, motions for relief from the automatic stay and all contested matters, but excluding reaffirmation agreements.

Unless additionally retained by the debtor, the attorney for the debtor is not required to represent the debtor in adversary proceedings in Chapter 7 cases.

(d) *Government representation.* Any attorney who is an employee of a government agency may represent that governmental agency before the Bankruptcy Court.

NOTE

See also LBR9011-2 for appearances of *pro se* parties.

Rule LBR2090-2. Attorneys — Discipline and Disbarment.

(a) *Standards of conduct.* Acts or omissions by an attorney practicing before this court which violate the Rules of Professional Conduct adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct of the North Carolina State Bar adopted by the Supreme Court of North Carolina, as amended from time to time by that state court, except as otherwise provided by a specific rule of this court.

(b) *Disciplinary enforcement.* For misconduct as defined in these rules, and after notice and an opportunity to be heard, any attorney practicing before this court may be disbarred, suspended from practice, reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

(c) *Duty to inform the clerk.* Any attorney practicing before this court shall, upon being subjected to public discipline by any court or by the state bar of any state, promptly inform the clerk of such action.

(d) *Referral of complaints to counsel or to a state bar.* When allegations of misconduct by an attorney practicing before this court come to the attention of a judge of this court, whether by complaint or otherwise, the judge may refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate. Alternatively, the judge may refer the matter to the appropriate state bar. The court is not restricted from taking such other disciplinary action as is within the inherent authority of the court.

(e) *Referral to counsel.* Should the judge decide to refer a disciplinary matter to counsel for investigation and the prosecution of a formal disciplinary proceeding, the proceeding shall be referred and shall proceed and be conducted as set forth in Rule 83.11 of the Local Rules of the United States District Court for this judicial district.

(f) *Attorneys specially appearing.* Whenever an attorney appears in this court for purposes of a particular proceeding, the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

(g) *Jurisdiction.* Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt or other sanctions under the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, these Local Rules or other applicable law.

Rule LBR3001-1. Claims and equity security interests — General.

(a) *Electronic filing of proofs of claim and transfers of claims.* In all cases, proofs of claim shall be filed electronically with the clerk according to the procedures established and published from time to time by the clerk. Those procedures are available from the clerk's office and are maintained on the court's website at: www.ncmb.uscourts.gov.

(b) *Procedures for electronic filing of proofs of claim.*

(1) When filing proofs of claim, the claimant shall comply with the requirements of Bankruptcy Rule 3001(c) and (d) regarding the attachment of documentation in electronic format sufficient to establish the validity and status of the claim.

(2) The filing of a proof electronically with the clerk shall constitute the filing claimant's approved signature by law and the provisions of 18 U.S.C. § 152 shall apply to such filing.

(3) The filing of a proof of claim electronically in accordance with the clerk's procedures shall constitute entry of the proof of claim in the claims register maintained by the clerk pursuant to bankruptcy Rule 5003.

(c) *Procedures for electronic filing of transfers of claims.*

(1) The filing of a transfer of claim electronically with the clerk shall constitute the filing claimant's approved signature by law and the provisions of 18 U.S.C. § 152 shall apply to such filing.

(2) The filing of a transfer of claim shall require the attachment of Official Bankruptcy Form B210 properly completed by the filing claimant. Supporting documentation may be attached within the same filing.

(3) The filing of a transfer of claim electronically in accordance with the clerk's procedures shall constitute entry of the transfer of claim pursuant to Bankruptcy Rule 5003.

Rule LBR3003-1. Chapter 11 claims.

(a) *Period for filing Chapter 11 claims.* In a chapter 11 case, an entity other than a governmental unit shall file a proof of claim (if required to be filed) within ninety (90) days after the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341(a), except as otherwise specified by order of the court.

(b) *Debtor Notification of Chapter 11 Creditor of Disputed, Contingent or Unliquidated Claim.* In chapter 11 cases, the debtor shall notify each creditor whose claim is listed on the schedules as contingent, disputed or unliquidated of that fact within fifteen (15) days after filing the schedules, or within fifteen (15) days after the addition of such creditor to the schedules. Within three (3) days after service has been made, the debtor shall file a certificate of service with the clerk's office. Failure to timely notify a creditor that its claim is listed as disputed, contingent or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent or unliquidated, as though a proof of claim had been filed by the creditor.

CASE NOTES

Filing of Proof of Claim Waived Right to Jury Trial. — Creditor lost his right to a jury trial under the Seventh Amendment when he chose to file a proof of claim after the debtor had notified him that his claim was listed as contingent, disputed, or unliquidated, as required under U.S. Dist. Ct., M.D. N.C., Civ., Crim. & Bankr. R. 3003-1; even though the creditor's proof of claim contained a disclaimer that he did not intend to waive a jury trial, the claim against the bankruptcy estate was integrally related to the allowance or disallowance of that filed claim and was, thus, equitable in nature and involved public rights rather than private rights. Anderson v. Brokers, Inc. (In re Brokers, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1100 (Bankr. M.D.N.C. June 6, 2005).

Rule LBR3007-1. Claims — Objections.

Any claimant filing a proof of claim shall be deemed to authorize service of any objection to claim by the mailing of a copy of the objection to claim to the claimant at the address set forth in the "Name and address where notices should be sent:" section of the proof of claim.

Rule LBR3018-1. Ballots — Voting on plans.

Unless otherwise ordered, all original ballots shall be filed with the clerk's office by the voting parties.Any proponent of a plan shall file a summary of ballots as they appear in the Bankruptcy record. The summary shall be filed with the clerk's office not later than 3 business days prior to the hearing on confirmation unless otherwise set by the court.

Rule LBR4001-1. Automatic stay — Relief from.

(a) *Lifting of stay upon abandonment.* In Chapter 7, 11,12 and 13 cases, the abandonment of property pursuant to 11 U.S.C. § 554 shall have the effect of lifting the automatic stay (of 11 U.S.C. § 362(a)) with respect to the property abandoned.

(b) *Secured creditor inquiry with Chapter 13 debtor or co-debtor.* In Chapter 13 cases after confirmation, affected allowed secured creditors may inquire of the debtor or the co-debtor in writing of the following:

1. the status of insurance coverage on property used as collateral;
2. whether insurance premiums are paid directly by the debtor or co-debtor;
3. the location, inspection, and appraisal of the collateral; and
4. the status of direct payments.

Copies of all inquiries shall be sent to the debtor's attorney and the Chapter 13 standing trustee.

(c) *Payment History.* Where a ground presented by a motion for relief from stay includes the debtor's failure to make payments that became due after the filing of the bankruptcy case, the moving party shall include with the motion a reasonably understandable post-petition account history.

Rule LBR4003-1. Exemptions.

Each debtor who is an individual and is claiming exempt property pursuant to the laws of the State of North Carolina and 11 U.S.C. § 522(b)(1) and (3) shall claim such exemptions on Local Form #91-C, which form is available from the clerk's office; the debtor's filing of Local Form #91-C must be referenced in Schedule "C" of the debtor's schedules. Each debtor who is an individual and is claiming exempt property pursuant to 11 U.S.C. § 522(b)(2) or pursuant to 11 U.S.C. § 522(b)(1) and (3) under a state's laws other than the laws of the State of North Carolina shall claim such exemptions on Schedule "C."

V. COURTS AND CLERKS

Rule LBR5005-1. Filing papers — Requirements.

(a) *Filing of papers with the Clerk's Office.* All pleadings (including but not limited to complaints, answers, motions and applications), and all prepared orders, shall be tendered by the party submitting such document to the clerk's office, and not to the Bankruptcy Judge.

Rule LBR5005-4. Electronic case filing.

Local Rule 5005-4 shall be read in conjunction with the Administrative Guide for Electronic Filing. The guide is available from the clerk's office and is maintained on the court's web site at :www.ncmb.uscourts.gov. In the event of a conflict between the Local Rules and the Administrative Guide, the Local Rules shall control.

Rule LBR5005-4(1). Assignment to system and filing requirements.

(a) *Assignment:*

All opened cases are assigned to the Electronic Case Filing System ("ECF System").

(b) *Filing:*

All petitions, motions, memoranda of law, and other pleadings or documents required to be filed with the court in connection with the case must be electronically filed via the internet except as provided in these rules or in exceptional circumstances preventing a Filing User from filing electronically. A Filing User is defined as a person who has been issued a login and password by the clerk's office, in order to file documents electronically.

(c) *Exception to Filing Requirement:* Notwithstanding the foregoing, attorneys and others who are not Filing Users as defined by Local Rule 5005-4(2) are not required to electronically file pleadings and other documents in cases assigned to the ECF System.

Rule LBR5005-4(2). Eligibility, registration and passwords.

(a) *Eligibility and Registration:* Attorneys admitted to the practice in this Bankruptcy Court (including those admitted pro hac vice), bankruptcy administrators and their assistants, private trustees, and others as the court deems appropriate, may register as Filing Users of the court's Electronic Case Filing System. Registration is in the form prescribed by and available from the clerk's office. The registration form also is contained in the Administrative Guide for Electronic Filing maintained by the clerk's office and published on the court's web site.

(b) *Non-represented Parties:* If the court permits, a party to a pending action who is not represented by an attorney may register as a Filing User in the ECF System solely for purposes of that action. If, during the course of the action,the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk's office to terminate the party's registration as a Filing User effective upon the attorney's appearance in the case.

(c) *Electronic Notice and Service; Waivers:*

(1) *Electronic Service via Rule 7005:* Registration as a Filing User constitutes a waiver of the right to receive notice or service by first class mail or personal delivery and consent to electronic service pursuant to Local Rule 5005-4(9) of all documents properly filed and served electronically which are permitted to be served pursuant to Rule 7005 of the Federal Rules of Bankruptcy Procedure.Waiver and consent pursuant to this provision also applies to notice of the entry of an order or judgment under Rule 9022 of the Federal Rules of Bankruptcy Procedure.

(2) *Service pursuant to Rule 7004 and service of Subpoenas pursuant to Rule 9016:* As to all documents required to be served pursuant Rules 7004 and/or 9016 of the Federal Rules of Bankruptcy Procedure, service must be accomplished as required under the applicable rule.

(d) *Passwords:* Once registration is completed, the Filing User will receive notification of the Filing User login and password. Filing Users agree to protect the security of their login information and passwords and to immediately notify the clerk's office if they learn that their login information or password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

(e) *Termination of Participation:*

1) A Filing User may withdraw from participation in the ECF system by filing a notice of withdrawal from the ECF System with the clerk's office.

(2) The court, for cause, may suspend a Filing User from participating in the ECF System after notice and a hearing.

Rule LBR5005-4(3). Consequences of electronic filing; deadlines.

(a) *Filing:* Electronic transmission of a document to the Electronic Case Filing System consistent with these rules, together with the transmission of a Notice of

Electronic Filing from the clerk, constitutes filing of the document for all purposes of the Federal Rules of Bankruptcy Procedure and these Local Rules, and constitutes entry of the document on the docket kept by the clerk under Rule 5003 of the Federal Rules of Bankruptcy Procedure.

(b) *Official Record:* When a document has been filed electronically, the official record is the electronic recording of the document as stored by the clerk, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing.

(c) *Deadlines Unchanged by Electronic Filing:* Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before 12:00 midnight, Eastern Time, in order to be considered timely filed that day.

Rule LBR5005-4(4). Entry of court orders.

(a) *Filing of Court Orders; Effect of Electronic Filing on Court Orders:* All orders, decrees, judgments and proceedings of the court will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under Rules 5003 and 9021 of the Federal Rules of Bankruptcy Procedure. Any order or other court-issued document filed electronically without the original signature of a judge or clerk has the same force and effect as if the judge or clerk had signed a paper copy of the order and it had been entered on the docket in a conventional manner.

(b) *Submission of Documents for Judge's Signature:* Any document submitted for a judge's signature in a case assigned to the ECF System must be submitted electronically to the clerk's office in the format specified by the Administrative Guide.

Rule LBR5005-4(5). Format; attachments and exhibits.

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing.

Rule LBR5005-4(6). Sealed documents.

Documents ordered to be placed under seal must be filed conventionally, and not electronically, unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. A court order authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of any order authorizing the filing of documents under seal must be attached to the documents and delivered to the clerk's office.

Rule LBR5005-4(7). Original signatures and retention requirements.

Electronically filed documents that require original signatures from any person other than the Filing User must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed. Upon the written request of any party in interest, the Filing User must make the original signed documents available for inspection, unless otherwise ordered by the court.

Rule LBR5005-4(8). Signatures and certification.

(a) *Electronic Filing Constitutes Signature and Certification:* The use of the login and password of the Filing User to electronically file any petition, pleading, motion, claim, or other document shall constitute the signature of that Filing User on the electronically filed document for purposes of the Federal Rules of Bankruptcy Procedure, including Rule 9011, these Local Rules, and any other purpose for which a signature is required in connection with proceedings before this court. Use of the login and password also shall constitute certification by the Filing User, and by any agent authorized by the Filing User to use the login and password, that: (1) all persons indicated to have signed the document have actually executed the original prior to electronic filing; and (2) the Filing User has authorized the electronic filing of the executed document.

(b) *Use of Login/password:* No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an agent of the Filing User authorized to use such login and password.

(c) *Form of Electronic Signature:* Electronically filed documents requiring a signature shall either: (1) show an image of such signature as it appears on the original document or appended as an image file, in which case such document shall indicate that it has been filed electronically, or (2) bear the name of the signatory preceded by an "s/" typed in the space where the signature would otherwise appear, as follows: s/Jane D. Doe.

Rule LBR5005-4(9). Service of documents by electronic or conventional means; calculation of response time.

(a) *Notice of Electronic Filing to Filing Users:* A Filing User who electronically files a pleading or other document in a case assigned to the ECF System may transmit or cause to be transmitted a "Notice of Electronic Filing" to other Filing Users entitled to notice or service of the document under the Federal Rules of Bankruptcy Procedure or these local Rules.

(b) *Transmission of Notice of Electronic Filing:* The Notice of Electronic Filing may be transmitted by e-mail, hand, facsimile, or by the U.S. Mail, first-class postage prepaid. Transmission of the Notice of Electronic Filing to Filing Users constitutes service or notice of the filed document on Filing Users.

(c) *Conventional Service of Documents and Notice to Non-consenting Parties:* Parties who have not consented to electronic service of documents or notice must be served with a paper copy of any electronically filed pleading or other document.

(d) *Calculation of Response Time:* Rule 9006(f) of the Federal Rules of Bankruptcy Procedure shall apply to the calculation of deadlines for responses to electronically filed pleadings and other documents.

Rule LBR5005-4(10). Notice and service of court orders.

(a) *Notice and Service to Filing Users:* Immediately upon the entry of an order, judgment, decree or other document generated by the Bankruptcy Court in an action assigned to the ECF System, the clerk will electronically transmit a Notice of Electronic Filing to all Filing Users in the case. Electronic Transmission of the Notice of Electronic Filing constitutes the notice required by Rule 9022 of the Federal Rules of Bankruptcy Procedure, and constitutes service of the document to Filing Users.

(b) *Notice and Service to Non-consenting Parties:* The clerk must give conventional notice and service of documents in accordance with the Federal Rules of Bankruptcy Procedure to any person who has not consented to electronic service.

Rule LBR5005-4(11). Technical failures.

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Rule LBR5010-1. Reopening cases.

A party seeking to reopen a case for purposes not related to the debtor's discharge, shall file a motion with the clerk's office and shall give twenty days notice to all parties-in-interest. The motion shall be served upon the bankruptcy administrator, the previously appointed trustee, and any party being added, if any, as a creditor or party-in-interest in the case. The motion shall be accompanied by the appropriate fee to reopen the case, a notice containing the hearing date as obtained from the clerk's office and proof of service. The motion shall also state that any objections to reopening the case must be filed at least three days prior to the hearing.

Rule LBR5011-1. Withdrawal of reference.

(a) *Form of request; place for filing.* A request for withdrawal, in whole or in part, of the reference of a case or proceeding referred to the Bankruptcy Court, other than a sua sponte request by a bankruptcy judge, shall be by motion filed with the clerk of the Bankruptcy Court. All such motions shall be accompanied by the proper filing fee. In addition, all such motions shall clearly and conspicuously state that "RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT COURT JUDGE."

(b) *Stay.* The filing of a motion to withdraw the reference does not stay proceedings in the Bankruptcy Court. The procedures relating to stay shall be those set forth in Rule 5011 of the Federal Rules of Bankruptcy Procedure.

(c) *Designation of record.* The moving party shall serve on all interested parties and file with the clerk of the Bankruptcy Court, together with the motion to withdraw the reference, a designation of those portions of the record of the case or proceeding in the Bankruptcy Court that the moving party believes will reasonably be necessary or pertinent to the District Court's consideration of the motion. Within ten (10) days after service of such designation of record, any other party may serve and file a designation of additional portions of the record. If the record designated by any party includes a transcript of any hearing or trial, or a part thereof, that party shall immediately after filing the designation, deliver to the court reporter and file with the clerk of the Bankruptcy Court a written request for the transcript and make satisfactory arrangements for the payment of its cost. All parties shall take any action necessary to enable the clerk to assemble and transmit the record.

(d) *Responses to motions to withdraw the reference; reply.* Opposing parties shall file with the clerk of the Bankruptcy Court, and serve on all parties to the matter for which withdrawal of the reference has been requested, their written responses to the motion to withdraw the reference, within ten (10) days after being served with a copy of the motion. The moving party may serve and file a reply within ten (10) days after service of the response.

(e) *Transmittal to and proceedings in district court.* When the record is complete for purposes of transmittal, but without awaiting the filing of any transcripts, the clerk of the Bankruptcy Court shall promptly transmit to the clerk of the District Court the motion and the portions of the record designated. After the opening of a docket in the District Court, documents pertaining to the matter under review by the District Court shall be filed with the clerk of the District Court, but all documents relating to other matters in the bankruptcy case or adversary proceeding or contested matter shall continue to be filed with the clerk of the Bankruptcy Court.

Rule LBR5020-1. Corporate disclosure.

Disclosure of corporate parent. Any nongovernmental corporate party identified as follows shall file a statement identifying all of its parent corporations and listing any public company that owns 10% or more of the party's stock:

(1) Corporate debtor filing a petition in a voluntary case;
(2) Petitioning corporate creditor in any involuntary case;
(3) Corporate party serving on a creditors' committee;
(4) Corporate party to any adversary proceeding; and
(5) Corporate party to any contested matter which arises in any pending bankruptcy case.

A party shall file the statement with its initial pleading or within 10 days of being appointed to a creditors committee. A party shall supplement the statement within a reasonable time of any change in the information.

Rule LBR5071-1. Continuance.

(a) No continuance of hearing or trial (whether stipulated to by counsel or not) shall be effective unless (1) the court announces it in open court, (2) the court approves it by written order or (3) the courtroom deputy informs the parties that the court has authorized the requested continuance;

(b) Requests for continuances of chapter 12 and chapter 13 creditors' meetings shall be made to the appropriate chapter 12 or chapter 13 standing trustee's office; requests for continuances of all other creditors' meetings shall be made to the bankruptcy administrator's office.

Rule LBR5073-1. Photography, recording devices and broadcasting.

All photographic, recording and broadcasting equipment is prohibited from the courtrooms and their environs without court permission.

Rule LBR7007-1. Motion practice (in adversary proceedings).

(a) *General Requirements.* In addition to complying with the requirements of the Federal Rules of Bankruptcy Procedure, all motions in adversary proceedings shall state with particularity the facts supporting the motion and shall state the relief requested.

(b) *Response to Motion.* Any party in interest may file a written response to any motion within 15 days after service of the motion unless otherwise ordered or provided in the Federal Rules of Bankruptcy Procedure or these Local Rules. The response may be a memorandum and may be accompanied by affidavits and other supporting documents. In the event that no response is timely filed, the court may proceed in its discretion to rule on the motion without further notice or opportunity to be heard.

(c) *Memorandum of Law.* Unless otherwise provided by these Local Rules or ordered by the court, all briefs or memoranda of law either in support of the motion or in opposition thereto are optional and are not required, and shall be filed with the clerk at least 3 days prior to any hearing that may be scheduled on the motion. If a brief or memorandum of law is filed, the filing party or the attorney for that party shall inform the judge's chambers of the filing if that party or attorney has filed the brief or memorandum directly on the court's CM/ECF system; and if the filing party or the attorney for that party has not filed the brief or memorandum on the court's CM/ECF system, then a working copy must either be e-mailed, faxed, or physically delivered to the chambers of the judge assigned to the matter.

(d) *Decided on Motion Papers and Briefs.* All motions in adversary proceedings shall be considered and decided by the court on the pleadings, admissible evidence in the record, and motion papers and briefs, without hearing or oral argument, unless otherwise ordered by the court. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the court's attention in the motion or response.

Rule LBR7055-1. Default — Failure to prosecute.

(a) *Clerk's Notice.* If, upon the expiration of six (6) months after the filing of the last pleading, it appears to the clerk that no significant activity has since occurred in an adversary proceeding or contested matter in which there is no scheduled hearing, the clerk will send written notice to all parties to the adversary proceeding or contested matter that the proceeding or matter will be denied or dismissed without prejudice unless, within thirty (30) days after the date of the notice, the plaintiff or movant presents good and sufficient cause in writing why the dismissal or denial should not be ordered.

(b) *Court Action.* If there is no response to the clerk's notice, an order of dismissal or denial without prejudice may be entered.

Rule LBR7056-1. Summary Judgment.

(a) *Time for Filing of Motion.* Motions for summary judgment shall be filed within the time deadlines set forth in the pre-trial order and shall comply with Rule 56 of the Federal Rules of Civil Procedure.

(b) *Supporting Brief or Memorandum of Law.* Each motion for summary judgment shall be accompanied by a brief or memorandum of law in support of the motion. The supporting brief or memorandum of law shall begin with a concise statement of uncontroverted material facts. Each fact shall be set forth in a separately numbered paragraph. Each fact shall be supported by reference to the place in the record where the fact is established.

(c) *Opposing Brief or Memorandum of Law.* A response and brief or memorandum of law in opposition to a motion for summary judgment shall be filed within 20 days of the filing of the motion for summary judgment. The opposing brief or memorandum of law shall begin with a section that contains a concise listing of material facts as to which the opposing party contends a genuine issue of material fact exists. Each material fact in dispute shall beset forth in a separate paragraph, shall refer specifically to those portions of the record upon which the opposing party relies, and, if applicable, shall state the paragraph number in the movant's listing of facts that is disputed. All facts set forth in the statement of the movant shall be deemed admitted for the purpose of the motion for summary judgment unless specifically controverted by the opposing party.

(d) *Reply Brief or Memorandum of Law.* A reply brief or memorandum of law may be filed within 10 days after service of the opposing brief or memorandum of law.

(e) *Facts.* All facts on which a motion or opposition is based shall be presented in accordance with Rule 56 of the Federal Rules of Civil Procedure. Where facts to which a party refers are contained in another document, such as a deposition, interrogatory answer, or admission, a copy of the relevant excerpt from the document shall be attached.

(f) *Limitations on Length of Briefs and Memorandum of Law.* Each brief or memorandum of law in support of a motion for summary judgment, or in opposition thereto, is limited in length to 20 pages, and a reply brief or memorandum of law is limited in length to 10 pages. The page limitations may be exceeded only by leave of the court.

(g) *Failure to File and Serve Brief or Response.* The failure to file a brief in support of a motion for summary judgment or response thereto within the time specified in this Local Rule shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect. A motion for summary judgment unaccompanied by a required brief or memorandum of law may, in the discretion of the court, be summarily denied. A response unaccompanied by a required brief may, in the discretion of the court, be disregarded and the pending motion may be considered and decided as an uncontested motion. If a respondent fails to file a response within the time required by this Local Rule, the motion may be considered and decided as an uncontested motion.

Rule LBR9004-1. Papers — Requirements of form.

Each bankruptcy case docket number used in the caption of documents or other papers filed with the clerk's office shall include the case chapter and division assigned to the case.

Rule LBR9006-1. Time periods.

(a) *Motions for the Shortening of Notice.* A motion to shorten notice must be made by separate written motion, which states with specificity the reasons that shortening notice is necessary, identifies the parties affected by the motion, and describes the service of notice of the request on interested parties.

(b) *Service of Motion and Order.* Immediately upon filing of the motion to shorten notice, the movant shall serve a copy of the motion by hand delivery, overnight delivery, facsimile, or electronic transmission. Immediately upon receipt of the order shortening time and setting the hearing, the movant shall serve notice of the hearing in a similar manner. In instances where service of the notice of hearing may not provide sufficient time for parties in interest to respond or appear, counsel for the moving party shall telephonically provide notice of the hearing as soon as practicable.

(c) *Objection to Timing of Hearing on Shortened Notice.* If, at or prior to the hearing held on shortened notice, any opposing party objects to the shortened notice, the moving party shall have the burden of demonstrating good cause for the shortened notice or the court shall grant a continuance.

Rule LBR9007-1. General notice and service provisions.

(a) *Designation of parties to provide notice.* The clerk is authorized to designate the parties who shall provide such notice to creditors and parties-in-interest as required under the Federal Rules of Bankruptcy Procedure and these Local Rules.

(b) *Service required on trustee.* In cases where a trustee has been appointed, any and all pleadings (except claims) in all matters and proceedings arising in or related to the case shall be served on the trustee whether or not such trustee is a party to the proceeding.

(c) *Service required on bankruptcy administrator.* In chapter 7, 11 and 12 cases, the bankruptcy administrator shall be served with all pleadings and documents required to be filed with the clerk's office, and any other documents specifically requested by the bankruptcy administrator. In chapter 13 cases, the bankruptcy administrator shall be served with fee applications, motions to dismiss with prejudice, responses to documents filed by the bankruptcy administrator and any other documents specifically requested by the bankruptcy administrator.

Rule LBR9011-2. Pro se parties.

An individual may appear *pro se.* All partnerships, corporations, and other business entities (other than an individual conducting business as a sole proprietorship) that desire to appear in cases or proceedings before this court must be represented by an attorney duly admitted to practice before the court, except in the following instances:

(a) A business entity, employed as a professional pursuant to 11 U.S.C. § 327, may file an interim or final fee application *pro se*;

(b) A business entity may file a claim *pro se*;

(c) A business entity may appear *pro se* at meeting of creditors called pursuant to 11 U.S.C. § 341.

(d) A business entity may file a response to a notice transferring the business entity's claim.

Any individual appearing *pro se* is subject to these Local Rules, as well as the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code.

NOTE

See also LBR2090-1 for attorney admission procedures.

CASE NOTES

Application to Corporate Debtors. — Appeals filed by a corporate debtor's president challenging bankruptcy court orders effecting the debtor's bankruptcy were dismissed because the debtor could not appear pro se, and the president, who was not a licensed attorney, could not bring appeals on behalf of the debtor without the appearance of a licensed attorney. Terry v. Sparrow, 328 B.R. 442, 2005 U.S. Dist. LEXIS 20067 (M.D.N.C. 2005).

Rule LBR9011-4. Signatures.

(a) *State bar code number.* The state bar number of an attorney shall appear on every petition, pleading, motion or other paper filed by such attorney with the clerk's office.

(b) *Typed or printed name of attorney or party filer.* Every petition, pleading, motion or other paper signed by an attorney or by a party who is not represented by an attorney shall contain a printed or typed name below all signatures.

Rule LBR9013-1. Motion practice.

(a) *Motions Covered.* For the purposes of this Local Rule, a "motion" filed in a case shall include any motion, application, notice, any other request for relief from the court, or any proposed action to be taken under the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, or Local Bankruptcy Rules. The definition of "motion" shall not include a petition for relief under the Bankruptcy Code, a proof of claim or an objection to a proof of claim, or any proposed order submitted to the court. Any letter that is received by the court need not be considered as a motion.

(b) *Form of Motion.* All motions, unless made in open court during a hearing or at trial, shall be in writing and filed with the clerk. All motions shall state with particularity the grounds for the relief requested in separately numbered paragraphs and shall be signed by the movant or the movant's counsel. Multiple requests for relief in a single motion will be allowed for filing purposes if those requests are based on identical facts or arise out of the same transaction. Multiple requests for relief not based on identical facts or not arising out of the same transaction shall be filed in separate documents. Authorities and arguments may be briefed in a motion. If time does not permit the filing of a written motion, the court, in its discretion, may waive the requirement. A motion will not be accepted by telephone or facsimile without the consent of the court.

(c) *Supporting Documentation.* Unless otherwise provided in these Local Rules, when allegations of facts on which a motion relies do not appear in the record, the source for those allegations of fact shall be summarized and this summary shall be submitted with, or as part of, the motion. If the motion is based on affidavits and documents evidencing facts that are not contained in the record, the affidavits and documents must be filed with the motion, unless they are unavailable at the time that the motion is filed. If the affidavits and documents are not then available, then the moving party may move for an extension of time for filing affidavits and documents in accordance with section (g) of this rule. In addition to the other requirements of these

Local Rules, any motion for relief from stay, abandonment, sale of property, or other relief with respect to property, shall have attached thereto copies of all documents evidencing the related indebtedness and perfected lien status, unless such documents have already been filed in connection with another motion in the case, in which case a specific reference should be made to the motion to which such copies are attached.

(d) *Service.* In addition to the parties affected by the motion, all motions in all proceedings and cases shall be served on the trustee whether or not the trustee is a party to the proceeding. In all cases, the attorney for the debtor must be served in like manner. In Chapter 7, 11, and 12 cases, all motions shall be served on the bankruptcy administrator.

(e) *Response; Time for Response.* Any party against whom relief is sought may file a written response to the motion. The response may be accompanied by affidavits and other supporting documents. A response and accompanying affidavits, if any, to a motion shall be served within the earlier of 15 days from the date of the service of the motion, or 3 days from the date of the hearing on the motion, unless otherwise ordered or provided in the Federal Rules of Bankruptcy Procedure or these Local Rules.

(f) *Content of Response.* All responses shall contain sufficient information to reasonably disclose the basis for the party's position and what specific issues are contested. If a response is not in compliance with this provision, the court in its discretion may resolve the matter without a hearing.

(g) *Extension of Time for Filing Supporting Affidavits and Documents.* Upon proper motion accompanied by a proposed order, the court may enter an ex parte order specifying the time within which supporting affidavits and documents may be filed pursuant to section (c), if it is shown in writing that such affidavits or documents are not available or cannot be filed contemporaneously with the motion or response. The time allowed to an opposing party for filing a response shall not run during any such extension.

(h) *Memorandum of Law.* Unless otherwise ordered by the court, all briefs or memoranda of law either in support of the motion or in opposition thereto are optional and are not required, and shall be filed with the clerk at least 3 days prior to the hearing on the motion. If a brief or memorandum of law is filed, the filing party or the attorney for that party shall inform the judge's chambers of the filing if that party or attorney has filed the brief or memorandum directly on the court's CM/ECF system; and if the filing party or the attorney for that party has not filed the brief or memorandum on the court's CM/ECF system, then a working copy must either be e-mailed, faxed, or physically delivered to the chambers of the judge assigned to the matter.

(i) *Hearing on Motion.* The clerk shall set all hearing dates.

(j) *Disclosure Requirements Inapplicable.* The disclosure requirements imposed by Rule 7026(a) of the Federal Rules of Bankruptcy Procedure are inapplicable to contested matters, unless otherwise ordered by the court.

Rule LBR9015-1. Jury trial.

(a) *Demand.*

(1) *Form.* A demand for jury trial shall state whether the party consents to the trial being conducted by the Bankruptcy Court.

(2) *Determination by the Bankruptcy Court.* On motion or on its own initiative, the court may determine whether there is a right to trial by jury of the issues for which a jury trial is demanded.

(3) *Statement of consent.* Within the later of (I) the time required for the filing of a response to the pleading in which a jury demand is set forth or (ii) 14 days after the filing of a jury demand, any other party shall file a statement as to that party's consent to trial by the Bankruptcy Court.

(b) *Applicability of certain Federal Rules of Civil Procedure.* Rules 38, 39, and 47-51 of the Federal Rules of Civil Procedure, and Rule 81(c) of the Federal Rules of Civil Procedure, insofar as they apply to jury trials, apply to cases and adversary proceedings except that a demand made under Rule 38(b) of the Federal Rules of Civil Procedure shall be filed in accordance with Rule 5005 of the Federal Rules of Bankruptcy Procedure.

(c) *Applicability of Local Rules of the District Court.* To the extent applicable, the Local Rules of the United States District Court for the Middle District of North

Carolina shall govern matters pertaining to the conduct of jury trials in this Bankruptcy Court.

Rule LBR9019-2. Mediated settlement conference.

(a) *Order for mediated settlement conference:*

(1) Order By Court: The court may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any adversary proceeding or contested matter pending in the Bankruptcy Court.

(2) Timing of the Order: The court may issue the order at any time after the time for filing answers has expired in an adversary proceeding or after a response is filed in a contested matter.

(3) Content of Order: The court's order shall:

(A) Require that a mediated settlement conference be held in the case;

(B) Establish a deadline for the completion of the conference;

(C) State clearly that the parties have the right to select their own mediator as provided by section (b);

(D) State the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to section (b); and

(E) State that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) Motion to Dispense with Mediated Settlement Conference: A party may move the court, within ten (10) days after the court's order, to dispense with the conference. The motion shall state the reasons the relief is sought, and shall be filed with the clerk of court and served on all opposing parties. Any party may file a written objection specifically stating his or her reasons for opposing the motion. The judge will rule upon such motion without a hearing.

(5) Motion for Court Ordered Mediated Settlement Conference: In cases not ordered to mediated settlement conference, any party may move the court to order such a conference. The motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the court within ten (10) days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing.

(6) Motion to Authorize the Use of Other Settlement Procedures: Within ten (10) days of the court's mediation order, any party may move the court to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. The motion shall state the reasons the authorization is requested and that all parties consent to the motion. The deadline for completion of the authorized settlement procedure shall be as provided by the rules authorizing the procedure or, if none, the deadline shall be as ordered for the mediated settlement conference.

(b) *Selection of Mediator:*

(1) Selection of Certified Mediator by Agreement of Parties: The parties appearing of record may select a mediator certified pursuant to the rules of the Supreme Court of North Carolina. The plaintiff shall file with the court an approved Designation for Mediator notice form indicating selection of Certified Mediator by Agreement within twenty-one (21) days of the court's order. The notice shall state the name, address, and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and the parties have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to the rules of the Supreme Court.

(2) Nomination and Court Approval of Noncertified Mediator: The parties may select a mediator who does not meet the certification requirements of the Supreme Court but who, in the opinion of the parties and the judge, is otherwise qualified by training or experience to mediate the action.

If the parties select a noncertified mediator, the plaintiff or plaintiff's attorney shall file with the court an approved Designation of Mediator notice form indicating Nomination for Noncertified Mediator within twenty-one (21) days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties have agreed upon the selection and rate of compensation. The judge shall rule on the nomination without a hearing.

(3) Appointment of Mediator by the Court: If the parties cannot agree upon the selection of a mediator, the plaintiff shall submit a Designation of Mediator form indicating a Motion for Court Appointment of Mediator to the court on behalf of the parties. The motion must be filed within twenty-one (21) days after the court's order and shall state that the parties and their attorneys have had a full and frank discussion concerning the selection of a mediator and have been unable to agree.

The motion shall state whether any party prefers a certified attorney mediator, and if so, the judge shall appoint a certified attorney mediator. The motion shall state that all parties prefer a certified, nonattorney mediator, and if so, the judge shall appoint a certified, nonattorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the judge may appoint a certified attorney mediator or a certified nonattorney mediator.

Upon receipt of a Motion for Court Appointment of Mediator, or in the event the plaintiff has not filed a Notice of Selection of Certified Mediator or Nomination of Noncertified Mediator with the court within twenty-one (21) days of the court's order, the judge shall appoint a mediator certified pursuant to these Rules. Only mediators that have indicated their desire to mediate cases in the Middle District shall be appointed.

(4) Mediator Information Directory: To assist the parties in the selection of a mediator by agreement, a central directory of information on all certified mediators who wish to mediate cases in the Middle District will be collected and maintained by the clerk's office.

(5) Disqualification of Mediator: Any party may move for an order disqualifying the mediator. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this rule. Nothing in this provision shall preclude mediators from disqualifying themselves upon written notice to the judges and the parties.

(c) *The Mediated Settlement Conference:*

(1) Where Conference Is to Be Held: Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the United States Bankruptcy Courthouse or other public or community building in the Middle District. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

(2) When Conference Is to Be Held: The court's order issued pursuant to section (a)(2) shall state a date of completion for the conference. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

(3) Request to Extend Date of Completion: A party, or the mediator, may request the judge to extend the deadline for completion of the conference. The request shall state the reasons the continuance is sought and shall be served by the movant upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the judge.

The judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. The order shall be served on all parties and on the mediator by the person who sought the extension.

(4) Recesses: The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(5) Mediated Settlement Conference is not to delay other proceedings: The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the judge.

(d) *Duties of Parties, Representatives, and Attorneys:*

(1) Attendance: The following persons shall physically attend the entire mediated settlement conference until an agreement is reduced to writing and signed as provided by section (d)(3) or an impasse has been declared, unless excused by the judge or by the mediator with approval of all parties and attorneys:

(A) Parties:

(i) All individual parties;

(ii) Any party that is not a natural person or a government entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle this action; and

(iii) Any party that is a governmental agency shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(B) Insurance Company Representatives: A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have decision making authority.

(C) Attorneys: At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) Notifying Lien Holders: Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify the lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request the lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

(3) Finalizing Agreement: Upon reaching agreement during the conference but before the conference concludes, a draft of the settlement terms shall be written by the mediator and signed by the parties and others with settlement authority. Upon reaching agreement, either before or during the conference, the parties and others with settlement authority, shall provide a copy of a formal executed written agreement to the mediator within seven (7) days of the settlement. The mediator shall attach a copy of the formal written agreement to the Report of Mediator filed pursuant to section (f)(2)(D) of these rules. Failure of the parties to provide a copy of the formal written agreement to the mediator on a timely basis may result in sanctions.

(e) *Sanctions and failure to attend:* If any person required to attend the conference pursuant to section (d) of these rules fails to attend without good cause, the judge may impose an appropriate monetary sanction, including but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and losses of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after notice and a hearing, and in a written order making findings of fact and conclusions of law.

(f) *Authority and duties of a mediator:*

(1) Authority of a Mediator:

(A) Control of Conference: The mediator shall at all times be in control of the conference and the procedures to be followed.

(B) Private Consultation: The mediator may meet and consult privately with any participant or counsel during the conference.

(C) Scheduling of the Conference: The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(2) Duties of Mediator:

(A) Generally: The mediator shall define and describe the following to the parties at the beginning of the conference:

(i) The process of mediation;

(ii) The difference between mediation and other forms of conflict resolution;

(iii) The costs of the mediated settlement conference;

(iv) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach a settlement;

(v) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(vi) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(vii) The inadmissibility of conduct and settlements as provided by applicable Rules of Evidence;

(viii) The duties and responsibilities of the mediator and the participants; and

(ix) The fact that any agreement reached will be reached by mutual consent.

(B) Disclosure: The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(C) Declaring Impasse: It is the duty of the mediator to timely determine that an impasse exists and that the conference should end.

(D) Reporting Results of Conference: The mediator shall submit a Report of Mediator to the judge which indicates the results of the conference. This report shall be filed within 2 weeks of the conclusion of the conference or upon the receipt of a copy of a written settlement agreement, whichever comes first.

If an agreement was reached, the report shall state whether the action will be concluded by consent judgement or voluntary dismissal and shall identify the persons designated to file the consent judgement or dismissal. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative who was absent without permission from the conference.

The mediator shall attach the written settlement agreement prepared by the parties to the Report of Mediator.

(E) Scheduling and Holding the Conference: It is the duty of the mediator to schedule the conference and to conduct and conclude the conference prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless the time limit is changed by a written order of the judge.

(3) Failure of mediator to comply with section (f): The judge may withhold future appointments of any mediator who does not fully comply with the requirement of section (f).

(g) *Compensation of the Mediator:*

(1) By Agreement: when the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(2) By Court Order: When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the judge.

(3) Payment of Compensation by Parties: Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid in equal shares by the parties. Multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally unless the court otherwise orders.

(4) Sanctions for Failure to Pay mediator's Fee: Except when excused by these rules or by order of the court, failure of a party to make a timely payment of the party's share of a mediator's fee at the conclusion of the conference may result in the imposition of sanctions.

(h) *Communications with the Court:* All communications concerning mediated settlement conferences should be addressed to the bankruptcy administrator.

APPENDIX

LOCAL BANKRUPTCY GUIDE

United States Bankruptcy Court
Middle District of North Carolina

1. Introduction to Bankruptcy Practice Guide

2. Bankruptcy Court Addresses
   2.1 Bankruptcy Clerks Offices
      2.1.1. Greensboro Office
      2.1.2. Winston-Salem Office
   2.2. Bankruptcy Administrator

3. General Information
   3.1. Public Office Hours
   3.2. Divisions
      3.2.1. Filing of Documents in Main and Divisional Offices
      3.2.2. Assignment of Cases to Divisions
      3.2.3. Assignment of Case Numbers
      3.2.4. Courtroom and Creditors Meeting Room Addresses for Divisions
   3.3. Access to Bankruptcy Court Records
      3.3.1. Open Records
      3.3.2. Closed Records
   3.4. Bankruptcy Clerks Office Searches
      3.4.1. VCIS
      3.4.2. PACER
      3.4.3. Internet Site
      3.4.5. Bankruptcy Clerks Office Personnel
   3.5. Copying Requests
   3.6. Creditors Meeting Tapes
   3.7. Bankruptcy Court Libraries
   3.8. Admission to Practice
   3.9. Fees Schedule

4. Commencement of Case
   4.1. Matrix Guidelines
   4.2. Diskette Guidelines
   4.3. Payment of Filing Fee in Installments
   4.4. Claim for Exempt Property in Chapter 7 Cases

5. Case Administration
   5.1. Disposition of Funds on Hand When a Chapter 13 Case is Dismissed or Converted.
      5.1.1. Case Dismissed Prior to Confirmation
      5.1.2. Case Dismissed After Confirmation
      5.1.3. Case Converted to Chapter 7 Prior to Confirmation
      5.1.4. Case Converted After Confirmation
   5.2. Service of Orders

6. Applications, Motions and Claims
   6.1. Form
   6.2. Summary Judgment
   6.3. Contents of Motion for Relief from Stay
   6.4. Motion to Avoid Lien
   6.5. 2004 Exams
   6.6. Objections to Claims

7. Courtroom Practices
   7.1. Addressing the Bankruptcy Court
   7.2. Questioning Witnesses

8. Employment of Professionals — § 327
   8.1. Attorney for Debtor

        8.1.1. Chapter 11
        8.1.2. Chapter 7 and Chapter 13
    8.2. Other Professionals Representing the Debtor or Trustee
    8.3. Disinterestedness & Pre-petition Claims

9. Fee Guidelines

10. Adversary Proceedings
    10.1. Scheduling Meeting
    10.2. Scheduling Memorandum
    10.3. Scheduling Memorandum and Request for Additional Time to File an Answer
    10.4. Multiple Requests in a Complaint

1. *Introduction to bankruptcy practice guide.* This guide is written and maintained for persons using the United States Bankruptcy Court for the Middle District of North Carolina. Its purpose is to inform practitioners of the Bankruptcy Court's preferred practices and procedures.

This guide is not intended to be a source of technical requirements or mandatory rules.[1] Consequently, this guide may not be cited to the Court as grounds for striking or otherwise objecting to the form or content of a pleading or other filing. The legal sufficiency of a matter is determined by reference to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Rules of the United States Bankruptcy Court for the Middle District of North Carolina.

2. *Bankruptcy court addresses.*

2.1 Bankruptcy Clerks Offices

2.1.1 Greensboro Office

Mailing Address:
United States Bankruptcy Court
P.O. Box 26100
Greensboro, NC 27420-6100

Street Address:
United States Bankruptcy Court
101 South Edgeworth Street
Greensboro, NC 27401

Phone Number: (336) 358-4000

2.1.2 Winston-Salem Office

Mailing/Street Address:
United States Bankruptcy Court
226 South Liberty Street
Winston-Salem, NC 27101

Phone Number: (336) 397-7765

2.2 Bankruptcy Administrator

Mailing Address:
United States Bankruptcy Administrator
P.O. Box 1828
Greensboro, NC 27401

Street Address:
United States Bankruptcy Administrator
101 South Edgeworth Street
Greensboro, NC 27401

Phone Number: (336) 358-4170

3. *General information.*

3.1 *Public Office Hours.* The Bankruptcy Clerks Office is open Monday through Friday from 8:00 a.m. to 5:00 p.m. Fees are accepted by the Clerks Office from 8:00 a.m. to 4:00 p.m. The office is closed in observance of all federal holidays. When the holiday falls on a Saturday, the federal holiday is observed on the Friday before. When the holiday falls on a Sunday, the federal holiday is observed on the following Monday.

3.2 *Divisions.*

3.2.1 *Filing of Documents in Main and Divisional Offices.* Documents for Greensboro and Durham cases should be filed in the Greensboro office. Documents for Winston-Salem cases should be filed in the Winston-Salem office.

3.2.2 *Assignment of Cases to Divisions.* The Bankruptcy Court for the Middle District of North Carolina consists of three divisions: 1) Greensboro, 2) Winston-Salem and 3) Durham. Cases are routinely assigned to these divisions depending upon the county of the debtor's residence, as follows:

---

[1] Except for the Chapter 7 and Chapter 11 fee guidelines, which *are* mandatory.

Greensboro	Winston-Salem	Durham
ALAMANCE	CABARRUS	CHATHAM
CASWELL	DAVIDSON	DURHAM
GUILFORD	DAVIE	HOKE
MONTGOMERY	FORSYTH	LEE
RANDOLPH	ROWAN	MOORE
RICHMOND	STANLY	ORANGE
ROCKINGHAM	STOKES	PERSON
	SURRY	SCOTLAND
	YADKIN	

If a debtor resides in a county other than one previously listed, the Clerks Office considers which division is closest to the debtor's residence in determining the divisional assignment.

3.2.3 *Assignment of Case Numbers.* A bankruptcy case number is comprised of a two digit designation of the year of filing, five additional digits, the chapter number and a letter designation for the division. The first number of the five additional digits will be a 1 if the case is assigned to the Greensboro division, an 8 if the case is assigned to the Durham division, and a 5 if the case is assigned to the Winston-Salem division. For example, case number 98-18888C-7G is a Chapter 7 case filed in 1998, which is assigned to the Greensboro division.

An adversary proceeding number is comprised of a two digit designation of the year of filing and four additional digits. The first number of the four additional digits is a 2 if the case is assigned to the Greensboro division, a 9 if the case is assigned to the Durham division, and a 6 if the case is assigned to the Winston-Salem division. For example, adversary proceeding number 98-6888 is an adversary proceeding filed in 1998, which is assigned to the Winston-Salem division.

3.2.4 *Courtroom and Creditors Meeting Room Addresses for Divisions.*

Greensboro
Courtroom #1, Second Floor
101 South Edgeworth Street
Greensboro, NC

Courtroon #2, Second Floor
101 South Edgeworth Street
Greensboro, NC

Courtroon #3, Second Floor
101 South Edgeworth Street
Greensboro, NC

Creditors Meeting Room, First Floor
101 South Edgeworth Street
Greensboro, NC

Winston-Salem
Courtroom, First Floor
226 South Liberty Street
Winston-Salem, NC

Creditors Meeting Room, First Floor
226 South Liberty Street
Winston-Salem, NC

Durham
Courtroom, First Floor
Peoples Security Building
300 West Morgan Street
Durham, NC

Creditors Meeting Room, 4th Floor
Peoples Security Building
300 West Morgan Street
Durham, NC

3.3 *Access to Bankruptcy Court Records.*

3.3.1 *Open Records.* Open case files for Greensboro and Durham cases are maintained and available for public viewing during normal operating hours in the Greensboro office. Open case files for Winston-Salem cases are maintained and available for public viewing during normal operating hours in the Winston-Salem office.

3.3.2 *Closed Records.* All cases, regardless of division, closed during the current calendar year are maintained and available for public viewing during normal operating hours in the **Greensboro** office. Cases closed in the previous calendar year may have been transferred to the Federal Records Center in East Point, GA. Requests for examination of closed case files and requests for copies from closed case files should be made to the Clerks Office. If the closed file is located in the Federal Records Center, a retrieval fee is required. For personal, non-business cases, the Clerks Office can arrange for a party to obtain copies directly from the Federal Records Center.

3.4 *Bankruptcy Clerks Office Searches.* The following methods may be used to obtain case information from the Bankruptcy Court:

3.4.1 *VCIS.* The Voice Case Information System (VCIS) allows a caller to access basic case information (by case name or number) from any touch-tone telephone at any time by dialing (336) 333-5532 or toll free at (888) 319-0455. There is no fee charged with this service except normal telephone costs incurred for making any call, including long distance charges. The information that can be obtained from VCIS includes the case number, case name, date case was filed, type of case, trustee, debtor's attorney, discharge date, closing date. [Cases available on VCIS are those that were filed on or after July 17, 1989, which are referred to as "BANCAP" cases.]

3.4.2 *PACER.* The PACER system allows computer access to not only basic case information but also to recent docketing entries, case reports, claims registers, current Bankruptcy Court hearing calendars and creditors meeting calendars. This system, like VCIS, is available at any time. Information on registering for this service and the fees charged may be obtained from the Clerks Office by calling (336) 333-5647 (Greensboro) or (336) 631-5340 (Winston-Salem). [All information described above is available on PACER for BANCAP cases; only Bankruptcy Court hearing calendar information is available on PACER for cases filed prior to July 17, 1989.]

PACER may be accessed from within Greensboro at 333-5389 or toll free from outside of Greensboro at (800) 417-3571.

3.4.3 *Internet Site.* Much of the information mentioned in this section is now also available on the Court's web page, www.ncmb.uscourts.gov. The site may be accessed through your own internet service provider or by using the public computer terminals, which are located in the Greensboro and Winston-Salem Bankruptcy Clerks Offices. The Clerks Office terminals may be used at no cost during normal office operating hours (8:00 a.m. — 5:00 p.m., Monday through Friday).

3.4.4 *RACER.* RACER provides access to images of case documents via the internet site. Documents docketed on or after January 4, 1999 in all cases and adversary proceedings have been scanned into the imaging system and are available for viewing. Claims docketed after the above date in Chapter 11 cases and Chapter 7 asset cases are also available for viewing.

3.4.5 *Bankruptcy Clerks Office Personnel.* Some case information for cases that were filed prior to July 17, 1989 (i.e.,"PRE-BANCAP" cases) may only be obtained by telephone, mail, or a visit to the Bankruptcy Court. However, a limited amount of information on these cases is available on the web page, www.ncmb.uscourts.gov.

If for some reason information is not available from VCIS, PACER, or the Internet Site, the following information (for any case filed in this judicial district) is available from the Clerks Office staff **without charge**: case name, case number, debtor's social security number, petition filing date, chapter of case, trustee, attorney for debtor, discharge date (if entered) and case closing date (if closed). Contact the Clerks Office staff with this request either by telephone, mail or a visit to the Bankruptcy Clerks Office.

Other case information is available from the Bankruptcy Clerks Office upon written request and payment of $15 for each item searched.

3.5 *Copying Requests.* A copy of a document/pleading may be requested either in writing or in person (telephone requests cannot be accepted), at the cost of 50 cents per page copied. The request must clearly and specifically identify the document sought. A search fee in addition to the copy costs will be imposed if the written request does not contain a clear reference to the requested document.

3.6 *Creditors Meeting Tapes.* Meetings of creditors pursuant to § 341 are recorded on audio cassette tapes. The tapes are kept in the office of the Bankruptcy Administrator and are retained for two years from the date of the meeting. Tapes of a specific meeting are available for review at the Bankruptcy Administrator's Office. The Bankruptcy Administrator will provide a copy of a tape at no charge upon receipt of a blank standard cassette tape. If a request for a copy of the tape is made by mail, the person requesting the copy should also include a self-addressed stamped envelope.

3.7 *Bankruptcy Court Libraries.* The Bankruptcy Court's libraries are maintained for the exclusive use of the Judges and their staffs.

3.8 *Admission to Practice.* All duly licensed lawyers who are admitted to practice before the District Court for the Middle District of North Carolina are allowed to practice law before the Bankruptcy Court for the Middle District of North Carolina. Admission to practice is governed by Rule 103 of the Local Rules of the District Court for the Middle District of North Carolina.

3.9 *Fees Schedule.* The Bankruptcy Clerks Office assesses bankruptcy petition filing fees pursuant to 28 U.S.C. § 1930. Other fees assessed by the Clerks Office are set forth in the Bankruptcy Court Miscellaneous Fee Schedule issued in accordance with 28 U.S.C. § 1930(b).

4. *Commencement of case.*

4.1 *Matrix Guidelines.*

1. Lists should be typed in alphabetical order and in a single column with a minimum of one inch margins for all borders
2. Each name/address must consist of no more than 5 (five) total lines, with at least one blank line between each of the name/address blocks.
3. Each line may not exceed 40 characters in length. Abbreviations are helpful, such as street, St.; avenue, Ave.; Corporation, Corp.; etc.
4. DO NOT include the following people: 1) **debtor**, 2) **joint debtor** and 3) **attorney for the debtor(s)**. Their names and addresses will be retrieved automatically by the computer for noticing.
5. DO use 2 digit state abbreviation only, such as NC, FL, MI, etc.
6. If account numbers or attention lines are used, they must appear on the second line of the address.
7. List each creditor only once, regardless of the number of debts that is owed by the debtor.
8. Zip codes should be typed at the end of the last line of the address only. If nine digit zip codes are used, place a hyphen between the two groups of digits.
9. Avoid the following:
   a. Stray marks. Do not type lines, debtor name, page numbers, or anything else on the front of the creditor list. Any identifying marks one chooses to add can be typed on the back of the list.
   b. Typing in all caps. Type in upper and lower case as one would in a letter.
   c. Slashes (/) and percent (%) signs. Don't slash numbers, such as zeros. Don't use percent signs; use c/o instead.

4.2 *Diskette Guidelines.* When a matrix is submitted on diskette, it should conform to the following guidelines.

1. Each address must contain 5 lines or less.
2. Address lines may not exceed 40 characters in length (any excess will be automatically truncated).
3. There must be 1 blank line between each complete address. Do not leave blank lines within an address.
4. The document must be stored in ascii text format (not delimited). If the matrix is prepared in a word processor, it should be exported to the appropriate format before the diskette copy is created. Since procedures vary with each program, consult the user's guide for assistance.
5. Submit the matrix on a 3.5′ diskette. Name the document the debtor's last name and use an extension of .txt. For example, a matrix for "John Doe" would be saved as "doe.txt."
6. When a diskette with a matrix is submitted over the counter, another blank diskette is immediately given in exchange.
7. When a diskette with a matrix is received in the mail, one will be returned to the sender provided a stamped, self-addressed mailer is enclosed.
8. Regardless of how a diskette is submitted, the data will be erased and the diskette will become part of the exchange pool.

Refer to Local Bankruptcy Rule LBR 1007-2, which requires that, when feasible, the original matrix shall be submitted on diskette.

4.3 *Payment of Filing Fee in Installments.* Whenever an application is made for a petition filing fee to be paid in installments, the application shall be accompanied by the first installment payment in an amount not less than $60.00. Any request for a deviation from this requirement must be set forth in the application, and must offer detailed reasons supporting it.

4.4 *Claim for Exempt Property in Chapter 7 Cases.* When completing the exempt property claim form(Local Form #91-C) in Chapter 7 cases, all property claimed as exempt and property not claimed as exempt should be listed. Copies of deeds (and other documents of title for real estate), motor vehicle registrations and retirement plans should be attached to the exempt property claim form.

5. *Case Administration.*

5.1 *Disposition of Funds on Hand When a Chapter 13 Case is Dismissed or Converted.*

5.1.1 *Case Dismissed Prior to Confirmation.* All funds on hand are refunded to the debtor except as otherwise ordered by the Court.

5.1.2 *Case Dismissed After Confirmation.* All funds on hand are disbursed to creditors pursuant to the confirmed plan. If funds are received from the debtor's employer after the dismissal order is signed, those funds will be refunded to the debtor.

5.1.3 *Case Converted to Chapter 7 Prior to Confirmation.* All funds on hand are refunded to the debtor.

5.1.4 *Case Converted After Confirmation.* Cases filed prior to October 22, 1994:

If the Chapter 13 case was filed prior to October 22, 1994, whether the funds are refunded to the debtor or turned over to the Chapter 7 trustee will depend upon the amount on hand. If the amount of funds on hand is $500.00 or less, the money is refunded to the debtor. If the amount of funds on hand is greater than $500.00, the refund is mailed to the Chapter 7 trustee, although the refund check is made payable to the debtor.

Cases filed after October 22, 1994:
All funds on hand, regardless of the amount, are refunded to the debtor.

5.2 *Service of Orders.* Pursuant to Federal Bankruptcy Rule 9022, the Bankruptcy Clerks Office is required to serve notice of entry of Judgments and Orders. Accordingly, the Clerks Office will note the date of entry on each Order, and, unless the Court directs otherwise, will serve copies of the Orders on all contesting parties. To ensure that service is proper, the Bankruptcy Court requires that the preparer of each Order submit the following items to the Clerks Office:

(1) *A certificate of service, which will be signed by the Clerks Office.* The certificate of service must include the Bankruptcy Administrator only in (a) all Chapter 7 and 11 cases, and (b) in Chapter 12 and 13 cases when the order regards (1) fees, (2) a dismissal with prejudice, (3) a motion filed by the Bankruptcy Administrator, or (4) a motion responded to by the Bankruptcy Administrator. If service of the Order upon the Bankruptcy Administrator is required, the certificate should include a notation that service was made by "hand delivery," which is the Clerks Office's method of serving the Bankruptcy Administrator.

The certificate should also include all contesting parties, who commonly include (as applicable) the movant, trustee, debtor in possession, creditors committee chairman, and any party filing a response or objection. If an attorney has appeared for a party, the party's name should be listed in care of the attorney (for example, Joe Debtor c/o Mary Attorney). Because the Clerks Office will serve all copies of the Order, the preparer's name should appear on the list of parties served as well. If the Greensboro or Winston-Salem Chapter 13 Standing Trustee is included on the certificate, the certificate should include a notation that service was made by "hand delivery," which is the method of service to these Trustees. This notation should not be included for the Durham Standing Trustee.

(2) *Pre-addressed, stamped envelopes for every party (except for Bankruptcy Administrator and Chapter 13 Standing Trustees) listed on the certificate of service.* The preparer's return address should appear on each envelope. If there are any returned envelopes, the preparer should prepare a new envelope with the correct address, and submit the envelope with a certificate of service (containing only the name and address of the returned envelope(s)) to the Clerks Office. For offices that use a postage meter, it is recommended that the meter date remain blank.

(3) *Enough copies of the Order for service upon the parties listed on the certificate of service, plus one more copy for scanning purposes.*

6. *Applications, Motions and Claims.*

6.1 *Form.* Petitions, motions, applications, briefs and other papers submitted for filing must be typewritten, printed, or legibly handwritten on letter size page. The pages shall be unfolded and shall be bound at the top. The margin at the top of each page shall not be less than one inch. Typewritten documents should be double spaced or one and one-half spaced. Mechanically reproduced copies which bear an original signature will be accepted by the Bankruptcy Court as originals.

6.2 *Summary Judgment.* All motions for summary judgment shall state with particularity the facts supporting such motion. If any of the facts can be determined from documents in the adversary proceeding or case file, the motion should provide specific references to each fact so established and the title, page number and filing date of the related document.

6.3 *Contents of Motion for Relief from Stay.* A motion for relief from stay should include the following information as applicable: 1) the amount of the net "pay-off," 2) the amount of any arrearage, 3) an appraisal or affidavit stating the fair market value of the property, 4) copies of documentation evidencing the perfected security interest in the property, 5) a list of all lienholders (if known) who have an interest in the property, and 6) a certificate of service.

In Chapter 7 cases, motions for relief from stay will be noticed on a tentative hearing basis (hearing only if objection) provided the motion or attachment includes the above requirements. If the above items are not provided, the motion will be set for hearing. If the above items are provided and there is written consent of the debtor (or debtor's attorney), Trustee and all creditors affected by the motion, the motion and accompanying Order will be sent to the Bankruptcy Judge for *ex parte* consideration.

In Chapter 13 cases, motions for relief from stay are scheduled for hearing unless the above information relating the property or indebtedness is provided and there is written consent of the debtor (or debtor's attorney), Standing Trustee and all creditors affected by the motion. When these requirements are met, the motion and accompanying Order will be sent to the Bankruptcy Judge for *ex parte* consideration.

In Chapter 11 and 12 cases, motions for relief from stay will be scheduled for hearing.

6.4 *Motion to Avoid Lien.* In general, a motion to avoid lien (that impairs exemption) will be noticed on a tentative hearing basis (hearing only if objection) if the motion contains the following: 1) a description of the property subject to the lien; 2) the value of the property; 3) the specific nature and amount of the lien to be avoided; and 4) the nature and amount of all other liens on the property. If the motion does not contain the above information, a hearing will be scheduled.

To have a motion to avoid a lien on real property in a Chapter 7 case noticed on a tentative hearing basis, it may be necessary to list the amount of the claimed exemption depending on the circumstances of the individual case. Copies of the form orders for these motions can be found under (and downloaded from) the *Procedures and Forms* section of the courts web page, www.ncmb.uscourts.gov.

6.5 *2004 Exams.* Motions for examination under Rule 2004 should include a statement as to whether the subject of the examination consents to the examination, the examination's location and the examination's date. Depending upon availability, the Bankruptcy Court's premises and Court Reporting Service may be used for examinations under Rule 2004. Unless otherwise agreed or directed by the Court, the movant shall give at least two weeks notice of the examination.

6.6 *Objections to Claims.* Unless otherwise ordered by the Court, a hearing on objections to claims will be noticed on a tentative hearing basis (hearing only if objection) to the parties as required by the Federal Rules of Bankruptcy Procedure. If a party timely files a response to an objection to claim, then a hearing will be held on the date set forth in the notice. If no responses to an objection are filed within the time provided in the Bankruptcy Clerks Office's notice, the Bankruptcy Court may consider the claims objection without hearing.

If the Bankruptcy Court considers a claims objection without a hearing in a Chapter 7 or 11 case, the party filing the objection shall prepare a proposed Order, which includes the following information: the date of filing the objection, the date of the Bankruptcy Clerks Office's notice, the date that objections were due and a statement that no responses to the objection were filed. In Chapter 12 and 13 cases, the Standing Trustee will prepare the Order.

7. *Courtroom Practices.*

7.1 *Addressing the Bankruptcy Court.* Attorneys or *pro se* litigants shall rise when addressing the Bankruptcy Court, and shall make all statements to the Court from behind the counsel table or the lectern facing the Court. They shall not approach the bench, except upon permission of the Court.

7.2 *Questioning Witnesses.* While questioning witnesses, attorneys or *pro se* litigants shall remain seated behind the counsel table or standing at the lectern. They shall not approach the witness except with the Court's permission for the purpose of examining the witness with respect to an exhibit. Only one attorney for each party may participate in the examination or cross-examination of a witness.

8. *Employment of Professionals — § 327.*

8.1 *Attorney for Debtor.*

8.1.1 *Chapter 11.* An attorney who represents the trustee or a debtor-in-possession in a Chapter 11 case must file an application with the Bankruptcy Court for approval of that professional's employment. In addition, Court approval for the debtor's, trustee's, creditors' committee's or other appointed committee's employment of other professionals (accountants, appraisers, auctioneers, real estate brokers, and other professionals) is required.

8.1.2 *Chapter 7 and Chapter 13.* Bankruptcy Court approval is not required for attorneys representing the debtor in cases under Chapter 7 or Chapter 13.

8.2 *Other Professionals Representing the Debtor or Trustee.* When in doubt as to whether Court approval for the employment of a professional is required under § 327, err on the side of filing the application to avoid a later question as to whether Court approval should have been obtained.

8.3 *Disinterestedness & Pre-petition Claims.* Professionals who have previously been employed by the debtor pre-petition and who are seeking to be employed to represent the debtor should be cautious with regard to claims that they may have for pre-petition fees at the time of the filing of the petition. Pre-petition indebtedness owed to a professional prevents the professional from meeting the disinterested test of § 327(a), according to rulings made by this Bankruptcy Court. The disinterestedness requirement may be met if (a) the professional waives the unpaid pre-petition indebtedness; (b) a third party pays the indebtedness; or (c) the professional has received a pre-petition retainer against which the pre-petition indebtedness is drawn prior to the filing of the case, or which retainer is sufficient to pay the pre-petition claim. Full disclosure of pre-petition claims and retainers must be made to the Court in the application, and the burden is upon the applicant to demonstrate that the professional is disinterested. Any waiver of pre-petition indebtedness should be set out in the application for employment.

9. *Fee Guidelines.* All Chapter 7 and Chapter 11 fee applications **shall** comply with the applicable fee guidelines approved by this Bankruptcy Court. Refer to the memoranda regarding "Chapter 7 Fee Application Guidelines" and "Chapter 11 Fee Application Guidelines" for the current fee guidelines. These memoranda may be viewed or downloaded from the web site, www.ncmb.uscourts.gov. Copies are also available at the Clerks Office front counter in both Greensboro and Winston-Salem.

10. *Adversary Proceedings.*

10.1 *Scheduling Meeting.* In accordance with Rule 26(f) of the Federal Rules of Civil Procedure and Bankruptcy Rule 7026, this Court requires that the parties to an adversary proceeding meet at least 14 days in advance of the pretrial hearing. At such meeting, the parties are required to discuss the items described in Federal Rule 26(f) with the exception of the disclosures required under Rule 26(a)(1), which have been excluded by Local Bankruptcy Rule 7026-1.

10.2 *Scheduling Memorandum.* If the parties agree on a discovery plan, they must sign and file a Joint Scheduling Memorandum with the Bankruptcy Court within **10 days** after the previously described scheduling meeting. The parties must also prepare and attach to the memorandum a **separate** Scheduling Order. In the event the Court signs the Scheduling Order, the initial pretrial hearing will be canceled.

If all matters in the Scheduling Memorandum are not agreed to by all parties, a separate Scheduling Memorandum must be filed by each party within **10** days of the scheduling meeting. Absent notification to the contrary, the Court will conduct the initial pretrial hearing when separate Scheduling Memorandums are filed.

10.3 *Scheduling Memorandum and Request for Additional Time to File an Answer.* If a party files a request for additional time to file an answer, the request shall be accompanied by an Order, which addresses the scheduling of a pretrial hearing and the time for filing a Scheduling Memorandum.

10.4 *Multiple Requests in a Complaint.* The propriety of multiple requests for relief, multiple issues, and the joinder or non-joinder of parties in a single COMPLAINT is governed by the Federal Bankruptcy Rules and the Federal Rules of Civil Procedure. Even in instances where permissive joinder might apply, however, the Court encourages separate complaints for separate defendants unless relief against the defendants arises from the same transaction or identical facts.

Index to Local Rules of Civil, Criminal, and Bankruptcy Practice of the United States District Court for the Middle District of North Carolina

A

ACCESS TO COURT RECORDS, LR-MD 79.1(a).

ADDRESS.
Stating in filed pleadings or papers, LR-MD 7.1(d).

ADMINISTRATIVE PROCEEDINGS.
Transcripts or voluminous exhibits.
  Return to counsel, LR-MD 79.3.

APPEALS.
Criminal cases.
  Motion to extend time to file notice of appeal.
    Notice filed before or with motion, LCrR-MD 32.2.
Docketing statement, LR-MD 3(b).
Filing and docket fee, LR-MD 3(a).
Interlocutory appeals.
  Designation of contents of record, LR-MD 79.3.

APPEARANCES.
Attorneys at law.
  Special appearance, LR-MD 83.1(d).
  Withdrawal of appearance, LR-MD 83.1(d).
Misdemeanors.
  Payment of fixed sum in lieu of appearance, LCrR-MD 58.1.

ARGUMENT TO JURY, LR-MD 51.1(a).

ARRAIGNMENTS.
Magistrate judges.
  Authority to conduct, LR-MD 72.1(b).

ATTORNEYS AT LAW.
Addressing the court, LR-MD 83.2(a).
Admission to bar of court, LR-MD 83.1(b).
  Bankruptcy practice, LBR-MD 2090-1.
Appointment.
  Criminal cases, LCrR-MD 44.1.
Criminal justice act.
  Court's plan for furnishing representation and services to defendant, LCrR-MD 44.1.
Disciplinary proceedings.
  Generally, LR-MD 83.10a to 83.10m.
    See DISCIPLINARY PROCEEDINGS.
Extrajudicial statements by counsel.
  Criminal cases, LCrR-MD 57.2.
Mediated settlement conferences.
  Duties of counsel, LR-MD 83.9e(d).
Questioning witnesses, LR-MD 83.2(b).
Representation by members of bar of court.
  Requirement, LR-MD 83.1(c).
Roll of attorneys, LR-MD 83.1(a).
Sanctions.
  Failure to comply with local rule, LR-MD 83.4.
Settlement of matter.
  Notice to court, LR-MD 83.3.
Special appearance, LR-MD 83.1(d).
Withdrawal of appearance, LR-MD 83.1(e).

ATTORNEYS' FEES.
Award of statutory fees, LR-MD 54.2.
Minors and incompetent persons.
  Request for counsel and service fees, LR-MD 17.1(d).
Motion to award statutory fees, LR-MD 54.2.

B

BANKRUPTCY COURT.
Access to court records, BankruptcyGuide 3.3 Appx, BankruptcyGuide 3.4 Appx.
Addressing court, BankruptcyGuide 7.1 Appx.
Adversary proceedings.
  Answer.
    Request for additional time to file, BankruptcyGuide 10.3 Appx.
  Complaint.
    Multiple requests for relief, BankruptcyGuide 10.4 Appx.
  Cover sheet, LBR-MD 7003-1.
  Motion practice, LBR-MD 7007-1.
  Scheduling meeting, BankruptcyGuide 10.1 Appx.
  Scheduling memorandum, BankruptcyGuide 10.2 Appx.
Assignment of case numbers.
  Divisional offices, BankruptcyGuide 3.2.3 Appx.
Assignment of cases to division.
  Divisional offices, BankruptcyGuide 3.2.2 Appx.
Attorney for debtor-in-possession.
  Service required, LBR-MD 9007-1(b).
Attorneys at law.
  Admission to practice, BankruptcyGuide 3.8 Appx, LBR-MD 2090-1(a).
  Discipline and disbarment, LBR-MD 2090-2.
  Employment, BankruptcyGuide 8.1 Appx.
  Government representation, LBR-MD 2090-1(d).
  Pro hac vice appearance, LBR-MD 2090-1(b).
  Representing debtor, duties, services performed, LBR-MD 2090-1(c).
Automatic stay.
  Relief from stay, LBR-MD 4001-1.
    Contents of motion, BankruptcyGuide 6.3 Appx.
Bankruptcy administrator.
  Mailing address, street address and phone numbers, BankruptcyGuide 2.2 Appx.
Briefs and memoranda of law, LBR-MD 9013-2.
Broadcast of proceedings, LBR-MD 5073-1.
Chapter 7 cases.
  Amendment to lists and schedules, LBR-MD 1009-1(a).
  Attorneys.
    Employment, BankruptcyGuide 8.1.2 Appx.
  Exempt property claims, BankruptcyGuide 4.4 Appx.
  Fees.
    Application guidelines, BankruptcyGuide 9 Appx.

BANKRUPTCY COURT —Cont'd
Chapter 7 cases —Cont'd
  Fees —Cont'd
    Installment payments, LBR-MD 1006-1.
  Homestead exemption, LBR-MD 4003-1.
  Mailing list or matrix, LBR-MD 1007-2(a).
  Petitions.
    Number of copies for filing, LBR-MD 1002-1.
  Place of filing claim, LBR-MD 3002-1(b).
  Property exemptions, LBR-MD 4003-1.
  Service required on bankruptcy administrator, LBR-MD 9007-1(c).
  Tax authority actions.
    Relief from automatic stay, LBR-MD 4001-1.
Chapter 11 cases.
  Amendments to lists and schedules, LBR-MD 1009-1(a).
  Attorneys.
    Employment, BankruptcyGuide 8.1.1 Appx.
  Compensation of professionals.
    Quarterly fee applications, LBR-MD 2016-1.
  Debtor notification.
    Creditor of disputed, contingent or unliquidated claim, LBR-MD 3003-1(b).
  Election of trustee, LBR-MD 2007.1-1.
  Fees application guidelines, BankruptcyGuide 9 Appx.
  Mailing list or matrix, LBR-MD 1007-2(a).
  Period for filing, LBR-MD 3003-1(a).
  Petitions.
    Number of copies for filing, LBR-MD 1002-1.
  Place of filing claim, LBR-MD 3002-1(b).
  Service required on bankruptcy administrator, LBR-MD 9007-1(c).
  Small business cases.
    Disclosure, approval, LBR-MD 1020-1(b).
    Election to be considered, LBR-MD 1020-1(a).
Chapter 12 cases.
  Conversion of case.
    Disposition of funds, LBR-MD 1019-1(a).
  Mailing list or matrix, LBR-MD 1007-2(a).
  Petitions.
    Number of copies for filing, LBR-MD 1002-1.
  Place of filing claim, LBR-MD 3002-1.
  Service required on bankruptcy administrator, LBR-MD 9007-1(c).
Chapter 13 cases.
  Attorneys.
    Employment, BankruptcyGuide 8.1.2 Appx.
  Automatic stay.
    Relief from, LBR-MD 4001-1.
  Conversion of case.
    Disposition of funds, BankruptcyGuide 5.1 Appx, LBR-MD 1019-1(b).
  Dismissal.
    Disposition of funds on hand, BankruptcyGuide 5.1 Appx.
  Fees.
    Installment payments, LBR-MD 1006-1.
  Mailing list or matrix, LBR-MD 1007-2(b).
  Petitions.
    Number of copies for filing, LBR-MD 1002-1.
  Place of filing claim, LBR-MD 3002-1(a).
  Service required on bankruptcy administrator, LBR-MD 9007-1(c).
  Tax authority actions.
    Relief from automatic stay, LBR-MD 4001-1.
Claims.
  Electronic filing.
    Proofs of claim, transfer of claims, LBR-MD 3001-1.

BANKRUPTCY COURT —Cont'd
Claims —Cont'd
  Objections, LBR-MD 3007-1.
Clerk's office.
  Filing of papers, LBR-MD 5005-1.
  Mailing address, street address and phone numbers, BankruptcyGuide 2.1 Appx.
  Office hours, BankruptcyGuide 3.1 Appx.
Continuances, LBR-MD 5071-1.
Conversion of case.
  Disposition of funds, LBR-MD 1019.1.
Copying request, BankruptcyGuide 3.5 Appx.
Corporate disclosure, LBR-MD 5020-1.
Corporate resolution, LBR-MD 1007-1(a).
Courtrooms and creditors meeting rooms.
  Addresses for division, BankruptcyGuide 3.2.4 Appx.
Creditors.
  Notice and hearing, LBR-MD 2002-1(a).
Creditors meeting tapes.
  Availability for review, BankruptcyGuide 3.6 Appx.
Default, failure to prosecute, LBR-MD 7055-1.
Depositions and examinations, LBR-MD 2004-1.
Discipline and disbarment of attorneys, LBR-MD 2090-2.
Disclosure by nongovernmental corporate party, LBR-MD 5020-1.
Discovery in contested matters, LBR-MD 9014-1.
Dismissal of case.
  Disposition of funds, LBR-MD 1019.1.
Docket number, LBR-MD 9004-1.
Electronic case filing, LBR-MD 5005-4.
  Assignment to system, LBR-MD 5005-4(1).
  Calculation of response time, LBR-MD 5005-4(9).
  Court orders, LBR-MD 5005-4(4).
    Notice and service, LBR-MD 5005-4(10).
  Deadlines unchanged, LBR-MD 5005-4(3).
  Documents submitted for judge's signature, LBR-MD 5005-4(4).
  Effect of, LBR-MD 5005-4(3).
  Eligibility, LBR-MD 5005-4(2).
  Exhibits and attachments, LBR-MD 5005-4(5).
  Filing requirements, LBR-MD 5005-4(1).
  Original signatures, retention of documents in paper form, LBR-MD 5005-4(7).
  Passwords, LBR-MD 5005-4(2).
  Proofs of claims and transfers of claims, LBR-MD 3001-1.
  Public access to documents, LBR-MD 5005-4(12).
  Sealed documents, LBR-MD 5005-4(6).
  Service of documents electronically filed, LBR-MD 5005-4(9).
  Signatures, what constitutes, LBR-MD 5005-4(8).
  Technical difficulties, LBR-MD 5005-4(11).
  Termination of participation, LBR-MD 5005-4(2).
  Waiver of notice and service, LBR-MD 5005-4(2).
Employment of professionals, BankruptcyGuide 8 Appx.
Examination under Rule 2004.
  Motions, BankruptcyGuide 6.5 Appx.
    Service, LBR-MD 2004-1.
  Videotape for recording.
    Use, LBR-MD 2004-1.
Failure to prosecute, LBR-MD 7055-1.

BANKRUPTCY COURT —Cont'd
Fee schedules, BankruptcyGuide 3.9 Appx.
Filing fees.
  Installment payments, BankruptcyGuide 4.3 Appx, LBR-MD 1006-1.
Filing of documents.
  Divisional offices, BankruptcyGuide 3.2.1 Appx.
  Electronic case filing, LBR-MD 5005-4.
  With clerk's office, LBR-MD 5005-1.
Form requirements.
  Application, motions and claims, BankruptcyGuide 6.1 Appx.
Interested parties.
  Notice and hearing, LBR-MD 2002-1(a).
Internet site, BankruptcyGuide 3.4.3 Appx.
Joint administration.
  Consolidation of estates of spouses, LBR-MD 1015-1.
Jury trial, LBR-MD 9015-1.
Libraries.
  Exclusive use of judges and staff, BankruptcyGuide 3.7 Appx.
Lien.
  Motion to avoid lien, BankruptcyGuide 6.4 Appx.
Mailing list or matrix, LBR-MD 1007-2.
  Amendments to add new creditors, LBR-MD 1009-1(b).
  Matrix guidelines, BankruptcyGuide 4.1 Appx.
    Diskette, matrix submitted on, BankruptcyGuide 4.2 Appx.
Mediated settlement conference, LBR-MD 9019-2.
Motion practice, LBR-MD 9013-1.
  Adversary proceedings, LBR-MD 7007-1.
New creditors.
  Mailing list or matrix.
    Amendments to matrix to add new creditors, LBR-MD 1009-1(b).
Notice and service provisions, LBR-MD 9007-1.
Notice of filing to other courts, LBR-MD 2072-1.
Notice, shortening.
  Motion, LBR-MD 9006-1(a).
  Objections, LBR-MD 9006-1(c).
  Service of motion and order, LBR-MD 9006-1(b).
Objections to claims, LBR-MD 3007-1.
  Hearing, BankruptcyGuide 6.6 Appx.
Orders.
  Served by clerk, preparer's duties, LBR-MD 9022-1.
PACER system, BankruptcyGuide 3.4.2 Appx.
Parties.
  Designation of parties to provide notice, LBR-MD 9007-1(a).
Partnership petition.
  Evidence of general partners' consent, LBR-MD 1004-1.
Petitions.
  Generally, LBR-MD 1002-1.
  Number of copies for filing, LBR-MD 1002-1.
  Partnerships.
    Evidence of general partners' consent, LBR-MD 1004-1.
Pleadings and papers.
  Signatures, LBR-MD 9011-4.
  Stamped copies of claims, LBR-MD 3002-1(c).
  State bar code number, LBR-MD 9011-4(a).
  Typed or printed name of attorney or party, LBR-MD 9011-4(b).

BANKRUPTCY COURT —Cont'd
Proofs of claims.
  Electronic filing, LBR-MD 3001-1.
Pro se parties, LBR-MD 9011-2.
RACER, BankruptcyGuide 3.4.3 Appx.
Reaffirmation agreements, LBR-MD 4008-1.
Reference of case or proceeding.
  Withdrawal of request, LBR-MD 5011-1.
Reopening cases, LBR-MD 5010-1.
Schedule of creditors, LBR-MD 1007-1(b).
Service, BankruptcyGuide 5.2 Appx, LBR-MD 9007-1.
Shortened notice.
  Motion, LBR-MD 9006-1(a).
  Objections, LBR-MD 9006-1(c).
  Service of motion and order, LBR-MD 9006-1(b).
Small business.
  Chapter 11 reorganization, LBR-MD 1020-1.
Summary judgment, BankruptcyGuide 6.2 Appx, LBR-MD 7056-1.
Summons and process.
  General notice and service provisions, LBR-MD 9007-1.
Time periods, LBR-MD 9006-1.
Transfer of claims.
  Electronic filing, LBR-MD 3001-1.
Trustee for debtor-in-possession.
  Service required, LBR-MD 9007-1(b).
Video depositions, LBR-MD 2004-1(b).
Voice case information system (VCIS), BankruptcyGuide 3.4.1 Appx.
Voting on plans.
  Ballots, LBR-MD 3018-1.
Withdrawal of reference of case, LBR-MD 5011-1.
Witnesses.
  Questioning, BankruptcyGuide 7.2 Appx.

BIRTH DATES.
Pleadings.
  Excluding or redacting, LR-MD 7.1(b).

BONDS, SURETY, LR-MD 65.1.1.

BRIEFS.
Additional copies for court use, LR-MD 7.2(e).
Bankruptcy court, LBR-MD 9013-2.
Citation.
  Decision not appearing in published reports, LR-MD 7.1(e).
  Published decisions, LR-MD 7.2(b).
  Unpublished decisions, LR-MD 7.2(c).
Contents, LR-MD 7.2(a).
Copies for court use.
  Delivery within reasonable time, LR-MD 5.1.
Decision not appearing in published reports.
  Citation, LR-MD 7.1(e).
Form, LR-MD 7.1(a).
Motions.
  Discovery motions, LR-MD 7.3(j).
  Limitations on length of briefs, LR-MD 7.3(d).
  Movant's supporting documents and briefs, LR-MD 7.3(e).
  Reply brief, LR-MD 7.3(h).
  Response to motion and brief, LR-MD 7.3(f).
Published decision.
  Defined, citation, form, LR-MD 7.2(b).
Reply brief.
  Motion practice, LR-MD 7.3(h).
Summary judgment or other dispositive motions.
  Form of briefs.
    Claimant's motion, LR-MD 56.1(d).

BRIEFS —Cont'd
Summary judgment or other dispositive motions —Cont'd
  Form of briefs —Cont'd
    Defending party's motion, LR-MD 56.1(e).
    Motion by claimant, LR-MD 56.1(d).
  Limitations of length of briefs, LR-MD 56.1(c).
Unpublished decisions.
  Citation, form, LR-MD 7.2(c).

BROADCASTING PROCEEDINGS.
Bankruptcy court, LBR-MD 5073-1.
Judicial consent, LR-MD 83.7.

BURDEN OF PROOF.
Class actions, LR-MD 23.1(d).

C

CALENDAR AND STATUS CALLS.
Magistrate judges.
  Authority to conduct, LR-MD 72.1(b).

CASE MANAGEMENT TRACKS.
Assignment of case with initial pretrial order, LR-MD 26.1(a).

CIRCUIT COURT MEDIATION CONFERENCES, LR-MD 33.

CIVIL DOCKET COVER SHEET, LR-MD 3.1(a).

CIVIL RIGHTS ACTIONS.
Pro se prisoner complaints, LR-MD 7.1(f).

CLAIM OF UNCONSTITUTIONALITY.
Notification.
  Question drawing into question constitutionality, LR-MD 83.6(a).
Original and 2 copies.
  Documents in proceedings required to be heard by 3 judge courts, LR-MD 83.6(b).

CLASS ACTIONS, LR-MD 23.1.

CLERKS OF COURT.
Conduct of business, LR-MD 77.1.
Copies of court records, LR-MD 79.1(b).
Disciplinary proceedings.
  Duties of clerk, LR-MD 83.10l.
Filings relating to matters noticed for hearing.
  Clerk advised, LR-MD 5.3.
Judgments grantable by clerk, LR-MD 77.2.
Mediated settlement conferences.
  Selection of mediator by clerk, LR-MD 83.9d(b).
Orders grantable by clerk, LR-MD 77.2(a).
  Clerk's action reviewable, LR-MD 77.2(b).
Place for delivery of filed documents, LR-MD 77.1(a).
Release of information not part of public record, LR-MD 79.2.

CLOSING ARGUMENT, LR-MD 51.1(a).

COMMENCEMENT OF ACTIONS, LR-MD 3.1.

CONDUCT OF BUSINESS, LR-MD 77.1.

CONFIDENTIALITY OF INFORMATION.
Attorney disciplinary proceedings.
  Public record, LR-MD 83.10g(c).
Jurors.
  Names and addresses of prospective jurors, LCrR-MD 47.1(c).
    Criminal cases, LCrR-MD 24.1(c).

CONFIDENTIALITY OF INFORMATION —Cont'd
Release of information by court personnel, LR-MD 79.2.

CONSTITUTIONALITY OF ACT OR STATUTE QUESTIONED.
Notice, LR-MD 83.6(a).
Original and 3 copies.
  Documents filed in cases requiring 3 judge courts, LR-MD 83.6(b).

CONSTRUCTION OF RULES, LR-MD 1.1, 1.2.

CONTINUANCES.
Filing, LR-MD 6.1(b).
Trial date, LR-MD 40.1(b).

COPIES OF DOCUMENTS.
Constitutionality questioned.
  Documents filed in cases requiring 3 judge courts, LR-MD 83.6(b).
Court use.
  Delivery within reasonable time, LR-MD 5.1.
Official court records, LR-MD 79.1(b).

COSTS.
Bill of costs.
  Filing, LR-MD 54.1(a).
  Objections, LR-MD 54.1(b).
Jury costs.
  Settlement or disposition prior to trial, LR-MD 83.3.
Payment of costs, LR-MD 54.1(e).
Settlements, LR-MD 54.1(d), 83.3.
Taxable costs, LR-MD 54.1(c).
Taxation, LR-MD 54.1.

COUNTERCLAIMS.
Class actions, LR-MD 23.1(c).

COURT LIBRARIES, LR-MD 77.3.

COURT RECORDS.
Access, LR-MD 79.1(a).
Copies, LR-MD 79.1(b).
Release of information by court personnel.
  Information not part of public record, LR-MD 79.2.

COURT REPORTERS.
Duties and responsibilities, LR-MD 80.1.

COURTROOM SECURITY, LR-MD 83.8.

COVER SHEET.
Civil docket cover sheet, LR-MD 3.1(b).

CREDITORS.
Bankruptcy petitions.
  Amendments to list and schedules to add new creditors, LBR-MD 1009-1(b).
  Schedule of creditors, LBR-MD 1007-1(b).

CRIMINAL JUSTICE ACT.
Legal counsel for defendants, LCrR-MD 44.1.

CRIMINAL PROCEDURE.
Appeals.
  Extension of time to file notice of appeal.
    Motion to extend.
      Notice filed before or with motion, requirement, LCrR-MD 32.2.
Appearance.
  Misdemeanors.
    Payment of fixed sum in lieu of appearance, LCrR-MD 58.1.

CRIMINAL PROCEDURE —Cont'd
Criminal justice act, LCrR-MD 44.1.
Discovery motions, LCrR-MD 16.1.
Documents other than exhibits.
  Use at trial, LCrR-MD 26.1.
Extrajudicial statements by counsel, LCrR-MD 57.2.
Fair trial directives, LCrR-MD 57.2.
Jurors, LCrR-MD 24.1.
Jury instructions, LCrR-MD 30.1.
Local rules of civil practice.
  Incorporation of certain rules, LCrR-MD 57.1.
Misdemeanors.
  Payment of fixed sum in lieu of appearance, LCrR-MD 58.1.
Pretrial motions, LCrR-MD 12.1.
Pretrial publicity, LCrR-MD 57.2.
Probation officers.
  Sentencing recommendations, LCrR-MD 32.1.
Right to counsel, LCrR-MD 44.1.
Sanctions, LCrR-MD 57.3.
Speedy trial act, LCrR-MD 50.1.

CROSS-CLAIMS.
Class actions, LR-MD 23.1(c).

D

DEPOSITIONS.
Bankruptcy court.
  Video depositions, LBR-MD 2004-1(b).
Conducting, guidelines, LR-MD 30.1.
Discovery procedures.
  See DISCOVERY.
Material witnesses.
  Taking prior to trial, LR-MD 26.1(e).
Requests for more discovery.
  Exceptional good cause showing, LR-MD 26.1(g).

DIFFERENTIATED CASE MANAGEMENT.
Assignment of case with initial pretrial order, LR-MD 26.1(a).

DISCIPLINARY PROCEEDINGS.
Appointment of counsel, LR-MD 83.10k.
Bankruptcy court.
  Discipline and disbarment, LBR-MD 2090-2.
Certificate of disciplinary judgment or order.
  Clerk to obtain, LR-MD 83.10l(b).
Clerks of court.
  Duties of clerk, LR-MD 83.10l.
Complaints to counsel or to state bar.
  Referral of complaints, LR-MD 83.10f(a).
Consent to disbarment, LR-MD 83.10g(a).
  Another court or before a state bar, LR-MD 83.10d.
  Order, LR-MD 83.10g(b).
    Public record, LR-MD 83.10g(c).
Conviction of crime, LR-MD 83.10b.
  Obtaining certification of conviction.
    Duties of clerk, LR-MD 83.10l(a).
  Other than serious crime, LR-MD 83.10b(d).
  Serious crime, LR-MD 83.10b(b)(c).
  Suspension upon filing of judgment, LR-MD 83.10b(a).
    Reinstatement after suspension, LR-MD 83.10b(e).
Hearing, LR-MD 83.10f(d).
Imposition of discipline.
  Another court or state bar.
    Attorney's duty to inform clerk, LR-MD 83.10c(a).

DISCIPLINARY PROCEEDINGS —Cont'd
Imposition of discipline —Cont'd
  Another court or state bar —Cont'd
    Identical discipline, imposition, LR-MD 83.10c(c).
    Presumption misconduct established, LR-MD 83.10c(c).
    Show cause order, LR-MD 83.10c(b).
  Conviction of crime, LR-MD 83.10b.
  Enforcement options, LR-MD 83.10e(a).
Informing other jurisdictions.
  Clerk to inform, LR-MD 83.10l(c).
Initiation of formal proceedings, LR-MD 83.10f(c).
Jurisdiction, LR-MD 83.10m.
  Attorneys specially appearing, LR-MD 83.10i.
National discipline database.
  Clerk to inform, LR-MD 83.10l(d).
Purpose, LR-MD 83.10a.
Recommendation for disposition, LR-MD 83.10f(b).
Reinstatement after suspension.
  Automatic reinstatement, LR-MD 83.10h(a).
  Conviction of crime, LR-MD 83.10b(e).
  Hearing, LR-MD 83.10h(c).
  Order of reinstatement, LR-MD 83.10h(a)(e).
  Petition.
    Costs, LR-MD 83.10h(d).
    Procedure, LR-MD 83.10h(c).
    Successive petitions, LR-MD 83.10h(f).
    Time period for, LR-MD 83.10h(b).
    Waiting period, LR-MD 83.10h(b).
  Procedure, LR-MD 83.10h(c).
Resignation from bar.
  Another court or before state bar, LR-MD 83.10d.
Service of papers and other notices, LR-MD 83.10j.
Special appearances.
  Conference of disciplinary jurisdiction, LR-MD 83.10i.
Standards for conduct, LR-MD 83.10e(b).

DISCOVERY.
Bankruptcy cases.
  Contested matters, LBR-MD 9014-1.
Completion, LR-MD 26.1(c).
Conducting depositions.
  Guidelines, LR-MD 30.1.
Conference of attorneys.
  Motions and objections relating to, LR-MD 37.1(a).
    Expedited resolution of disputes, LR-MD 37.1(b).
Criminal cases.
  Discovery motions, LCrR-MD 16.1.
Differentiated case management, LR-MD 26.1(a).
Expedited resolution of disputes, LR-MD 37.1(b).
Extension.
  Discovery period or request for more discovery, LR-MD 26.1(d).
Filing of discovery papers, LR-MD 5.2.
Mediated settlement conferences, LR-MD 16.4(a).
Motions.
  Criminal cases, LCrR-MD 16.1.
Preservation and delivery of material taken or obtained, LR-MD 5.2.

DISCOVERY —Cont'd
Pretrial orders.
  Expert witnesses, LR-MD 16.1(e).
    Discovery.
      Pretrial orders, LR-MD 16.1(e).
  Joint rule 26(f) report, LR-MD 16.1(d).
    Form, LR-MD 16.2.
  Rule 26(f) report, LR-MD 16.3.
Procedures and materials, LR-MD 26.1(b).
Service of papers, LR-MD 26.1(b).
Telephone conference.
  Expedited resolution of disputes, LR-MD 37.1(b).
Trial preparation after close of discovery, LR-MD 26.1(e).

DISMISSAL OF ACTIONS.
Incompetent persons.
  Court hearing and approval, LR-MD 17.1(c).
Minors.
  Court hearing and approval, LR-MD 17.1(c).

DISPOSITION OF PRIVATE PROPERTY.
Determining ownership or directing disposition.
  Application for order, LR-MD 83.5(a).

DOCKET FEE, LR-MD 3(a).

DOCKETING STATEMENT, LR-MD 3(b).

E

ELECTRONIC FILING.
Service of electronically filed documents, LR-MD 5.4.

E-MAIL ADDRESS.
Stating in filed pleadings or papers, LR-MD 7.1(d).

EXHIBITS.
Documents other than exhibits.
  Use at trial.
    Criminal cases, LCrR-MD 26.1.
Pleadings and papers.
  Bulky or voluminous materials, LR-MD 7.1(e).
Return to counsel.
  Administrative proceedings, social security cases, LR-MD 79.3.

EXTENSION OF TIME.
Discovery period or request for more discovery, LR-MD 26.1(d).
Motion, LR-MD 6.1(a).
Notice of appeal in criminal case.
  Motion to extend time for filing.
    Notice filed before or with motion, requirement, LCrR-MD 32.2.
Pretrial motions in criminal cases, LCrR-MD 12.1(b).

EXTRADITION.
Magistrate judges.
  Authority to conduct proceedings, LR-MD 72.1(b).

EXTRAJUDICIAL STATEMENTS BY COUNSEL.
Criminal cases, LCrR-MD 57.2.

F

FAIR TRIAL DIRECTIVES.
Criminal cases, LCrR-MD 57.2.

FEES.
Bankruptcy petitions.
  Installment payments, LBR-MD 1006-1.
Filing and docket fee, LR-MD 3(a).

FILING FEE.
Notice of appeal, LR-MD 3(a).

FINANCIAL ACCOUNT NUMBERS.
Pleadings.
  Excluding or redacting, LR-MD 7.1(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW.
Copy for court use.
  Delivery within reasonable time, LR-MD 5.1.

FORMS.
Discovery.
  Pretrial orders.
    Joint rule 26(f) report, LR-MD 16.2.
    Rule 26(f) report, LR-MD 16.3.
Pretrial orders.
  Discovery.
    Joint rule 26(f) report, LR-MD 16.2.
    Rule 26(f) report, LR-MD 16.3.

G

GUARDIAN AD LITEM.
Minors and incompetent persons.
  Appointment, LR-MD 17.1(b).

H

HABEAS CORPUS.
Magistrate judges.
  Authority to issue, LR-MD 72.1(b).

HEADING FORMAT.
Documents filed, LR-MD 7.1(c).

HEADQUARTERS OF COURT, LR-MD 77.1(a).

I

IDENTIFICATION OF DOCUMENTS FILED, LR-MD 7.1(c).

INCOMPETENT PERSONS.
Capacity to sue or be sued, LR-MD 17.1(a).
Compromise settlement of claims.
  Consent judgments approving settlement, LR-MD 17.1(e).
Guardian ad litem.
  Appointment, LR-MD 17.1(b).
Payment of judgment, LR-MD 17.1(f).
Request for counsel and service fees, LR-MD 17.1(d).
Termination of actions.
  Court hearing and approval, LR-MD 17.1(c).

INJUNCTIONS, LR-MD 65.1.

INTERLOCUTORY APPEALS.
Designation of contents of record, LR-MD 79.3.

INTERROGATORIES.
Discovery procedures.
  See DISCOVERY.
Numbering, LR-MD 26.1(b).

INVESTMENTS.
Registry funds.
  Income-earning account, LR-MD 67.1(b).

J

JUDGMENTS AND DECREES.
Clerks of court.
  Orders and judgments grantable by clerk, LR-MD 77.2(a).
    Action reviewable, LR-MD 77.2(b).
Minors and incompetent persons.
  Compromise settlement of claims.
    Consent judgments approving settlement, LR-MD 17.1(e).
  Payment of judgment, LR-MD 17.1(f).

JURISDICTION.
Consent to jurisdiction, LR-MD 73.1.

JURORS, LR-MD 47.1.
Contact prohibition, LR-MD 47.1(b).
  Criminal cases, LCrR-MD 24.1(b).
Examination, LR-MD 47.1(a).
  Criminal cases, LCrR-MD 24.1(a).
Prospective jurors.
  Disclosure of names and addresses, LR-MD 47.1(c).
    Criminal cases, LCrR-MD 24.1(c).

JURY COSTS.
Settlement or disposition prior to jury trial.
  Assessment, LR-MD 83.3.

JURY INSTRUCTIONS.
Request for jury instructions.
  Delivery within reasonable time, LR-MD 5.1.
Written submission to court, LR-MD 51.1(b).
  Criminal case, LCrR-MD 30.1.

M

MAGISTRATE JUDGES.
Additional duties.
  Enumerated, authority to perform, LR-MD 72.1(b).
Assignment or referral of matters to, LR-MD 72.2.
Authority to exercise enumerated duties, LR-MD 72.1(a).
Consent to exercise of civil trial jurisdiction, LR-MD 73.1(a).
  Reference of case to magistrate, LR-MD 73.1(c).
  Withdrawal, LR-MD 73.1(b).
Special master in civil proceedings.
  Consent to designation, LR-MD 72.3(a).
  Reference of case to magistrate, LR-MD 72.3(b).
Stay of magistrate's order pending review, LR-MD 72.4.

MEDIATED SETTLEMENT CONFERENCES, LR-MD 16.4.
Attorneys at law.
  Duties of counsel, LR-MD 83.9e(d).
Automatic selection, LR-MD 83.9b(a).
Automatic selection by rules, LR-MD 16.4(b).
Bankruptcy court, LBR-MD 9019-2.
Completion of conference, LR-MD 83.9f.
Discovery period, LR-MD 16.4(a).
Discretionary judicial selection, LR-MD 83.9b(b).

MEDIATED SETTLEMENT CONFERENCES —Cont'd
Evaluation reports, LR-MD 83.9g.
Exemption from mediation, LR-MD 83.9b(d).
Exemption from requirement, LR-MD 16.4(c).
Mediators.
  Authority, LR-MD 83.9e(e).
  Certification, LR-MD 83.9c(a).
  Compensation, LR-MD 83.9c(b)(c).
  Copies of pleadings, LR-MD 83.9d(d).
  Disqualification, LR-MD 83.9d(c).
  Duties, LR-MD 83.9e(f).
    Completion of mediation, LR-MD 83.9f.
  Selection, LR-MD 83.9d(a).
  Submission of position papers, LR-MD 83.9e(c).
Modification of procedures.
  Agreement to modify, LR-MD 83.9e(g).
Parties.
  Duties of parties, LR-MD 83.9e(d).
Purpose, LR-MD 83.9a.
Sanctions.
  Failure to appear, LR-MD 83.9e(h).
Scheduling, LR-MD 83.9e(b).
Selection of cases, LR-MD 83.9b.
Stipulated selection by parties, LR-MD 83.9b(c).
Submission of position papers to mediator, LR-MD 83.9e(c).
Time period, LR-MD 83.9e(a).

MINORS.
Capacity to sue or be sued, LR-MD 17.1(a).
Compromise settlement of claims.
  Consent judgments approving settlement, LR-MD 17.1(e).
Guardian ad litem.
  Appointment, LR-MD 17.1(b).
Payment of judgment, LR-MD 17.1(f).
Request for counsel and service fees, LR-MD 17.1(d).
Termination of actions.
  Court hearing and approval, LR-MD 17.1(c).

MISDEMEANOR CASES.
Payment of fixed sum in lieu of appearance, LCrR-MD 58.1.

MOTIONS.
Attorneys' fees.
  Motion to award statutory fees, LR-MD 54.2.
Bankruptcy court.
  Motion practice, LBR-MD 9013-1.
    Adversary proceedings, LBR-MD 7007-1.
Bankruptcy practice.
  Motions for examination, LBR-MD 2004-1(a).
Briefs.
  Page length limitations, LR-MD 7.3(d).
Class actions.
  Motion for class action determination, LR-MD 23.1(b).
Content, LR-MD 7.3(b).
Continuances.
  Filing, LR-MD 6.1(b).
Criminal cases.
  Motions adopting other motions, LCrR-MD 12.1(c).
Decided on motion papers and briefs, LR-MD 7.3(c).
Discovery.
  Criminal cases, LCrR-MD 16.1.
Extension of time, LR-MD 6.1(a).

MOTIONS —Cont'd
Form, LR-MD 7.1(a), 7.3(a).
Oral argument, LR-MD 7.3(c).
Preliminary injunction, LR-MD 65.1.
Pretrial motions, LCrR-MD 12.1.
Reply brief, LR-MD 7.3(h).
Response to motion and brief, LR-MD 7.3(f).
Summary judgment or other dispositive motion, LR-MD 56.1.
Summons and process.
Failure to file and serve motion papers, LR-MD 7.3(k).
Supporting documents by movant, LR-MD 7.3(e).
Temporary restraining orders, LR-MD 65.1(a).

N

NAMES OF MINOR CHILDREN.
Pleadings.
Excluding or redacting, LR-MD 7.1(b).

NATURALIZATION.
Petitions for naturalization, LR-MD 77.1(c).

NOTICE.
Appeals.
Filing and docket fee, LR-MD 3(a).
Bankruptcy court.
General notice and service provisions, LBR-MD 9007-1.
Class actions, LR-MD 23.1(d).
Constitutionality of laws.
Claims of unconstitutionality, LR-MD 83.6(a).
Summary judgment motions, LR-MD 56.1(a).

O

OBJECTIONS.
Bill of costs, LR-MD 54.1(b).

OPENING ARGUMENT, LR-MD 51.1(a).

OPENING STATEMENTS, LR-MD 43.1(a), 51.1(a).

ORDERS.
Attorney disciplinary proceedings.
Order of disbarment, LR-MD 83.10g(b).
Reinstatement after suspension.
Order of reinstatement, LR-MD 83.10h(a)(e).
Show cause order, LR-MD 83.10c(b).
Clerks of court.
Orders and judgments grantable by clerk, LR-MD 77.2(a).
Action reviewable, LR-MD 77.2(b).

OWNERSHIP OF PRIVATE PROPERTY.
Determining ownership or directing disposition.
Application for order, LR-MD 83.5(a).

P

PARTIES.
Incompetent persons, LR-MD 17.1.
Mediated settlement conferences.
Duties of parties, LR-MD 83.9e(d).
Mental examination after close of discovery, LR-MD 26.1(h).
Minors, LR-MD 17.1.

PARTIES —Cont'd
Physical examination after close of discovery, LR-MD 26.1(h).
Sanctions.
Failure to comply with local rule, LR-MD 83.4.

PARTNERSHIPS.
Bankruptcy petition.
Evidence of general partners' consent, LBR-MD 1004-1.

PERSONAL DATA IDENTIFIERS.
Pleadings.
Excluding or redacting, LR-MD 7.1(b).

PETITIONS.
Attorney disciplinary proceedings.
Reinstatement after suspension, LR-MD 83.10h(b)(c)(f).
Bankruptcy practice, LBR-MD 1002-1, 1004-1.

PHOTOGRAPHS.
Trial proceedings.
Judicial consent, LR-MD 83.7.

PHYSICAL OR MENTAL EXAMINATION OF PARTY.
Prior to trial, LR-MD 26.1(e).

PLACE FOR DELIVERY OF FILED DOCUMENTS, LR-MD 77.1(a).

PLEADINGS AND PAPERS.
Bankruptcy court.
Lists and schedules.
Amendments, LBR-MD 1009-1.
Mailing list or matrix, LBR-MD 1007-2.
Class action complaint, LR-MD 23.1(a).
Exhibits.
Bulky or voluminous materials, LR-MD 7.1(e).
Extension of time for filing.
Criminal cases, LCrR-MD 12.1(b).
Motions.
Supporting documents and briefs, LR-MD 7.3(g).
Federal civil rights actions by state prisoners.
Pro se complaints, LR-MD 7.1(f).
Form requirements, LR-MD 7.1(a).
Handwritten papers, LR-MD 7.1(a).
Mediated settlement conferences.
Copies of pleadings to mediator, LR-MD 83.9d(d).
Submission of position papers to mediator, LR-MD 83.9e(c).
Personal data identifiers.
Excluding or redacting, LR-MD 7.1(b).
Telephone numbers and addresses, LR-MD 7.1(d).
Unconstitutionality of laws.
Claims of unconstitutionality.
Additional copies, LR-MD 83.6(b).

PRELIMINARY INJUNCTIONS, LR-MD 65.1.

PRESUMPTIONS.
Verdict.
Absence during return of verdict, LR-MD 43.1(c).

PRETRIAL CONFERENCES.
Initial pretrial proceedings, LR-MD 16.1.
Magistrate judges.
Authority to perform, LR-MD 72.1(b).
Mediated settlement conferences, LR-MD 16.4.
Parties, LR-MD 16.1(b).

PRETRIAL CONFERENCES —Cont'd
Scheduled initial pretrial conference, LR-MD 16.1(c).

PRETRIAL MOTIONS.
Criminal cases, LCrR-MD 12.1.

PRETRIAL ORDERS.
Differentiated case management, LR-MD 26.1(a).
Discovery.
Expert witnesses, LR-MD 16.1(e).
Requirement, LR-MD 16.1(a).

PRETRIAL PUBLICITY, LCrR-MD 57.2.

PRIVACY PROTECTION.
Personal data identifiers.
Pleadings filed with court.
Not including, partially redacting, LR-MD 7.1(a).

PRIVATE PROPERTY.
Determining ownership or directing disposition.
Application for order, LR-MD 83.5(a).
Sanctions, LR-MD 83.5(b).

PRODUCTION OF DOCUMENTS.
Discovery procedures.
See DISCOVERY.
Numbering requests, LR-MD 26.1(b).

PRO SE LITIGANTS.
Bankruptcy court, LBR-MD 9011-2.
Federal civil rights actions by state prisoners, LR-MD 7.1(f).
Pretrial orders.
Exception from requirement, LR-MD 16.1(a).
Questioning witnesses, LR-MD 83.2(b).
Settlement, LR-MD 83.3.

PUBLISHED DECISIONS.
Defined, citation, form, LR-MD 7.2(b).

R

RADIO.
Broadcasting trial proceedings.
Judicial consent, LR-MD 83.7.

RECORDING.
Trial proceedings.
Judicial consent, LR-MD 83.7.

RECORDS.
Access to court records, LR-MD 77.1(a).
Copies of court records, LR-MD 77.1(b).

REGISTRY FUNDS, LR-MD 67.1.
Magistrate judges.
Authority to issue orders of withdrawal, LR-MD 72.1(b).

RELEASE OF INFORMATION BY COURT PERSONNEL.
Information not part of public record, LR-MD 79.2.

REMOVAL OF ACTION FROM STATE COURT.
Copy of state court file filed with district court, LR-MD 3.1(b).

REQUESTS FOR ADMISSION.
Discovery procedure.
See DISCOVERY.

REQUESTS FOR ADMISSION —Cont'd
Numbering, LR-MD 26.1(b).

S

SANCTIONS.
Criminal cases, LCrR-MD 57.3.
Disposition of private property.
Failure to comply with rule, LR-MD 83.5(b).
Imposition against attorney or party.
Failure to comply with local rule, LR-MD 83.4(a).
Discretion of court, LR-MD 83.4(b).
Mediated settlement conferences.
Failure to appear, LR-MD 83.9e(h).

SCHEDULING.
Clerks of court, LR-MD 77.1(b).
Mediated settlement conferences, LR-MD 83.9e(b).

SCOPE OF RULES, LR-MD 1.1.

SECTION 1983 ACTIONS.
Pro se state prisoner complaints, LR-MD 7.1(f).

SENTENCING.
Probation officers.
Sentencing recommendations, LCrR-MD 32.1.

SERVICE OF PROCESS.
Bankruptcy court.
General notice and service provisions, LBR-MD 9007-1.
Discovery papers, LR-MD 26.1(b).
Electronically filed documents, LR-MD 5.4.

SETTLEMENT.
Attorneys or pro se litigants.
Notification requirements, LR-MD 83.3.
Mediated settlement conference, LR-MD 83.9a to 83.9g.
Minors and incompetent persons.
Compromise settlement of claims, LR-MD 17.1(e).
Taxation of costs.
Costs in settlements, LR-MD 54.1(d), 83.3.

SOCIAL SECURITY CASES.
Administrative records and transcripts.
Return to counsel, LR-MD 79.3.

SOCIAL SECURITY NUMBERS.
Pleadings.
Excluding or redacting, LR-MD 7.1(b).

SPECIAL APPEARANCE.
Attorney member of highest bar of state, LR-MD 83.1(d).

SPEEDY TRIAL ACT, LCrR-MD 50.1.

STANDARDS OF PROFESSIONAL CONDUCT.
Attorneys at law, LR-MD 83.10e(b).

STAYS.
Magistrate judges.
Application for stay of magistrate judge's order, LR-MD 72.3.

SUBPOENAS.
Magistrate judges.
Authority to issue, LR-MD 72.1(b).

SUMMARY JUDGMENT MOTION OR OTHER DISPOSITIVE MOTION.
Bankruptcy court.
  Summary judgment, LBR-MD 7056-1.
Filing, serving, time, LR-MD 56.1(b).
  Failure to timely file, LR-MD 56.1(g).
Notice of intent to file.
  Filing, service, LR-MD 56.1(a).
Supporting briefs.
  Filing, serving, time, LR-MD 56.1(b).
  Form requirements, LR-MD 56.1(d), (e).
  Length, limitations, LR-MD 56.1(c).
Trial date not delayed, LR-MD 56.1(f).

SUMMONS AND PROCESS.
Attorney disciplinary proceedings.
  Service of papers and other notices, LR-MD 83.10j.
Motions.
  Failure to file and serve motion papers, LR-MD 7.3(k).

SURETIES, LR-MD 65.1.1.

T

TELEPHONE NUMBERS.
Stating in filed pleadings or papers, LR-MD 7.1(d).

TELEVISION.
Broadcasting trial proceedings.
  Judicial consent, LR-MD 83.7.

TEMPORARY RESTRAINING ORDERS, LR-MD 65.1.

TRANSCRIPTS.
Administrative proceedings, social security cases.
  Return to counsel, LR-MD 79.3.

TRIAL DATE.
Continuance of trial, LR-MD 40.1(b).
Establishment, LR-MD 40.1(a).

TRIALS.
Broadcasting proceedings.
  Judicial consent, LR-MD 83.7.
Continuance, LR-MD 40.1(b).
Courtroom security, LR-MD 83.8.
Documents other than exhibits.
  Copy for use by judge, LR-MD 43.1(b).
  Criminal cases, LCrR-MD 26.1.
Examination of jurors, LR-MD 47.1(a).
Final pretrial preparation, LR-MD 40.1(c).
Jurisdiction.
  Consent to exercise, LR-MD 73.1(a).
  Discretionary reference to magistrate judge, LR-MD 73.1(c).
  Withdrawal of consent, LR-MD 73.1(b).

TRIALS —Cont'd
Jurors.
  Contact prohibition, LR-MD 47.1(b).
    Criminal cases, LCrR-MD 24.1(b).
  Examination, LR-MD 47.1(a).
    Criminal cases, LCrR-MD 24.1(a).
  Prospective jurors.
    Disclosure of names and addresses, LR-MD 47.1(c).
      Criminal cases, LCrR-MD 24.1(c).
  Voir dire, LR-MD 47.1(a).
Magistrate judges.
  Authority to conduct voir dire and select petit juries, LR-MD 72.1(b).
  Designation to conduct trials, LR-MD 72.1(a).
Opening statements, LR-MD 43.1(a).
Pretrial preparation, LR-MD 40.1(c).
Trial dates.
  Establishment, LR-MD 40.1(a).
  Summary judgment motions, LR-MD 56.1(f).
Verdict.
  Absence during return of verdict.
    Party or counsel, LR-MD 43.1.

U

UNDERTAKINGS, LR-MD 65.1.1.

UNPUBLISHED DECISIONS.
Citation, form, LR-MD 7.2(c).

V

VERDICT.
Trial.
  Absence during return of verdict, LR-MD 43.1(c).

VIDEO DEPOSITIONS.
Bankruptcy practice.
  Use for recording examinations, LBR-MD 2004-1(b).

W

WITHDRAWAL OF APPEARANCE BY ATTORNEY, LR-MD 83.1(e).

WITNESSES.
Cross-examination.
  Documents other than exhibits, LR-MD 43.1(b).
  Questioning by attorneys or pro se litigants, LR-MD 83.2(b).
Examination.
  Documents other than exhibits, LR-MD 43.1(b).
  How conducted by attorneys or pro se litigants, LR-MD 83.2.
  Questioning by attorney or pro se litigants, LR-MD 83.2(b).

RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Adopted effective January 1, 2008.

Part I. Local Rules Governing Civil Procedure

Rule
LR3.1. Filing fee, bond, security and prohibited sureties.
LR4.1. Service of the summons and complaint.
LR4.2. Publication of notice by the United States in Civil Forfeiture Actions.
LR5.2.1. Filing of papers, presenting judgments, orders, and communications to judge.
LR5.3. Service by electronic means.
LR6.1. Sealed filings and public access.
LR7.1. Motions in civil actions.
LR16.1. Pretrial conferences.
LR16.2. Mediation or alternative dispute resolution (ADR).
LR16.3. Rules applicable to mediation or alternative dispute resolution (ADR).
LR26.1. Commencement of discovery.
LR26.2. Discovery material not to be filed unless ordered or needed.
LR45.1. Production of subpoenaed material by certain non-parties.
LR47.1. Contact with jurors before trial and during voir dire.
LR54.1. Taxation of costs other than attorneys' fees.
LR67.1. Registry funds.
LR72.1. Authority of magistrate judges in civil matters.
LR73.1. Trial by consent before a United States Magistrate Judge.
LR77.1. Orders and judgments which the clerk of court may grant.
LR79.1. Custody and disposition of evidence, models, exhibits and depositions.
LR83.1. Attorney admission and eligibility.
LR83.2. No photographing, televising, or broadcasting of court proceedings.

Part II. Local Rules Governing Criminal Procedure

Rule
LCrR5.2. Filing of papers, presenting judgments, orders, and communications to judge.
LCrR5.3. Service of documents by electronic means.
LCrR11.1. Electronic recording of Rule 11 inquiry.
LCrR17.2. Subpoenas in criminal cases.
LCrR17.3. Applications for writs in criminal cases.
LCrR20.1. Consolidation and transfer of cases.
LCrR23.1. Fair trial and free press in criminal cases.
LCrR23.1. Fair trial and free press in criminal cases.
LCrR32.3. Disclosure of pre-sentence or probation records.
LCrR32.4. Assignment of authority to magistrate judges in criminal forfeiture cases and publication of notice in forfeiture cases.
LCrR44.1. Admission and appointment of counsel.
LCrR47.1. Motions practice in criminal cases.
LCrR55.1. Sealed records and public access.
LCrR57.1. Authority of magistrate judges in criminal matters.
LCrR58.1. Forfeiture of collateral security in lieu of appearance.
LCrR58.2. Procedures applicable to collateral forfeitures, petty offenses, and Class A misdemeanors.

Appendix of Forms

Appx.
A. Form for Certification and Report of Initial Attorneys' Conference.
B. Joint Stipulation of Magistrate Judge Consent Form.
C. Entities with a Direct Financial Interest in Litigation Form.
D. Administrative Procedures.

Index follows Rules.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF RULES) ORDER ADOPTING
OF PRACTICE AND) RULES OF PRACTICE
PROCEDURE IN THIS) AND PROCEDURE
THIS COURT)

For good cause appearing to the Court,

IT IS ORDERED that:

1. The following Local Rules of Practice and Procedure in the United States District Court for the Western District of North Carolina be and they are hereby adopted effective at 12:01 a.m. on the 1st day of January, 1999. At that time these local rules shall supersede all local rules theretofore in effect, as well as the Civil Justice Expense and Delay Reduction Plan adopted by this court on September 23, 1993, and shall apply to all pending cases, unless the Court finds that their application in a specific case would result in injustice or hardship.

2. These rules are adopted in compliance with and pursuant to the authority of Rule 83, Fed. R. Civ. P.; Rule 57, Fed. R. Crim. P.; and other federal rules and statutes providing for district court local rules. Those rules are adopted after having provided the public and the bar with an opportunity to comment.

3. These local rules supplement the Federal Rules of Civil Procedure as necessary in all civil suits in the United States District Courts for the Western District of North Carolina. Where applicable, these rules also supplement the Federal Rules of Criminal Procedure and Bankruptcy. In keeping with the spirit of the Federal Rules, these rules are designed, and will be construed and administered, to enhance speed and flexibility, control expense, and direct the efforts of all involved to the ends of justice.

4. The Clerk is directed to make appropriate arrangements to see that these rules are published promptly and that copies of the rules are made available for distribution to the bar and the public.

This, the 31st day of December, 1998.

Chief Judge
United States District Court

Judge
United States District Court

Judge
United States District Court

PART I. LOCAL RULES GOVERNING CIVIL PROCEDURE

Rule LR3.1. Filing fee, bond, security and prohibited sureties.

(A) *Filing fee and cost bond.* In every civil action commenced in or removed to this court, there shall be filed at the time of commencing or removal a filing fee in such amount as determined according to law. In a civil case commenced in this court, no bond, or cash deposit in lieu of such bond, as security for costs shall be required except on motion and for good cause shown.

(B) *Security.* In both civil and criminal actions, bonds shall be allowed and taken with security, or one or more securities, as provided by the federal statutes, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. The judges of this district may, for good cause, enter orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

(C) *Prohibited sureties.* Counsel of record, administrative officers or employees of this Court, or the United States Marshal and his deputies or assistants, shall not act as surety in any suit, action, or proceeding pending in this Court, except by leave of Court.

(D) *Payment of filing and other fees electronically.* Where the Federal Rules of Civil Procedure or the Local Rules of this Court require the payment of filing, admission, special admission, or other fees, such may be accomplished through secure electronic means as may be established by the Clerk of Court.

(E) *Fee refunds.* Fees paid to the Clerk of Court will only be refunded where the payment was made in error or upon Court Order.

(1) *Refunds by the Clerk of Court for erroneous payments.* When fees are accepted by the Clerk of Court in error, such may be refunded in the discretion of the Clerk of Court. Examples of payments in error are duplicate payments, payments to the wrong district, over payments, and payments made in error by attorneys through the Electronic Filing Payment System. To receive a refund from the Clerk of Court based on an erroneous payment, the payor must submit a written request to the Clerk of Court indicating the amount of payment,the case in which the payment was made, and the nature of the error. Once it has been determined through reconciliation that payment was made in error, the payment may be refunded at the discretion the Clerk of Court or his designee without a Court Order. Refunds of electronic payments will be credited electronically to the payor's credit card. No cash refunds will be made.

(2) *Refunds by court order.* Requests for refunds of payments which were not made in error by the payor will be referred to the presiding judge. Such refunds will only be made at the direction of the Court.

(3) *Refunds where payee has an outstanding balance.* The Clerk of Court will not refund payments made in error if it is determined that the payor owes any other debt to the Court.

(F) *Clerk of Court's responsibilities as to payments and refunds.*

(1) *Electronic payments.* As to electronic payments, in conducting Electronic Case Filing training, the Clerk of Court will train attorneys on the Electronic Payment System, including Court regulations governing the Electronic Payment System.

(2) *Conventional payments.* As to conventional payments that are received through the mail or by the Clerk of Court, every effort will be made by the Clerk of Court to confirm that each payment is proper before it is deposited and a receipt is issued. If a conventional payment is deposited and receipted in error, it will be refunded to the payor by a United States Treasury check, which will issue at the discretion of the Clerk of Court as explained in Subsection (E) of this Local Rule.

Editor's note. — For website, see **www.ncwd.uscourts.gov/.**

Rule LR4.1. Service of the summons and complaint.

Service of the summons and complaint by electronic means is not permitted for purposes of obtaining personal jurisdiction.

Rule LR4.2. Publication of notice by the United States in Civil Forfeiture Actions.

Unless otherwise required by statute, rule, or specific Order of this Court, in any civil judicial forfeiture case filed in this district, the government may satisfy its requirement of publication of notice by publishing once in a newspaper of general circulation. Publication in such manner shall be deemed to satisfy the publication requirements of 21 U.S.C. § 853(n)(1) and Rules C(4)and G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Rule LR5.2.1. Filing of papers, presenting judgments, orders, and communications to judge.

(A) *Electronic filing authorized.* The Court will accept for filing documents submitted, signed or verified by electronic means that comply with the Federal Rules of Civil Procedure, these Local Rules, and the "Administrative Procedures Governing Filing and Service by Electronic Means" (hereinafter "Administrative Procedures") adopted by this Court.

(B) *Mandatory electronic filing.* All documents submitted for filing in this district shall be filed electronically unless expressly exempted from electronic filing either by the Administrative Procedures or by the assigned judge.

(C) *Filing of papers.* All pleadings, motions, memoranda, orders, and judgments shall be filed electronically with the Court. In circumstances where conventional filing is permitted by the Administrative Procedures, all papers of every sort may be filed in Asheville, Charlotte, or Statesville, regardless of the division in which the case may be pending as may suit the convenience of counsel.

(D) *Motion for consolidation of cases.* A motion for consolidation shall be filed in only one of the related cases with a notice of the motion being filed in the proposed member case(s). Absent an Order to the contrary, after consolidation, all further proceedings will be docketed and filed in the designated lead case only.

(E) *Presenting judgments, orders, and other communications to judges.* As provided by the Administrative Procedures, parties may submit proposed orders, memoranda of decision, judgments, bills of costs, and other proposed documents for consideration and entry by the Court or the Clerk of Court electronically. Such proposed documents must be submitted through cyberclerk and may also be submitted as attachments to a motion, brief, or notice that relates to the proposed relief sought. In any event, such proposed documents must be served on all parties.

Rule LR5.3. Service by electronic means.

(A) *Service by electronic means for registered users after service of process.* Other than the document upon which an action is commenced, registered users may serve all papers through the Court's Electronic Case Filing ("ECF") system. Issuance of the "Notice of Electronic Filing" ("NEF"), which is automatically generated by the Court's electronic filing system, constitutes proof of service of the filed document upon all registered users unless the filing party learns that such attempted service was not successful. Administrative Procedures, Section II, B2 While the NEF constitutes proof of service, it is not a substitute for the Certificate of Service, which is still required as discussed below.

(B) *Conventional service of and by parties and attorneys exempt from electronic case filing.* Parties and attorneys who are not registered users must be served conventionally in accordance with the Federal Rules of Civil Procedure, the Local Rules, and this district's Administrative Procedures.

(C) *Certificate of service required.* A certificate of service must be included with all documents, including those filed electronically, indicating thereon that service was or will be accomplished through the Notice of Electronic Filing for parties and counsel who are registered users and indicating how service was or will be accomplished as to non-registered users.

Rule LR6.1. Sealed filings and public access.

(A) *Scope of rule.* This rule shall govern any request by a party to seal, or otherwise restrict public access to, any materials filed with the Court or utilized in connection with judicial decision-making. As used in this rule, "materials" shall include pleadings as well as documents of any nature and in any medium.

(B) *Filing under seal.* No materials may be filed under seal except by Order of the Court, pursuant to a statute, or in accordance with a previously entered Rule 26(e) Protective Order.

(C) *Motion to seal or otherwise restrict public access.* A request by a party to file materials under seal shall be made by formal motion pursuant to LCvR 7.1. Such motion shall be filed electronically under the designation "Motion to Seal." The motion or supporting brief shall set forth:

(1) a non-confidential description of the material sought to be sealed;

(2) a statement as to why sealing is necessary and why there are no alternatives to filing under seal;

(3) unless permanent sealing is sought, a statement as to the period of time the party seeks to have the material maintained under seal and as to how the matter is to be handled upon unsealing; and

(4) supporting statutes, case law or other authority.

(D) *Filing of an unredacted copy allowed.* If necessary, information deemed confidential by a party may be redacted from the filed motion or brief and an unredacted version submitted under seal for in *camera* review. Materials deemed confidential may be submitted under seal for in *camera* review via cyberclerk.

(E) *Public notice.* No motion to seal or otherwise restrict public access shall be determined without reasonable public notice. Notice shall be deemed reasonable where a motion is filed in accordance with the provisions of LCvR 6.1(C). Other parties, interveners, and non-parties may file objections and briefs in opposition or support of the motion within the time provided by LCvR 7.1and may move to intervene under Fed. R. Civ. P. 24.

(F) *Orders sealing documents.* Orders sealing or otherwise restricting access shall reflect consideration of the factors set forth in LCvR 6.1(C). In the discretion of the Court, such orders may be filed electronically or conventionally and may be redacted.

(G) *Filings subsequent to entry of an order sealing documents.* After an Order permitting the filing under seal has been entered, any materials filed pursuant to that Order shall be filed electronically with a non-confidential description of the materials filed.

(H) *Motions to unseal.* Nothing in this Local Rule shall limit the right of a party, intervenor, or non-party to file a motion to unseal material at any time.Such a motion to unseal shall include a statement of reasons why the material should be unsealed and any change in circumstances that would warrant unsealing.

(1) *Case closing.* Unless otherwise ordered by a Court, any case file or documents under Court seal that have not previously been unsealed by the Court shall be unsealed at the time of final disposition of the case.

(2) *Access to sealed documents.* Unless otherwise ordered by the Court, access to documents and cases under Court seal shall be provided by the Clerk of Court only pursuant to Court Order. Unless otherwise ordered by the court, the Clerk of Court shall make no copies of sealed cases files or documents.

(I) *Impact on designation of confidential materials.* Nothing in this Local Rule shall limit the ability of parties, by agreement, to restrict access to discovery or other materials not filed with the Court or to submit motions pursuant to Fed. R. Civ. P. for a Protective Order governing such materials.

Rule LR7.1. Motions in civil actions.

(A) *Motions in writing.* Unless made during a hearing or trial, all motions must be put in writing and filed as provided by LCvR 5.2(C) and shall state with particularity the grounds of the motions and shall set forth the relief or Order sought. Motions will ordinarily be ruled upon without oral argument, unless otherwise ordered by the Court.

(B) *Requirement of consultation.* Any motions other than for dismissal, summary judgment, or default judgment shall show that counsel have conferred or attempted to confer and have attempted in good faith to resolve areas of disagreement and set forth which issues remain unresolved. The requirement of consultation also applies to motions for extension of time and to motions for continuance of a trial or other proceeding. Consultation is not required where the moving party is represented and the non-moving party is unrepresented, or where the motion is for an extension of time to file a responsive pleading to a complaint, counterclaim, crossclaim, or any other initial petition for relief.

(C) *Requirement of briefs.* Briefs shall be filed contemporaneously with the motion, except no brief is required in support of timely motions for extension of time, continuances, admission pro hac vice, or early discovery. Exhibits in support of a brief shall be attached as appendices as specified in the Administrative Procedures. Factual contentions shall be supported as specifically as possible by citation to exhibit number and page.

(1) *Motions contained in initial responsive pleadings.* Motions to dismiss contained in answers to complaints, replies to counterclaims, or answers to crossclaims are considered by the Court to be preserved. A party wishing to have decided any preserved motion shall file a separate motion and supporting brief.

(2) *Motions not to be included in responsive briefs.* Motions shall not be included in responsive briefs. Each motion should be set forth as a separately filed pleading.

(3) *Exhibits shall be numbered and filed as a separate attachment.* All exhibits as well as all pages within an exhibit shall be numbered prior to filing. Exhibits previously filed shall not be re-filed by any party and may be incorporated into any

other pleading by specific reference to the docket entry, exhibit number, and page. Each exhibit shall be filed as a separate attachment to the pleading it supports.

(D) *Page limits, fonts, and spacing.* Page limits, font sizes, spacing, and other formatting requirements are governed by the Standing Civil Order of the judge to whom the case is assigned. *Standing Civil Orders* Absent such requirements in the Standing Civil Order of the judge to whom the case is assigned, the page limit for any brief is 25 pages, the font size is a minimum of 12 point, lines are double spaced, margins are one inch, and each page is numbered.

(E) *Time frames for the filing of responses to motions and for replies.* Responses to motions, if any, shall be filed within fourteen (14) days of the date on which the motion is served, as evidenced by the certificate of service attached to said motion. A reply to the response to a motion, if any, shall be filed within seven (7) days of the date on which the response is served, as evidenced by the certificate of service attached to said response. The filing of a reply brief is not mandatory. In any event, a reply brief should be limited to a discussion of matters newly raised in the response. If the party making the motion does not wish to file a reply brief, it must so inform the Court and opposing counsel promptly in an electronically filed notice.

(F) *Seeking a continuance.* Any motion seeking continuance of a hearing or trial shall be filed immediately upon counsel learning of the need for same.

(G) *Proposed orders.* Proposed orders must be submitted through cyberclerk and may also be submitted as attachments to a motion, brief, or notice that relates to the proposed relief sought. In any event, such proposed document must be served on all parties.

CASE NOTES

Defendant's Motion to Stay was treated as a timely response under pretrial order although it was late under the changed Local Rule 7.1 time for filing responses. Holz-Her U.S., Inc. v. Monarch Mach., Inc., 187 F.R.D. 238 (W.D.N.C. 1999).

Failure to Attempt Resolution. — Where defendants did not attempt to confer with plaintiff prior to filing the motion to compel, nor was any certification as to that requirement attached, the fact that defendants did not confer with opposing counsel and attempt to resolve this dispute before filing the motion to compel was sufficient reason to deny the motion. Ambu, Inc. v. Kohlbrat & Bunz Corp., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 241 (W.D.N.C. Jan. 6, 2000).

Applied in Angel Med. Ctr., Inc. v. Abernathy, 159 F. Supp. 2d 215, 2000 U.S. Dist. LEXIS 5109 (W.D.N.C. 2000), aff'd, 243 F.3d 535 (4th Cir. 2001); Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 2003 U.S. Dist. LEXIS 5895 (W.D.N.C. 2003); State v. Whiteley, 172 N.C. App. 772, 616 S.E.2d 576, 2005 N.C. App. LEXIS 1795 (2005).

Rule LR16.1. Pretrial conferences.

(A) *Initial Attorney's conference.* As soon as is practicable, and in any event not later than fourteen (14) days from joinder of the issues (as defined in Section (D) below), the parties or their counsel shall confer as provided by Fed. R. Civ. P. 26(f), and conduct an "Initial Attorney's Conference" ("IAC"). In addition, counsel shall also discuss at such conference consent to magistrate judge jurisdiction.

(B) *Deadline for filing the certification of initial attorney's conference.* Within five (5) days of the IAC, the parties shall complete and file the Certification of Initial Attorney's Conference ("CIAC"), which shall include a proposed discovery plan. The CIAC shall serve as a guideline for the Court in issuing a Scheduling Order as provided by Fed. R. Civ. P. 16(b). If the parties choose to stipulate out of, or object to, the mandatory initial disclosure procedure required by Fed. R. Civ. P. 26(a)(1), they must so indicate in the discovery plan.

(C) *Filing of joint stipulation of consent to magistrate jurisdiction.* Where all parties agree to magistrate judge jurisdiction, the Joint Stipulation of Consent to Exercise of Jurisdiction by a United States Magistrate Judge shall be filed simultaneously with either the CIAC as provided in Local Civil Rule 73.1(C), or within five (5) days of the Court's ruling on a motion to stay.

(D) *Joinder of the issues.* For the limited purpose of these Local Civil Rules, "joinder of the issues" occurs when the final answer to a complaint, third-party complaint, or crossclaim or the final reply to counterclaim has been filed, or the time for doing so has expired. Rule 12 motions contained in an Answer, but not supported by a brief, act as place holders and do not prevent joinder of the issues. Where Rule 12 motions are filed and briefed, issues will not join until such motions are resolved by the court, unless otherwise ordered by the Court.

(E) *Joinder of the issues and outstanding discovery in removed or transferred cases.*
(1) *Procedure where issues already joined.* In a removed or transferred case in which issues joined prior to removal or transfer, the parties shall conduct an Initial Attorneys Conference ("IAC") in this district and file the Certificate of Initial Attorneys Conference ("CIAC") within the time provided by Subsection (A), supra. The time for doing so shall be measured from the date the removed or transferred action is filed in this district.

(2) *Procedure where issues not previously joined.* Where issues did not join prior to removal or transfer, the provisions of Subsection (D), *supra*, apply. Outstanding discovery requests and any previously entered Scheduling Orders are null and void, with discovery not commencing or recommencing until such time as a new Scheduling Order is entered. The admissibility and use of evidentiary material produced prior to transfer or removal is not, however, diminished by this provision.

(F) *Early discover.* While the parties may engage in consensual discovery at any time, Court enforceable discovery does not commence until issues have joined and a Scheduling Order is entered. If a party believes that early court sanctioned discovery is warranted, such party may file a motion for leave to take early discovery therein showing good cause. No supporting memorandum of law is required for such a motion.

(G) *Initial Pretrial Conference ("IPC").* An Initial Pretrial Conference ("IPC") may be requested by the parties in the proposed discovery plan. Unless otherwise directed by a district judge, magistrate judges will preside over the IPc in all cases. Counsel for all parties must appear in person. Permission to appear by telephone will be determined by the judicial officer conducting the conference. Not later than 14 days after receipt of the proposed discovery plan, the court will set the date for the IPC unless the judicial officer conducting the conference deems otherwise appropriate.

Unless otherwise directed by a district judge, magistrate judges will issue the Scheduling Order in all cases and manage the pretrial activity of the case through direct involvement in the establishment, supervision and enforcement of the Scheduling Order and other applicable rules of procedure. Court-sanctioned discovery does not commence until issuance of the Scheduling Order.

Matters which may be considered during the IPC may include, but are not limited to the following: consent to magistrate judge jurisdiction; discovery guidelines and deadlines; Rule 26 disclosures; responses to interrogatories and requests for admission; maintenance of discovery material; video depositions; protective orders; motions deadlines; motions hearings; response to motions; trial subpoenas; counsel's duties prior to trial; trial date; proposed jury instructions; exhibits; mediation; and production of electronically stored information ("ESI").

Rule LR16.2. Mediation or alternative dispute resolution (ADR).

(A) *Mandatory mediated settlement conference.* All parties to civil actions are required to attend a Mediated Settlement Conference, unless otherwise ordered by the court. A mediated settlement conference is a pretrial, court-ordered (by local rule) conference of the parties to a civil action and their representatives conducted by a mediator. The procedure for the conference shall be as provided in Local Rule 16.3. A non-exclusive list of Court-approved mediators is maintained by the Court.

(B) *Cases not suitable for ADR.* These rules for mandatory ADR shall not apply to *habeas corpus* proceedings or other actions for extraordinary writs, appeals from rulings of administrative agencies, forfeitures of seized property, and bankruptcy appeals. The Judicial Officer may determine, either *sua sponte* or on application of any party, that any other case is not suitable for ADR, in which case no ADR procedure will be ordered.

Rule LR16.3. Rules applicable to mediation or alternative dispute resolution (ADR).

(A) *Time for proceeding.* The Court favors the use of alternative dispute resolution (ADR), ordinarily in the form of a mediated settlement conference, for the efficient and orderly resolution of civil cases. Accordingly, in the CIAC, the parties shall indicate their opinion(s) regarding the usefulness of ADR, the preferred method of ADR, and the most advantageous time at which to commence ADR. If the parties fail to submit, or are unable to agree on, a proposed method of ADR, a mediated settlement conference shall be selected as the default. The presiding magistrate judge or other judicial officer will in the Scheduling Order, or an Order for Alternative Dispute Resolution issued shortly thereafter, select the ADR method and order it to commence on a schedule after due consideration of the applicable responses given by counsel in the CIAC.

(B) *Rules for proceeding.* Upon entry of an Order for Alternative Dispute Resolution, the case shall proceed as follows:

(1) *Rules governing mediation.* If a mediated settlement conference is ordered, the conduct of the ADR proceeding shall be governed by the *Rules Governing Mediated Settlement Conferences in Superior Court Civil Actions* promulgated by the North Carolina Supreme Court pursuant to N.C. Gen. Stat. § 7A-38 (the "Mediation Rules"), and by the supplemental rules set forth herein.

(a) *Interpretation of state court terms.* Wherever the Mediation Rules refer to "Senior Resident Superior Court Judge" and "Administrative Office of the Court," it shall mean "Judicial Officer" and "Clerk of the United States District Court," respectively.

(b) *Appropriate facilities.* Rule 3(a) of the Mediation Rules is modified to permit the mediated settlement conference to be held in an appropriate facility anywhere as may be agreed to by the parties or allowed by the Court.

(2) *Rules governing alternative ADR proceeding.* If an Alternative ADR Procedure is ordered, the ADR proceeding shall be governed by these Rules and by such other procedural rules submitted by the parties and approved by the judicial officer. The rules submitted by the parties shall include, in addition to rules regarding the actual proceeding, provisions setting a deadline for completion of the proceeding; the location for the proceeding; preproceeding submissions; and the method for selection and compensation of a mediator, evaluator or other "neutral" to preside over the proceeding.

(3) *Impact on Federal Law.* Nothing in this Alternative Dispute Resolution Program shall be deemed to override the Federal Arbitration Act or any other provision of the United States Code.

(4) *Exceptions to rules.* The Judicial Officer may, either *sua sponte* or on motion of any party, permit exceptions or deviations from these rules.

(C) *Supplemental rules for mediated settlement conferences.* In addition to the Mediation Rules, the following rules shall also apply to mediated settlement conferences in the Western District:

(1) *No record made.* There shall be no record made of any proceedings under these rules.

(2) *Telephonic attendance.* All mediated settlement conferences shall be conducted in person, unless leave is otherwise granted by the mediator.

(3) *Mediator's report of outcome.* The mediator's report required by the Mediation Rules shall be issued within seven (7) days of the conclusion of the Mediated Settlement Conference. The mediator may submit his or her report on a report form provided by the Clerk of Court, or using his or her own letterhead or individually developed mediation report form. Such report may be filed by the mediator electronically or by conventional means.

(D) *Judicial settlement conference.*

(1) *Mandatory consideration.* The Judicial Officer to whom a case is assigned may, at any time, order the parties to participate in a settlement conference to be convened by the court. Any party may also request a judicial settlement conference.

(2) *Mandatory attendance by representatives with full authority to effect settlement.* A person with full authority to settle all pending claims must be present at the settlement conference and, for purposes of this rule, the "person with full authority to settle" shall not be the attorney. Such rule is not applicable to government attorneys and federal agency parties. Government attorneys are required to bring as much binding authority to settle as is feasible under the circumstances.

(3) *Presiding judicial officer.* Any Judicial Officer of the district other than the Judicial Officer to whom the case is assigned for disposition may preside over a judicial settlement conference convened by the court.

Rule LR26.1. Commencement of discovery.

Official Court-ordered and enforceable discovery does not commence until issuance of the Scheduling Order. While parties are encouraged to engage in consensual discovery before such period and up to trial, the Court will only enforce discovery that is conducted within the context of the Scheduling Order or where leave is granted in accordance with LCvR 16.1(f).

Rule LR26.2. Discovery material not to be filed unless ordered or needed.

The parties shall not file any initial disclosures, designations of expert witnesses and their reports, discovery requests or responses thereto, deposition transcripts, or other discovery material unless: (1) directed to do so by the Court; (2) such materials are necessary for use in an in-court proceeding; or (3) such materials are filed in support of, or in opposition to, a motion or petition.

Materials filed in support of, or in opposition to, a motion or petition shall be appropriately labeled as an "Appendix" or "Attachment" thereto and shall be limited to those portions of the material directly necessary to support the motion or petition. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk of Court as provided in the Administrative Procedures. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

Rule LR45.1. Production of subpoenaed material by certain non-parties.

(A) *Custodians of public records:* Where a subpoena commands any custodian of public records to appear for the sole purpose of producing certain records in their custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the court, by registered mail or personal delivery, certified copies of the records requested, on or before the date and time specified in the subpoena, together with a copy of the subpoena and an affidavit by the custodian as to the authentication of the record tendered or, if no such records are in their custody, an affidavit to that effect.

(B) *Custodians of medical records:* Where a subpoena commands the custodian of medical records to appear for the sole purpose of producing certain records in their custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the Clerk of court, by certified mail or by personal delivery, certified copies of the records requested, on or before the time specified in the subpoena, together with a copy of the subpoena and an affidavit by the custodian testifying to the identity and authenticity of the records, that they are true and correct copies, and as appropriate, that the records were made and kept in the regular course of business at or near the time of the acts, conditions, or events recorded, and that they were made by persons having knowledge of the information set forth; or if no such records are in their custody, an affidavit to that effect. When the copies of medical records are personally delivered, a receipt shall be obtained from the person receiving the records.

(C) *Admissibility and format.* Any original or certified copy of any public or medical records, or affidavit, delivered according to the provisions of this rule shall not be held inadmissible in any action or proceeding on the grounds that it lacks certification, identification, or authentication, and it shall be received as evidence if otherwise admissible. Any data that is maintained in electronic format should, if readily retrievable, be submitted in electronic format, preferably on a compact disc. Certification of copies of such electronically provided records may be accomplished by appropriate affidavit in the same manner as described in the preceding paragraphs.

(D) *Protection of privacy.* The copies of public or medical records so tendered shall not be open to inspection or copying by any persons, except the parties and their attorneys, unless and until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communications under law to be disclosed.

Unless the underlying subpoena for medical records is accompanied by a written consent of the patient, the materials submitted to the court in response thereto shall not be disclosed to anyone, including the parties and their attorneys, except upon judicial finding that disclosure is necessary to proper administration of justice.

(E) *Duties of the clerk of this court.* The Clerk of this court will sign or mark as "Received" a receipt if such is tendered by the subpoenaed party. The Clerk of Court has no duty to generate a receipt or mail a receipt back to the responding party unless a receipt and self addressed stamped envelope is provided. Upon presentation to the Court, the Clerk of Court shall stamp the first page or cover sheet of any such material as "Received", and place such materials in an official Court envelope or other container indicating that the materials are sealed. The Clerk of Court shall bring such filing to the Court's attention at an appropriate time in the proceedings.

Unless such materials are made part of the record, they shall be destroyed by the Clerk of Court within a reasonable time after the case is closed and appeals are exhausted. Originals may be returned to the custodian if arrangements are made with the Clerk of Court at the time of tender.

Rule LR47.1. Contact with jurors before trial and during voir dire.

(A) *Juror information.* When jurors for a term of Court are drawn, counsel of record shall be allowed to have a copy of the list of potential jurors. (The list of potential jurors shall not include the street address of any juror). If questionnaires are used, the responses to such questionnaires will also be made available to counsel. Depending on the needs of the case, such disclosure shall be made at a time deemed appropriate by the Court. *Pro se* parties may apply to the Court for similar pretrial access.

(B) *Pretrial contact with potential jurors prohibited.* No attorney or party to an action, or persons acting on their behalf, shall contact any potential juror, either directly or through any member of his or her immediate family, in an effort to secure information concerning his or her background.

(C) *Voir Dire.* Ordinarily, in the interest of time, the Court will conduct the examination of prospective jurors, but may permit counsel to do so. If the Court conducts the examination, counsel or *pro se* parties may suggest additional questions.

(D) *Contact with jurors during or after trial.* No attorney or party to an action, or persons acting on their behalf, shall personally or through their designees, directly or indirectly, interview, examine or question or communicate in any way with any juror, relative, friend, or associate thereof during the pendency of the trial, or with respect to the deliberations or verdict of the jury in any action, except on leave of the presiding judge upon good cause shown. Incidental contacts with jurors during the course of a trial, such as the exchange of pleasantries, are likely due to close confines of the courthouse and do not violate this rule. Contacts of substance, however, should be promptly reported by the attorney or *pro se* party to the presiding judge outside the hearing of the jury.

Rule LR54.1. Taxation of costs other than attorneys' fees.

(A) *Filing bill of costs.* A prevailing party may request the Clerk of Court to tax allowable costs, other than attorneys' fees, in a civil action as a part of a judgment or decree by electronically filing a bill of costs on a form available from the Clerk of Court, within thirty (30) days after:

(1) the expiration of time allowed for appeal of a final judgment or decree; or

(2) receipt by the Clerk of Court of the mandate or other Order terminating the action on appeal.

(B) *Electronic filing of the bill of costs.* The original of the bill of costs shall be filed electronically with the Clerk of Court, with copies served on adverse parties via NEF or mail as set forth in these Local Rules and by the Administrative Procedures.

(C) *Failure to file.* The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

(D) *Objections to bill of costs.* If an adverse party objects to the bill of costs or any item claimed by a prevailing party, that party may file an objection to the bill of costs with supporting brief within ten (10) days after the electronic filing of the bill of costs. Within five (5) days thereafter, the prevailing party may electronically file a response with brief to any filed objections. Unless a hearing is ordered by the Clerk of Court, a ruling will be made by the Clerk of Court on the record.

(E) *Objections to the ruling of the clerk of court.* A party may request review of the Clerk of Court's ruling by electronically filing a motion within five (5) days after the action of the Clerk of Court. The Court's review of the Clerk of Court's action will be made on the existing record unless otherwise ordered.

(F) *Taxable costs.* Items normally taxed include, without limitation:

(1) those items specifically listed on the bill of costs form. The costs incident to the taking of depositions (when allowable as necessarily obtained for use in the litigation) normally include only the reporter's attendance fee and charge for the original transcript of the deposition;

(2) premiums on required bonds;

(3) actual mileage, subsistence, and attendance allowances for necessary witnesses at actual cost, but not to exceed the applicable statutory rates, whether they reside in or out of this district; and

(4) one copy of the trial transcript for each party represented by separate counsel.

(G) *Non-Taxable costs.* Items normally not taxed include, without limitation:

(1) multiple copies of depositions;

(2) daily copy of trial transcripts, unless prior Court approval has been obtained; and

(3) copies of documents filed electronically.

(H) *Costs in settlement.* The Court will not tax costs in any action terminated by compromise or settlement. Settlement agreements must resolve any issue relating to costs. In the absence of specific agreement, each party will bear its own costs.

(I) *Payment of costs.* Costs are not to be paid to the Clerk of Court, but are to be paid directly to the party entitled to reimbursement.

Rule LR67.1. Registry funds.

(A) *Deposit with the treasury.* All registry funds less than $5,000.00 shall be placed in the Treasury of the United States where they earn no interest unlessotherwise specifically ordered by the Court.

(B) *Investment in income-earning account.* The Clerk of Court shall invest all registry funds in the amount of $5,000.00 or more in an income-earning account which will be the Court Registry Investment System.

(1) *Proposed order.* A person requesting disbursement must submit a proposed Order in accordance with LCvR 5.2(G) to disburse any registry funds, which must contain the following information:

(a) the amount to be disbursed;

(b) the name, address, and tax identification number of the designated beneficiary or beneficiaries; and

(c) such other information that may be deemed appropriate under the facts and circumstances of the particular case.

(2) *Service fee.* A service fee shall be charged by the Clerk of Court for the investment of registry funds.

(C) *Interest on registry funds — "Settlement funds".* Funds invested with the Court for the purpose of settlement are subject to additional rules under 26 U.S.C. § 468B. To comply with the requirements found in Section 468B, the proposed Order required above must also contain the following information:

(1) that the deposit is identified as a "settlement fund";

(2) that liability is resolved by the settlement agreement as described in 26 U.S.C. § 468B or 26 C.F.R. § 1.468B-1(c); and

(3) designation of a person outside the Court as the administrator responsible for obtaining the employer identification number for the fund, filing all fiduciary tax returns, and paying any tax.

Rule LR72.1. Authority of magistrate judges in civil matters.

(A) *Magistrate Judges are authorized and designated to exercise the following functions and duties regarding civil actions in the Western District:*

(1) to perform the duties prescribed in 28 U.S.C. § 636(a).

(2) to hear and decide non-dispositive procedural or discovery motions and other pretrial matters, as provided by 28 U.S.C. § 636(b)(1)(A).

(3) to hear any dispositive motions involving cases in which the parties have not consented to jurisdiction of the Magistrate Judge, and thereafter to submit to the District Court proposed findings of fact and recommendations for disposition of such motions, as provided by 28 U.S.C. § 636(b)(1)(B).

(4) to make a final determination upon any dispositive motion in a case wherein the parties have consented to the jurisdiction of the Magistrate Judge, subject to right of appeal to the United States Court of Appeals for the Fourth Circuit;

(5) to serve as a Special Master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53;

(6) upon the consent of all parties, to conduct jury *voir dire* in civil cases when designated by the District Court to do so on a case-by-case basis.

(7) to accept petit jury verdicts in civil cases in the absence of a district judge.

(8) upon the consent of all parties, to conduct the trial and order entry of judgment, as authorized by 28 U.S.C. § 636(c).

(9) to issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States Government pursuant to 28 U.S.C. § 636(b)(3);

(10) to conduct proceedings of the court under the Federal Debt Collection Procedures Act, consistent with the Constitution and the laws of the United States as authorized by 28 U.S.C. § 3008; and

(11) to perform any additional duties that are not inconsistent with the Constitution or the laws of the United States, as shall be assigned or delegated by the district court.

(B) *Standing orders of reference.* In addition to the above paragraph, a district judge may enter a Standing Order of Reference concerning the extent to which such judge's matters are referred to magistrate judges.

(C) *Objections and responses to a memorandum and recommendation.* Any objections to a Memorandum and Recommendation issued by a magistrate judge or responses to objections shall be filed within the time frames provided in 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b). An additional three (3) days shall be added to the prescribed periods for the filing of said objections or responses pursuant to Fed. R. Civ. P. 6(d).

Rule LR73.1. Trial by consent before a United States Magistrate Judge.

(A) *Initial assignment of cases.* All cases shall be initially assigned to a district judge.

(B) *Duties of the proponent of the litigation.* The plaintiff or the removing party in a removal action shall serve the Case Assignment Notice, the Notice of Availability of a Magistrate Judge to Exercise Jurisdiction, and the Joint Stipulation of Consent to Exercise of Jurisdiction by a United States Magistrate Judge form on all parties with the complaint or notice of removal.

(C) *Duty of all parties.* The parties or their counsel may consent to magistrate judge jurisdiction at any time. The parties or their counsel are **REQUIRED** to discuss the issue of consent to the jurisdiction of a magistrate judge as part of their Initial Attorney's Conference (Fed. R. Civ. P. 26(f) Conference) and certify such within the Certificate Of Initial Attorney's Conference ("CIAC"). If all parties consent, the executed Joint Stipulation of Consent to Exercise of Jurisdiction by a United States Magistrate Judge form shall be filed electronically. The completed form shall be returned as part of and by the deadline established for filing the completed CIAC. *See* LCvR 16.1(A).

(D) *Failure to file the joint stipulation.* Where the Joint Stipulation is not filed within the time provided, such failure shall be presumed to be a declination of consent and the parties need take no further action.

(E) *Consents after the deadline.* Where the parties wish to consent after such deadline, the presumption of declination may be overcome by the filing of the Joint Stipulation and approval of the reassignment by the district judge to whom the case was assigned.

(F) *Addition of parties.* When the initial parties to an action consent and additional parties are joined during the course of litigation, the plaintiff or removing party shall provide such parties with the documents specified in paragraph (B) above. The new party is to inform the Clerk of Court of his or her decision to consent or not to consent to the exercise of jurisdiction by a magistrate judge with the first responsive pleading. Such election shall be communicated to the Clerk of Court and not disclosed to the Court. For the purpose of this rule, any pleading filed by the new party, including a motion to dismiss, shall be deemed its first responsive pleading.

(G) *Cases transferred from another federal judicial district.* When a case is transferred into this district from another federal judicial district, the Clerk of Court shall send all parties the information required by this rule and establish an appropriate deadline for the completion and electronic filing of the consent of the newly added parties. The procedures specified in paragraphs (A) through (F) are, otherwise, applicable to cases transferred from another federal district.

Rule LR77.1. Orders and judgments which the clerk of court may grant.

Pursuant to the provisions of Fed. R. Civ. P. Rule 77(c), the Clerk of Court, or any authorized Deputy Clerk within the district, is authorized to grant and enter the following orders and judgments without further direction by the Court, although any such action may be suspended, altered or rescinded by the Court for good cause shown:

(1) orders directing inmates to file sworn statements showing exhaustion of all administrative remedies through the North Carolina Department of Correction pursuant to 42 U.S.C. § 1997(e);

(2) orders directing inmates and the correctional facility in which the inmate is housed to file a copy of the inmate's trust fund account statement (or institutional equivalent) pursuant to 28 U.S.C. § 1915; and

(3) orders waiving the filing fee or directing a partial filing fee be paid by the inmate pursuant to Section 804 of the Prison Litigation Reform Act of 1995. These orders may also include directing the correctional facility at which the inmate is incarcerated to deduct monthly payments from the inmate's trust fund account and forward said payment to the Clerk of Court.

Rule LR79.1. Custody and disposition of evidence, models, exhibits and depositions.

(A) *Custody with the clerk of court.* Unless otherwise directed by the Court, or except as provided in Section (B) of this rule, all trial exhibits admitted into evidence in criminal and civil actions shall be placed in the custody of the Clerk of Court.

(B) *Custody with the offering party.* All exhibits not suitable for filing and transmission to the court of appeals as a part of a record on appeal shall be retained in the custody of the party offering them, subject to the orders of the court. Such exhibits shall include, but not be limited to, the following types of bulky or sensitive exhibits: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit currency; biological hazards; and documents or physical exhibits of unusual bulk or weight.

At the conclusion of a trial or proceedings, the party offering such exhibits shall retain custody of them and be responsible to the court for preserving them in their condition as of the time admitted until any appeal is resolved or the time for appeal has expired. The party retaining custody shall make such exhibits available to opposing counsel for use in preparation of an appeal and be responsible for their safe transmission to the appellate court, if required.

(C) *Disposition of exhibits, sealed documents, and filed depositions by clerk of court.* Any exhibit, sealed document, or filed deposition in the clerk's of court's custody more than 30 days after (1) the time for appeal, if any, has expired or (2) an appeal has been decided and mandate received, may be returned to the parties or destroyed by the clerk of court. The unsealing of sealed documents is governed by LCvR 6.1.

(D) *Depositions.* Depositions read into the court record are considered exhibits for which the parties shall be responsible as provided in Section (B) above. Depositions on file admitted into evidence but not read into the record shall be retained in the clerk of court's custody and disposed of as authorized in Section (C) of this rule.

Rule LR83.1. Attorney admission and eligibility.

(A) *An ECF Account must be established prior to admission.* Any attorney moving for admission to this Court must establish an ECF account with the Clerk of Court prior to moving for admission. To establish an ECF account, anattorney must complete ECF training made available in this district or certify that they have completed training in another federal district.

In the event that establishment of an ECF account is not possible (i.e., time is of the essence for the admission for purposes of filing a time sensitive document), an attorney already admitted and who has an ECF account may instead aver that such attorney will accept electronic service on behalf of the attorney being admitted until the admitted attorney can establish an ECF account.

The judicial officer who is considering the admission may make such exceptions to this rule as he or she deems just and equitable.

(B) *ECF requirements where a party is represented by multiple attorneys.* Each attorney appearing of record in any matter must file an individual entry or notice of appearance using his or her ECF User ID issued upon the establishment of the ECF account. For example, where multiple attorneys, either in the same firm or different firms, represent a party in a case, each attorney must file an individual notice of appearance, using his or her own User ID in order to receive electronic notification of future filings. The electronic filing system does not "read" the names of the attorneys who sign a document, but only notes the appearance of attorney(s) whose ECF passwords are used to file the document.

(C) *Eligibility for regular admission.* Any lawyer who is a member in good standing of the North Carolina State Bar is eligible for admission to practice before this Court upon motion of a member of the Bar of this Court, which admission shall be granted as a matter of course upon payment of all admission fees and upon taking the prescribed oath.

Attorneys already admitted to the Bars of either the United States District Court for the Eastern District of North Carolina or the United States District Court for the Middle District of North Carolina may be admitted to the Bar of this Court upon tendering the application and fees required by this rule, together with a copy of the Order or Certificate of Admission admitting the attorney to practice in either of the aforementioned districts.

Counsel representing governmental or tribal agencies who are members in good standing of the Bar of a United States District Court, the Bar of the highest Court of any state, or the District of Columbia, are neither required to associate local counsel nor required to pay an attorney admission fee. By making an appearance, such attorney agrees to abide by the Local Rules, the North Carolina Rules of Professional Conduct, and to submit themselves to this Court for the enforcement of such rules.

(D) *Other types of admissions.* In addition to regular admission, an attorney may be admitted to practice before the Bar of this Court under the following types of admission:

(1) *Pro Hac vice admissions.* A pro hac vice admission is defined as an admission to the Bar of this Court in a particular case by an attorney who is a member in good standing of the Bar of a United States District Court, the Bar of the highest Court of any state, or the District of Columbia Bar. Such a candidate for admission must associate local counsel and be accompanied by local counsel at all hearings unless otherwise permitted by the Court.

(2) *Special admissions.* A special admission is defined as a conditional admission to the Bar of this Court in a particular case without association of local counsel.

(3) *Nunc Pro tunc admissions.* A *nunc pro tunc* admission is defined as retroactive admission to the Bar of this Court. A *nunc pro tunc* admission is normally allowed at the time of a hearing or trial on behalf of an attorney who failed to be admitted to this Bar by regular, special, or *pro hac vice* admission. *Nunc pro tunc* admission is only temporary admission and must be followed up by seeking admission in one or the manners set forth above.

(E) *Procedures and forms applicable to special, pro hac vice, and nunc pro tunc admissions.*

(1) Special, *pro hac vice*, and *nunc pro tunc* admissions are discretionary and additional requirements or expectations for such admissions may be found in the Standing Civil Order of the judge to whom the case is assigned.

(2) A motion seeking admission under this Rule shall be submitted to the Court upon the forms prescribed by this Court;

(a) the motion shall be filed electronically by local counsel who must be registered to file electronically;

(b) the motion shall include the e-mail address of the attorney seeking admission; and

(c) the motion shall be accompanied by a District Application Fee plus the National Admission Fee established by the Judicial Conference of the United States.

(3) Upon admission by the Court, the *pro hac vice* or special admission attorney will be added to the docket and will receive only electronic notices from the Clerk of Court.

(4) The Clerk of Court may permit the pre-admission filing of papers at the request of non-admitted counsel where justice requires; provided, however, the further participation of such counsel is subject to compliance with the admission practices of this Court.

(F) *Withdrawal of counsel.* In support of a motion, counsel seeking to withdraw shall electronically file written consent of their client to their withdrawal which shall become effective, however, only upon Court approval. Absent consent of the client, withdrawal may be obtained by electronically filing a motion to withdraw showing good cause for the withdrawal. This motion is to include the last known address of the client. Even in the absence of consent, withdrawal may still be allowed upon good cause shown.

(G) *Substitution of counsel.* Substitution of counsel is accomplished automatically when the new attorney files a "Notice of Substitution of Counsel," which automatically terminates previous counsel and substitutes the new attorney as counsel of record.

Rule LR83.2. No photographing, televising, or broadcasting of court proceedings.

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess, and the transmitting or sound recording of such proceedings for broadcasting by radio or television or any other media, shall not be permitted. However, proceedings that are designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the Court, presentation of portraits, naturalization ceremonies, and similar ceremonial occasions, may be photographed and/or broadcasted or televised from the courtroom, with the permission and under the supervision of the Court.

PART II. LOCAL RULES GOVERNING CRIMINAL PROCEDURE

Rule LCrR5.2. Filing of papers, presenting judgments, orders, and communications to judge.

(A) *Electronic filing authorized.* The Court will accept for filing documents submitted, signed or verified by electronic means that comply with the Federal Rules of Criminal Procedure, Local Rules, and the Administrative Procedures Governing Filing and Service by Electronic Means adopted by this Court (hereinafter "Administrative Procedures").

(B) *Mandatory electronic filing.* All documents submitted for filing in this district shall be filed electronically unless expressly exempted from electronic filing either by the Administrative Procedures or by the assigned judge.

(C) *Filing of papers.* All pleadings, motions, memoranda, orders, and judgments shall be filed electronically with the Court. In circumstances where conventional filing is permitted by the Administrative Procedures, all papers of every sort may be filed in Asheville, Charlotte, or Statesville regardless of the division in which the case may be pending as may suit the convenience of counsel.

(D) *Motion for consolidation of cases.* A motion for consolidation shall be filed in accordance with LCrR 20.1.

(E) *Filing of a redacted pleading is permitted to eliminate personal data identifiers.* In compliance with the Policy of the Judicial Conference of the United States and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper form, unless otherwise ordered by the Court:

(1) *Social Security Numbers.* If the individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.

(2) *Names of minor children.* If the involvement of a minor child must be mentioned in a pleading, only the initials of that child should be used.

(3) *Dates of birth.* If the individual's date of birth must be included in a pleading, only the year should be used.

(4) *Financial account numbers.* If financial account numbers are relevant and must be included in a pleading, only the last four digits of the financial account number should be used.

(5) *Other identifying information.* Counsel may also redact any other personal identifier information which they deem appropriate. This redacted document will be made available in electronic format to the public. A reference list containing the redacted personal information may be filed under seal.

The responsibility for redacting these personal identifiers rests solely with counsel and parties. The Clerk of Court will not review each pleading for compliance with this rule.

(F) *Filing of an unredacted pleading or other paper under seal permitted.* In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal.

(G) *Presenting judgments, orders, and other communications to judges.* As provided by the Administrative Procedures, parties may submit proposed orders, memoranda of decision, judgments, bills of costs, and other proposed documents for consideration and entry by the Court or the Clerk of Court electronically. Such proposed documents must be submitted through cyberclerk and may also be submitted as attachments to a motion, brief, or notice that relates to the proposed relief sought. In any event, such proposed document must be served on all parties as provided by Rule 5, Fed. R. Civ. P., unless an exception is provided by the Fed. R. Crim. P. for proceeding *ex parte*.

Rule LCrR5.3. Service of documents by electronic means.

(A) *Service by electronic means for registered users after service of process.* Other than the document upon which an action is commenced, registered users may serve all papers through the Court's Electronic Case Filing ("ECF") system. Issuance of the "Notice of Electronic Filing" ("NEF"), which is automatically generated by the Court's electronic filing system, constitutes proof of service of the filed document upon all registered users unless the filing party learns that such attempted service was not successful. Administrative Procedures, Section II, B2 While the NEF constitutes proof of service, it is not a substitute for the Certificate of Service, which is still required as discussed below.

(B) *Conventional service of and by parties and attorneys exempt from electronic case filing.* Parties and attorneys who are not registered users must be served conventionally in accordance with the Federal Rules of Civil procedure and the Federal Rules of Criminal Procedure, the Local Rules, and this district's Administrative Procedures.

(C) *Certificate of service required.* Unless an exception for proceeding *ex parte* is provided by the Federal Rules of Criminal Procedure, a certificate of service must be included with all documents, including those filed electronically, indicating thereon that service was or will be accomplished through the NEF for parties and counsel who are registered users and indicating how service was or will be accomplished as to non-registered users.

Rule LCrR11.1. Electronic recording of Rule 11 inquiry.

When an inquiry under Fed. R. Crim. P. 11 is conducted by a magistrate judge, the electronic recording of the proceeding shall constitute the *verbatim* record of the proceeding.

Rule LCrR17.2. Subpoenas in criminal cases.

Requests for subpoenas where defendant is unable to pay. All defense motions that seek service of subpoenas by the United States Marshal at government expense must be filed with the Court at least fourteen (14) days in advance of either the hearing date or the first day of the term of Court, whichever date is earlier, for which the witness's presence is being requested. Any subpoena request not made at least fourteen (14) days in advance of the applicable date may be denied as untimely. Upon a finding of good cause, however, a judicial officer may elect to honor an untimely subpoena request.

Rule LCrR17.3. Applications for writs in criminal cases.

Applications for issuance of writs of habeas corpus to be executed by the United States Marshal's Service. In order to ensure the prisoner's presence in the district at the requested time, applications for writs of *habeas corpus* (*ad prosecuendum* and/or *ad testificandum*) that are to be executed by the United States Marshal must be filed with the Court within the time frames provided below:

(i) if the prisoner is out-of-district, at least twenty-four (24) days in advance of the hearing date, or the first day of the term of Court, whichever date is earlier, for which the prisoner is needed;

(ii) if the prisoner is within the district, at least fourteen (14) days in advance of the hearing date, or the first day of the term of Court, whichever date is earlier, for which the prisoner is needed.

Any writ application not made within the time period prescribed herein may be denied as untimely. Upon a finding of good cause, however, a judicial officer may elect to honor an untimely writ application.

Rule LCrR20.1. Consolidation and transfer of cases.

Consolidation or transfer of related cases. If a related case is pending before another district judge, the government or defendant shall move for consolidation before or transfer to the judge assigned to the lowest case number and submit a proposed Order for the Court. The motion for consolidation or transfer may be filed in either of the cases with proper notice of the motion in the related case. Upon execution of the Order, the Clerk of Court shall re-assign the later case to the judge presiding on the lowest case number, unless otherwise set forth in the Order.

Rule LCrR23.1. Fair trial and free press in criminal cases.

It is the duty of the lawyer, in connection with pending or imminent criminal litigation with which he or she is associated, not to release or authorize the release of information or opinion for dissemination by any means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

Rule LCrR23.1. Fair trial and free press in criminal cases.

It is the duty of the lawyer, in connection with pending or imminent criminal litigation with which he or she is associated, not to release or authorize the release of information or opinion for dissemination by any means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

Rule LCrR32.3. Disclosure of pre-sentence or probation records.

The probation officer's sentencing recommendation is a confidential record and shall not be disclosed, except pursuant to an Order of the Court. No confidential records of this Court maintained by the probation office, including but not limited to the sentencing recommendation, shall be sought by an applicant except by written petition to this Court establishing with particularity the need for specific information in the records.

Rule LCrR32.4. Assignment of authority to magistrate judges in criminal forfeiture cases and publication of notice in forfeiture cases.

(A) *Magistrate judge's duties in criminal forfeiture cases.* In any case where a defendant pleads guilty and consents to forfeiture of property, a duly appointed magistrate judge is authorized to enter one or more orders and judgments of forfeiture in connection with the hearing under Fed. R. Crim. P. 11.

(1) *Findings of fact.* Based upon a stipulation of the parties or other proper showing, the magistrate judge may make any related finding of fact contemplated by Fed. R. Crim. P. 32.2, provided that the defendant consents to those findings.

(2) *Waiver of notice.* The notice required by Fed. R. Crim. P. 32.2 may be waived by defendant either through written consent contained in the plea agreement or through written consent of both defendant and defendant's counsel contained in a proposed Order and/or Judgment.

(3) *Ancillary proceedings.*

(a) Where a forfeiture consists of a money judgment or where no third party files a timely petition, the Order of Forfeiture may become final without conducting an ancillary proceeding to adjudicate third party interests.

(b) A magistrate judge shall not conduct an ancillary proceeding unless instructed by a district judge to do so.

(c) Where an ancillary proceeding is conducted by a magistrate judge, the Order and Judgment entered in connection with the Rule 11 proceeding is deemed to be a "Preliminary Order" for purposes of Rule 32.2(c) and may be amended, if necessary, by a further Order and Judgment of a district judge.

(B) *Publication of notice by the government.* Unless otherwise required by statute, rule, or specific Order of this Court, in any criminal judicial forfeiture case filed in this district, the government may satisfy its requirement of publication of notice by publishing once in a newspaper of general circulation. Publication in such manner shall be deemed to satisfy the publication requirements of 21 U.S.C. § 853(n)(1) and Rule C(4) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Rule LCrR44.1. Admission and appointment of counsel.

(A) *Civil local rules for admission are applicable to admission in criminal cases.* The admission and appearance of counsel are governed by LCvR 83.1. Such civil local rule is adopted herein as if fully set forth. Appointment of counsel is governed by Title 18 and the district's Criminal Justice Act Plan.

(B) *Additional considerations for representation in criminal proceedings.* The Sixth Amendment guarantees that each defendant in a criminal matter has the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. The

Court makes every effort to ensure that a defendant's right to counsel of his choice is protected. To that end, a defendant has the following choices in a criminal matter and may

(1) represent himself if he voluntarily elects to do so;

(2) request that the Court appoint counsel based upon a showing of indigency;

(3) hire an attorney who is a member of the Bar of the Western District of North Carolina; or

(4) hire an attorney who is not a member of the Bar of the Western District of North Carolina, but who meets at least one of the following criteria:

(a) is a member in good standing of the Bar of the Eastern District or Middle District of North Carolina;

(b) is a member in good standing of any state, district, or territorial Bar of the United States and is appearing with a member in good standing of the Bar of this Court, who moves on behalf of such out-of-state attorney admission *pro hac vice*, which motion is granted; or

(c) is a member in good standing of any state, district, or territorial Bar, and moves for and is granted "special admission" upon a showing of good and adequate cause.

"Special admission" (admission without association of local counsel) is conditional admission to the Bar, and shall not be granted absent a showing of good cause. The right to counsel includes the right to effective assistance of counsel; therefore, a request for special admission requires averment of familiarity with North Carolina trial practices as well as the Local Rules. Even when special admission is allowed in a criminal matter, the Court reserves the right to require specially admitted counsel to associate local counsel at any time.

Rule LCrR47.1. Motions practice in criminal cases.

(A) *Motions in writing.* Unless made during a hearing or trial, all motions must be made in writing, filed as provided by LCrR 5.2, and shall state with particularity the grounds of the motion and shall set forth the relief or Order sought. Unless otherwise ordered by the Court, motions will ordinarily be ruled upon without oral argument.

(B) *Certificate of conference with filing.* Pretrial motions, other than motions to suppress, ex parte motions, and notices (notice of substitution of counsel, notice of appearance, notice of intent to present certain types of evidence, etc.) shall include a certification that the moving party has conferred with opposing counsel and state opposing counsel's position on the relief sought, or an explanation as to why conferring should not be required under the circumstances. If a hearing on a motion is requested, counsel should estimate the length of such hearing.

(C) *Requirement of briefs.* Briefs shall be filed contemporaneously with any potentially dispositive pretrial or post-trial motion submitted in a criminal action. No brief is required in support of timely motions for extension of time, continuances, admissions *pro hac vice*, etc.

(D) *Response required by the government.* Unless otherwise directed by the Court, the government shall respond to all potentially dispositive defense motions filed in a criminal case. Examples of such motions include motions to suppress and motions to dismiss the indictment. Unless otherwise directed by the Court, the government is not required to respond to pro se motions filed by a criminal defendant who is still represented by counsel and who has not formally waived his or her right to counsel after appearing before a judicial officer and being fully advised of the consequences of waiver.

(E) *Motions deadline / time for filing response.* Motions practice,including deadlines for the filing of pretrial motions, and the time for filing responses and replies to motions, is governed by the practice of the presiding judge consistent with Federal Rules of Criminal Procedure 12 and 47. Unless otherwise directed by the Court, responses to motions, if any, shall be filed within seven (7) days of the date on which the motion is served, as evidenced by the certificate of service attached to said motion. Neither the motions deadlines set within an Arraignment Order, nor operative deadlines under this local rule, entitle any party to continuance of a trial date.

(F) *Calculation of deadlines.* Deadlines for filing and serving responses and replies (if allowed) are calculated consistent with Rule 45, Federal Rules of Criminal Procedure.

(G) *Proposed orders.* When a proposed Order is submitted, such proposed documents must be submitted through "Cyberclerk," but may also be submitted as attachments to a motion, brief, or notice that relates to the proposed relief sought. In any event, unless the motion is submitted *ex parte*, such proposed document must be served on all parties.

(H) *Pro se motions filed by criminal defendants who have not waived their right to counsel.* Except for challenges to the effective assistance of counsel, the Court will not ordinarily entertain a motion filed by a criminal defendant who is still represented by counsel and has not formally waived his or her right to counsel in the presence of a judicial officer after being fully advised of the consequences of waiver. Exceptions to this general rule may be made in the discretion of te judicial officer considering the *pro se* motion.

Rule LCrR55.1. Sealed records and public access.

(A) *Sealing criminal cases.* At the time of filing a complaint or information, or upon the return of an indictment, the government may move to seal such case by accompanying the charging document with an ex parte motion and proposed Order requesting that all or a portion of the documents in the criminal case be sealed. After review by the Court and consideration of alternatives to sealing, the Court may enter either its own Order or adopt a proposed Order submitted by the government if the facts shown justify sealing. The Clerk of Court shall seal the case or documents as specified in the Court's Order.

(B) *Unsealing criminal cases.* Unless a motion is made to keep any case or document(s) sealed and such motion is granted, the case or document(s) shall be unsealed as follows:

(1) where the case involves a single defendant, at the time of the defendant's initial appearance;

(2) where the case involves more than one defendant, at the time of the last defendant's initial appearance; or

(3) upon motion of the government to unseal.

(C) *Pending cases.* Upon motion of either party and notice as provided by law, the Court may enter an Order sealing a pending case or any portion thereof. After review by the Court and consideration of alternatives to sealing, the Court may enter either its own Order or adopt a proposed Order submitted by the government if the facts shown justify sealing. The sealing motion and proposed Order presented to the Court should specifically identify that portion of the record which is to be sealed, such as:

(1) the case file;

(2) the case docket;

(3) a specific pleading and/or its docket entry; or

(4) the identity of new defendants brought into the case.

Any documents sought to be filed under seal may be submitted to the Court for in camera review in person or *via* cyberclerk.

(D) *Documents.* Unless otherwise ordered by the Court, documents sealed by the Court or otherwise required to be sealed by statute shall be marked as such within the document caption and filed electronically. If the document is sealed pursuant to a prior Order of the Court, the pleading caption shall include a notation that the document is being filed under Court seal and include the Order's entry date. No document shall be designated by any party as "filed under seal" or "confidential" unless:

(1) the document has been sealed by prior Order of the Court;

(2) it is being filed in a case that the Court has ordered sealed; or

(3) it contains material that is the subject of a Protective Order entered by the Court.

(E) *Case closing.* After final disposition of any criminal case where the file or documents under Court seal have not previously been unsealed by Court Order, unless otherwise ordered by the Court, the filing party shall be responsible for filing a motion unsealing the matter with a proposed Order for the Court's execution.

(F) *Access to sealed documents.* Unless otherwise ordered by the Court, access to documents and cases under Court seal shall be provided by the Clerk of Court only pursuant to Court Order. Unless otherwise ordered by the Court, the Clerk of Court shall make no copies of sealed files or documents.

(G) *Arrest, search, and seizure warrants.* Any application for an arrest, search, or seizure warrant shall be sealed until all the warrants have been executed and returned to the Court. No motion to seal shall be required for such materials. The government, defendant, or interested nonparties may move to unseal prior to the execution or delivery of all warrants. The government may move to continue the seal after the execution of all warrants. After review by the Court and consideration of alternatives to sealing, the Court may enter either its own Order or adopt a proposed Order submitted by the government if the facts shown justify sealing.

(H) *Sentencing materials.* All portions of pleadings, motions and objections which incorporate or refer to a defendant's pre-sentence report shall, if filed, be filed under seal. (Objections to the pre-sentence report are not filed, but are submitted directly to the United States Probation Office.) No motion to seal shall be required for such materials. The defendant, government, and United States Probation Office shall be notified by the moving party of any motion to unseal pre-sentence materials, sentencing memoranda, pre-sentence report, or any related materials and given an opportunity to respond to such motion within the times set forth in Local Criminal Rule 12.5(E) before any such material is publicly disclosed.

(I) *Public notice.* The Clerk of Court shall provide public notice by docketing the motion in a way that discloses it as a motion to seal unless otherwise ordered by the Court consistent with this Rule and applicable law. Within the time allowed by the Court for the non-moving party to respond to the motion to seal, other parties and non-parties may submit memoranda in support of or in opposition to the motion, and may designate all or part of such memoranda as confidential. Any confidential memoranda will be treated as sealed pending the outcome of the ruling on the motion. Where the Court allows no response, such as where the motion to seal is consented to by all parties, interested non-parties may thereafter file a Motion to Unseal.

Rule LCrR57.1. Authority of magistrate judges in criminal matters.

(A) Magistrate judges are authorized and designated to exercise the following functions and duties in criminal actions:

(1) to perform the duties prescribed in 28 U.S.C. § 636(a).

(2) to try and sentence, if found guilty, persons charged with petty offenses and misdemeanors, and to direct the United States Probation Office to prepare a presentence report in any such case, as provided by 18 U.S.C. § 3401;

(3) to hear and decide non-dispositive procedural or discovery motions and other pretrial matters, as provided by 28 U.S.C. § 636(b)(1)(A).

(4) to hear any dispositive motions involving cases in which the parties have not consented to jurisdiction of the Magistrate Judge and thereafter to submit to the district court proposed findings of fact and recommendations for disposition of such motions, as provided by 28 U.S.C. § 636(b)(1)(B).

(5) to issue preliminary orders and conduct necessary evidentiary hearings or other appropriate proceedings in connection with cases filed pursuant to 28 U.S.C. § 2254 and § 2255, and to submit to the district court a report containing proposed findings of fact and recommendations for disposition of such cases (unless consent is obtained for final disposition).

(6) to accept returns of true bills of indictment from the grand jury.

(7) to issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States Government pursuant to 28 U.S.C. § 636(b)(3).

(8) to perform any additional duties that are not inconsistent with the Constitution or the laws of the United States, as shall be assigned or delegated by the district court; and

(9) to conduct, take, and accept pleas under Fed. R. Crim. P. 11.

Rule LCrR58.1. Forfeiture of collateral security in lieu of appearance.

Pursuant to Fed. R. Crim. P. 58 and 28 U.S.C. § 636(b)(3), and upon motion made by the government in the interest of justice, good Court administration, and sound law enforcement, the Unified Collateral Forfeiture Schedule implemented April 14, 2004, is hereby adopted and incorporated herein by reference as if fully set forth, as amended by the "2004 Supplement to the Unified Collateral Forfeiture Schedule." In accordance with Fed. R. Crim. P. 58, the Board of Judges may periodically supplement the Collateral Forfeiture Schedule by and through subsequent orders issued by a majority of the Board of Judges.

Editor's note. — The following Unified Collateral Forfeiture Schedule is printed herein exactly as it appears on the website for the United States District Court for the Western District of North Carolina.

Rule LCrR58.2. Procedures applicable to collateral forfeitures, petty offenses, and Class A misdemeanors.

(A) *Effect of payment of a collateral forfeiture.* The payment of a collateral in lieu of appearance is a "civil penalty," is not an admission of guilt, and shall not be deemed to be a "criminal conviction" for any purpose.

(B) *Procedures applicable to processing and trial of petty and Class A misdemeanor offenses.*

(1) *Scheduling of court days.* The Clerk of Court shall establish and calendar Court days for the hearing of petty and misdemeanor offenses at such times and places as the Clerk of Court deems necessary.

(2) *Attendance.* Persons charged, as well as the charging officer shall be present on scheduled Court days. Pretrial motions to continue shall be determined by the Clerk of Court or any judicial officer. Most cases will be resolved at the first Court day, and persons charged with offenses as well as charging officers should be prepared to dispose of their cases that day. Continuances upon good cause shown will be the exception, not the rule.

(3) *Charging instruments.* Decisions as to which charging instruments to issue, and the charging instruments on which to proceed, are within the sound discretion of the government as provided by Fed. R. Crim. P. 58(b)(1).

(a) *Initial charging instrument.* Any misdemeanor (Class A, Petty, or Infraction), may be commenced through the issuance of a violation notice.

(b) *Sending the violation to CVB.* In accordance with the rules promulgated by the Central Violations Bureau ("CVB"), any officer who issues a violation notice must mail the violation notice to the CVB within three (3) business days of issuance. Failure to do so may result in summary dismissal of the ticket, referral of the matter to the government, or further Court action.

(c) *Charging instrument sufficient for trial.* Trial of a petty offense or infraction may proceed on a violation notice. Fed. R. Crim. P. 58(b)(1). Trial of a Class A misdemeanor may proceed on an indictment, information, or complaint. *Id.* Where a Class A misdemeanor is initially charged by way of a violation notice, the government should be prepared by the first scheduled Court day to supersede the violation notice with an appropriate trial instrument or stipulate that it is only proceeding on the lesser included petty offense.

(4) *Plea Negotiations.* Plea negotiations are anticipated by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 11. A period of time will be set aside at the beginning of the Court day sufficient for each person charged or their attorney to discuss their charges with the government.

(5) *Collaterals on the day of court.* The government has, as a matter of law, full authority to dispose of any charge before trial in any manner the government deems appropriate. In recognition of this important duty, the government may, within the confines of plea negotiations, allow resolution of any violation notice by way of payment of a collateral forfeiture ("collateral"), may raise or lower a collateral (not to exceed the maximum possible fine), and may convert a mandatory appearance into a collateral up to and through the day of Court. Fed. R. Crim. P. 58(d)(1).

(6) *Calendar call.* After the government indicates that it has had sufficient time for plea negotiations, Court will commence.

(7) *Taking of pleas.* Where a charge is to be resolved through a plea of guilty, the Court will provide the person charged with a combined and brief initial appearance, an abbreviated Rule 11 proceeding, and a sentencing hearing.

(8) *Appointment of counsel.* The Court will consider the appointment of counsel in cases where the government indicates that there is a possibility of imprisonment. Persons desiring Court-appointed counsel should fill out an appropriate affidavit of indigency the day of Court. The Federal Defender may assist persons in making such requests and such requests may be tendered for approval before Court so that the Federal Defender may participate in the plea negotiation process.

(9) *Trials.* Where a person charged tenders a plea of not guilty, the Court will afford such person a bench trial. In Class A misdemeanors where a jury trial is requested or where the person charged does not consent to proceed before a magistrate judge, such charges will be transferred to a district judge. Once transferred to a district judge,

"Class A" misdemeanors will only be remanded to the magistrate judge where the district judge so directs.

(10) *Sentencing.* In the event a person is found guilty after either a plea or trial, the Court will proceed immediately to sentencing. In a Class B misdemeanor or infraction (also known as "petty offenses"), no pre-sentence report is required. In a Class A misdemeanor, a person charged may waive preparation of a pre-sentence report or the Court may direct the preparation of an abbreviated report.

(11) *Payment of fines.* Immediate payment of the fine and special assessment is required by way of mail payment. The Court does not accept cash payments. Where the Court allows deferred payment, defendant shall provide the Clerk of Court with his or her Social Security number, driver's license number, and phone number.

(12) *Failure to appear.* At the conclusion of all matters, the Court will determine who has failed to appear. Where a person fails to appear on an offense for which a collateral was issued, a warrant for arrest shall issue which shall allow either payment of twice the collateral in lieu of arrest or an arrest without bond. The United States Marshal is authorized to contact the government or a United States Magistrate Judge (or such judge's staff) for permission to accept a lesser amount as circumstances may warrant. Where a person fails to appear on an offense for which a mandatory appearance was issued, the Court shall issue a warrant for arrest.

(13) *Dismissal for insufficient address.* Where a person charged with an offense cannot be located and noticed to come to Court by the CVB based on the information provided by the charging officer, the Court will administratively dismiss such violation notice without prejudice. *See* U.S.M.J. Manual, CVB, at 4-5 (2003). The charging officer may, thereafter, issue a new violation notice to such person if further investigation provides the issuing officer with a better address. It is the responsibility of the charging officer to check with the CVB or the government, not the Clerk of Court, as to the status of any violation notice.

(14) *Non-current warrants.* Warrants that have not been served after eight (8) months shall be disposed of in a manner consistent with the rules, regulations, and standards set forth and promulgated by the CVB. Any such dismissal shall be without prejudice as to the charging agency or the government taking whatever action it deems appropriate in further prosecution of such alleged offenses.

(C) *Arrests.*

(1) *Field bonds.* Officers are authorized to issue unsecured "field bonds" on forms approved by the Court to assure the appearance of any person. Unsecured Field Bond Form Such forms may be utilized where the accused is not a danger to himself and/or the community and has no known history of failure to appear. If the person arrested qualifies for a field bond, the officer shall advise the arrestee of the right to be taken before a judicial officer within a reasonable time and that by signing a field bond, the arrestee waives that right.

(2) *Appearance before a judicial officer.* Unless a field bond is used, an arrested person shall be promptly brought before a United States Magistrate Judge or, in the event a federal magistrate judge is not reasonably available, before a state judicial officer as authorized by 18 U.S.C. § 3041. The arresting officer shall use best efforts to contact the Clerk of Court and advise the Court of such arrest prior to arriving at the courthouse.

(3) *Custody.* The United States Marshal only takes custody of a defendant who is arrested by another agency after a federal magistrate judge has found that there was probable cause for the arrest. *See* 28 C.F.R. ¶ 0.111(k). Where an officer houses a defendant in a facility overnight, it is the duty of the arresting officer to secure the defendant from the local jail facility and promptly take such person before a federal magistrate judge for an initial appearance. *See* Fed. R. Crim. P. 5(a). The arresting officer shall use best efforts to contact the Clerk of Court and advise the Court of such arrest prior to arriving at the courthouse.

Editor's note. — The following Unified Collateral Forfeiture Schedule is printed herein exactly as it appears on the website for the United States District Court for the Western District of North Carolina.

APPENDIX OF FORMS

Appendix A. Form for Certification and Report of Initial Attorneys' Conference.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
__________ DIVISION
CIVIL NO.

______________________)
______________________)
______________________)
______________________)
______________________)
______________________)
Plaintiff[s],)
)
vs.) **CERTIFICATION AND REPORT OF F.R.C.P. 26(f) CONFERENCE AND DISCOVERY PLAN**
)
)
)
______________________)
______________________)
______________________)
______________________)
______________________)
______________________)
Defendant[s].)
______________________)

Please fill in or check the appropriate blanks (print legibly) to certify completion of the Rule 26(f) Attorney's Conference and provide the required information to the Court. Where the parties were unable to agree on a specific provision or item, please so note and attach any necessary explanation. Please note that this information will be used as a guideline by the judge conducting the Initial Pretrial Conference or issuing the Initial Pretrial Order.

1. Certification of Conference. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on __________ *(date)* [ ] at ______________ *(place)* or [ ] by telephone and was conducted by the undersigned counsel for the designated parties in the above-captioned case.

2. Pre-Discovery Disclosures. The information required by Fed. R. Civ. P. 26(a)(1) *(check one)* [ ] has been exchanged [ ] will be exchanged by __________ *(date)*.

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [*Use separate paragraphs or subparagraphs as necessary if parties disagree*.]

a) All discovery shall be commenced in time to be completed by __________ *(date.*

[*if needed*] Discovery on

____

____

______________________________ *(identify any issues requiring early discovery)* will be completed by __________ *(date)*.

b) Discovery Limits:

1) Maximum of ______ *(ordinarily 20)* interrogatories by each party to any other party.

2) Maximum of ______ *(ordinarily 20)* requests for admission by each party to any other party.

3) Maximum of ______ depositions by plaintiff(s) and ______ by defendant(s) *(ordinarily 6 each)* [or ______ by *each* plaintiff and ______ by *each* defendant].

c) Reports from retained experts under Rule 26(a)(2) will be due:
-from plaintiff(s) by ______________ *(date)*
-from defendant(s) by ______________ *(date)*
Supplementations under Rule 26(e) due ____________ *(list time(s) or interval(s))*

4. Other Items. [*Attach separate paragraphs as necessary if parties disagree.*]

a) The parties [ ] request [ ] do not request a conference with the court before entry of the scheduling order.

b) All potentially dispositive motions should be filed by ____________ *(date, ordinarily one month after the close of discovery)*

c) Settlement:
[ ] is likely
[ ] is unlikely
[ ] cannot be evaluated prior to ____________ *(date)*
[ ] may be enhanced by use of the following ADR procedure:
  [ ] Mediated Settlement Conference
  [ ] binding arbitration
  [ ] judicial settlement conference
  [ ] other ____________________

The parties agree that the above selected ADR procedure would be most useful if conducted:
[ ] after resolution of any outstanding dispositive motions, but prior to further discovery;
[ ] after an initial round of preliminary discovery to be completed by ____________ *(date)*;
[ ] after the completion of discovery;
[ ] after resolution of summary judgment motions, if any
[ ] not applicable.

d) Final lists of witnesses and exhibits under Rule 26(a)(3) are due:

from plaintiff(s) by ____________ *(date)*
from defendant(s) by ____________ *(date)*

e) If the case is ultimately tried, trial is expected to take approximately ______ days.

f) [ ] The parties have discussed the issue of consent to the jurisdiction of a U.S.magistrate judge.

5. Please identify any other matters regarding discovery or case management which may require the Court's attention (e.g., concerns re: confidentiality, protective orders, etc., unmovable scheduling conflicts)

____
____
____
____
____
____
____

______________________________ ______________________________
Plaintiff's Counsel *Party* *Date* *Defendant's Counsel* *Party* *Date*

______________________________ ______________________________
Plaintiff's Counsel *Party* *Date* *Defendant's Counsel* *Party* *Date*

Plaintiff's Counsel	*Party*	*Date*	*Defendant's Counsel*	*Party*	*Date*
Plaintiff's Counsel	*Party*	*Date*	*Defendant's Counsel*	*Party*	*Date*
Plaintiff's Counsel	*Party*	*Date*	*Defendant's Counsel*	*Party*	*Date*

(attach additional sheets if necessary)

Appendix B. Joint Stipulation of Magistrate Judge Consent Form.

Notice of Availability of Magistrate Judge to Exercise Jurisdiction

(Form 33 Notice)

In accordance with the provisions of Title 28, United States Code, Section 636(c), you are hereby notified that a United States magistrate judge of this District Court is available to exercise the Court's jurisdiction and to conduct any or all proceedings in this case including a jury or nonjury trial, and entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted ***only if all parties voluntarily consent***.

You may, without adverse substantive consequences, withhold your consent. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned. Failure to file the Joint Stipulation of Consent constitutes the withholding of consent, no declination of consent is to be filed.

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States Court of Appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court.

Consent to the jurisdiction of a magistrate judge is exercised in this district by the filing of a ***Joint Stipulation of Consent*** which is to be executed by the parties any time after service of this Notice but not later than immediately after the Initial Attorney's Conference. To withhold consent to the jurisdiction of a magistrate judge the parties are **NOT** to file anything; the case will remain with the Article III judge already assigned to the case. Parties are reminded that each Article III judge may and regularly do refer civil matters to the magistrate judges in this district in accordance with their own Order of Reference. Orders of Reference for each Article III judge are available on the court's web site at www.ncwd.uscourts.gov.

Local Rule 16.1 (A) requires that "as soon as practicable, and in any event not later than fourteen (14) days from joinder of the issues the parties or their counsel shall confer as provided by Fed. R. Civ. P. 26(f), and conduct an "Initial Attorney's Conference." The parties are directed to discuss the issue of consent to the jurisdiction of a magistrate judge at this conference, and if ***ALL*** parties agree, execute a ***Joint Stipulation of Consent*** and file this stipulation with the Certification and Report of Initial Attorneys Conference as required by the above local rule.

Local Rule 16.1(8) defines joinder of issues for the limited purpose of the local rules as occurring "when the last responsive pleading other than a Motion to Dismiss is filed. Where a briefed Motion to Dismiss is filed, either as a separate pleading or is included in the Answer and accompanied by a brief, joinder of the issues does not occur until that motion is resolved and the Answer to the Complaint, Reply to a Counterclaim, or Answer to a Cross claim is filed. Motions to dismiss contained in an Answer, but not supported by a brief, simply preserve the motion and do not prevent joinder of the issues."

Joint Stipulation of Consent to Exercise of Jurisdiction by a United States Magistrate Judge

(Form 34 Consent Form)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

Plaintiff,
vs. Case Number:
Defendant

In accordance with the provisions of Title 28, United States Code, Section 636(c) and Fed. R. Civ. P. 73, the parties in this case consent to have a United States magistrate judge conduct any and all proceedings in the case, including the trial, order the entry of a final judgment and conduct all post-judgment proceedings.

Counsel's Signature	Party	Date
Counsel's Signature	Party	Date
Counsel's Signature	Party	Date
Counsel's Signature	Party	Date
Counsel's Signature	Party	Date

Note: Return this form to the Clerk of the Court *ONLY* if all parties have consented on this form to the exercise of jurisdiction by a United States magistrate judge.

Appendix C. Entities with a Direct Financial Interest in Litigation Form.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

)
)
Plaintiff(s),)
)
vs.) Case No.
)
)
Defendant(s).)
____)

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST INLITIGATION

ONLY ONE FORM NEED BE COMPLETED FOR EACH NONGOVERNMENTAL PARTY EVEN IF THE PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUAL NONGOVERNMENTAL PARTIES AS WELL AS NONGOVERNMENTAL CORPORATE PARTIES. COUNSEL HAVE A CONTINUING DUTY TO UPDATE THIS INFORMATION. PLEASE FILE AN ORIGINAL AND ONE COPY OF THIS FORM. PLAINTIFF OR MOVING PARTY MUST SERVE THIS ON THE DEFENDANT(S) OR RESPONDENT(S) WHEN INITIAL SERVICE IS MADE.

________________________ who is ________________________
(Name of party.) (Plaintiff/moving party or defendant)
makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

( ) Yes ( ) No

2. Does party have any parent corporations?

( ) Yes ( ) No

If yes, identify all parent corporations, including grandparent and great grandparent corporations: ________________________
____
____

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity?

( ) Yes ( ) No

If yes, identify all such owners: ________________________
____
____
____

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?

( ) Yes ( ) No

If yes, identify entity and nature of interest: ________________________
____

________________________ ________________________
(Signature) (Date)

Appendix D. Administrative Procedures.

ADMINISTRATIVE PROCEDURES GOVERNING FILING AND SERVICE BY ELECTRONIC MEANS

I. THE ELECTRONIC FILING SYSTEM

A. In General Unless otherwise permitted by these administrative procedures or unless otherwise authorized by the assigned judge, all documents submitted for filing in this district after **January 1, 2006**, nomatter when a case was originally filed, shall be filed electronically using the Electronic Filing System ("System").

1. Parties proceeding pro se shall not file electronically.
2. The filing of Social Security cases shall be subject to the limitations imposed in Section VI of these procedures.
3. Juvenile criminal matters shall not be filed electronically unless, after hearing the Court rules that the juvenile shall be tried as an adult.
4. For good cause shown, an attorney may apply to the assigned judge for permission to file documents conventionally. Such permission, if granted, will be granted only with respect to a particular case. Even if the assigned judge initially grants an attorney permission to file documents conventionally, however, the assigned judge may withdraw that permission at any time during the pendency of a case and require the attorney to file documents electronically using the System.
5. The Clerk's Office or any judge of this Court may deviate from these procedures in specific cases, without prior notice, if deemed appropriate in the exercise of discretion, considering the need for the just, speedy, and inexpensive determination of matters pending before the Court. The Court may also amend these procedures at any time without prior notice.
6. Rule 6 of the Federal Rules of Civil Procedure shall govern the computation of time under these procedures.

B. Attorney Registration

1. Each attorney filing electronically must complete and submit an Online Attorney Registration Form. The form is available on the Court's web site at www.ncwd.uscourts.gov/ecf.
2. After the attorney electronically submits the Online Attorney Registration Form to the Clerk's Office, an Internet e-mail message will be sent to the attorney stating the Clerk's Office is in receipt of their registration.
3. The Clerk's Office will verify the registration within two business days. After the Clerk's Office has verified the registration, the Clerk's Office will send the attorney an Internet e-mail message with the attorney's log-in name and password. ***The attorney should log in to the System and change his or her password immediately on receipt of his or her log-in name and password.***
4. Once registered, an attorney may withdraw from participating in the System by providing the Clerk's Office with notice of withdrawal. Such notice must be in writing, and mailed or delivered to United States District Court for the Western District of North Carolina, 401 West Trade Street, Suite 210, Charlotte, North Carolina 28202. ***Upon receipt, the Clerk's Office will immediately cancel the attorney's password and delete the attorney's name from any applicable electronic service list. An attorney's withdrawal from participation in the System shall not be construed as authorization to file cases or documents conventionally.***
5. After registering, attorneys may change their passwords at any time. If an attorney comes to believe that the security of an existing password has been compromised and that a threat to the System exists, the attorney must immediately change his or her password and contact the Clerk's Office by telephone.
6. An attorney whose e-mail address, mailing address, telephone or fax number has changed from that of the original Online Attorney Registration Form shall (i) edit his or her information in the System,and (ii) timely file a notice of such change and serve a copy of the notice on all other parties.

C. Passwords

Each attorney shall be entitled to one System log-in name and password from the District Court. The log-in name and password permit the attorney to participate in the electronic retrieval and filing of pleadings and other documents

1. No attorney shall knowingly permit or cause to permit his or her log-in name and password to be utilized by anyone other than an authorized employee of his or her office.
2. Once registered, the attorney shall be responsible for all documents filed with his or her log-in name and password.
3. Registration for a log-in name and password is governed by I(B) of these procedures.
4. An attorney admitted pro hac vice must register for a log-in name and password in accordance with these administrative procedures.

D. Pro Se Registration.

1. Although parties proceeding pro se shall not file electronically, parties proceeding pro se may request in writing — solely for the purpose of the action — to receive notice via e-mail whenever a pleading or other paper is filed electronically in accordance with these procedures. Following the update to the pro se litigant's record an NEF will be generated to notify parties.
2. A party proceeding pro se may withdraw from receiving notice via email by providing the Clerk's Office with notice of withdrawal. Such notice must be in writing, and mailed or delivered to the United States District Court for the Western District of North Carolina, 401 West Trade Street, Suite 210, Charlotte, North Carolina 28202. Upon receipt, the Clerk's Office will immediately delete the party's name from any applicable electronic service list.
3. A pro se party whose e-mail address, mailing address, telephone or fax number has changed shall notify the Clerk of a change of address and serve a copy of the notice on all other parties.
4. If during the course of the action, the pro se party retains an attorney who appears on the pro se party's behalf, the attorney must advise the Clerk's Office to terminate the pro se party's e-mail notification upon the attorney's appearance.

II. ELECTRONIC FILING AND SERVICE OF DOCUMENTS

A. FILING.

1. All motions, pleadings, applications, briefs, memoranda of law, or other documents in a case shall be electronically filed on the System except as otherwise provided by these administrative procedures.
   a. A document shall not be considered filed for purpose of the Federal Rules of Civil Procedure until the filing party receives a system-generated "Notice of Electronic Filing" described in II(B)1 of these procedures. ***E-mailing a document to the Clerk's Office or to the assigned judge shall not constitute "filing" of the document.***
2. Complaints in a Civil Case
   a. The Clerk's Office will not accept complaints sent by e-mail, by United States Mail, or delivered in person to the Clerk's Office except by pro se parties.
      1. Complaints shall be filed electronically using unassigned case opening and paying the fee through secure electronic means. If proceeding in forma pauperis thec omplaint must be accompanied by a Motion to Proceed in Forma Pauperis.
      2. If the complaint and cover sheet are submitted in paper form, the Clerk's Office will scan the complaint and cover sheet, upload them to the System, and retain the paper documents.

   b. A party may not electronically serve a complaint, but instead must effect service according to Federal Rules of Civil Procedure 4.
   c. Civil cover sheets and summons forms should be submitted as attachments to the complaint.
3. Summonses in a Civil Case
   a. Counsel should create the civil summons in PDF format for each named defendant using the Administrative Office form AO440 located on the Court's webpage. The summons can be submitted either separately or as one PDF

document for each named defendant, however, each summons must be completed with both pages of the AO440 form per named defendant. Failure to submit both pages per defendant will result in the Clerk's Office requesting that the form be resubmitted in its entirety. Counsel will receive a notice of electronic filing (NEF) of the summons when it is entered on the court's docket. Use the NEF hyperlink to retrieve the issued form to effect service of process.

b. In the event a Waiver of Service is requested it shall be electronically filed as a separate document.

c. A party may not electronically serve a summons, but instead must perfect service according to Federal Rule of Civil Procedure 4.

4. Notice of Removal in a Civil Case

a. Notices of removal shall be filed in accordance with the procedures in II(A)2.

5. Charging Documents in a Criminal Case

a. All charging documents, e.g. the complaint, information and/or indictment, shall be filed conventionally, i.e. in paper form.

i. If a criminal complaint if filed, the Clerk's Office will scan criminal complaint, upload it to the System, and retain the paper document.

ii. If an indictment is filed, the Clerk's Office will redact the name of the grand jury foreperson, scan the indictment,upload it to the System, and retain the paper document.

iii. If any other charging document is filed, the Clerk's Office will scan the charging document, upload it to the System, and retain the paper document.

6. Plea-Related Documents in a Criminal Case

All plea agreements shall be filed conventionally, i.e., in paper form. The clerk's Office will scan the paper document, upload it to the system, and retain the paper document.

7. Filing Deadlines

Filing a document electronically does not alter the filing deadline for that document. A document will be deemed timely filed on a particular day if filed prior to midnight Eastern Time. If the time of day is of the essence, however, the judge will order that document filed by a time certain.

8. Document Requiring Leave of Court to File

If filing a document requires leave of the Court, such as an amended complaint, the attorney shall attach the proposed document as an exhibit to the motion according to the procedures in IV. If the Court grants the motion, the filer will be responsible for electronically filing the document on the case docket.

9. Attachments and Exhibits.

Attachments and exhibits larger than two megabytes (approximately 50 pages) may be filed electronically in separate two-megabyte segments unless electronic filing is impractical as set out in III(C) and IV(B) of this Order.

10. Official Court Record

The Clerk's Office shall not maintain a paper court file in any case begun after the effective date of these procedures except as otherwise provided in these procedures. The official court record shall be the electronic file maintained on the Court's servers. The official record shall include, however any conventional documents or exhibits filed or maintained in accordance with these procedures.

11. Sealed Documents

A document subject to an existing sealing order or sealing statute shall be filed electronically under seal pursuant to LCvR 6.1 and LCrR 55.1 and this Order. A motion to file any document under seal shall be filed electronically, unless prohibited by law. The document for which sealing is sought may be submitted for in camera review prior to filing via Cyberclerk.

An order of the court granting a motion to seal shall not itself be sealed, unless prohibited by law or unless the court finds that electronic filing of the order without seal would be in appropriate.

B. SERVICE

1. Whenever a pleading or other paper is filed electronically in accordance with these procedures, the System will generate a "Notice of Electronic Filing" to the filing party and any other party who is a registered user and has requested electronic notice in that case.

2. If the recipient is a registered participant in the System, the System's e-mailing of the "Notice of Electronic Filing" shall be the equivalent of service of the pleading or other paper by first class mail, postage prepaid.
3. A certificate of service on all parties entitled to service or notice is still required when a party files a document electronically.
4. A party who is not a registered participant of the System is entitled to a paper copy of any electronically-filed pleading, document or order. The filing party must therefore provide the non-registered party with the pleading, document, or order according to the Federal Rules of Civil Procedure. When mailing paper copies of documents that have been electronically filed, the filing party may include the "Notice of Electronic Filing" to provide the recipient with proof of the filing.
5. The three-day rule of Federal Rule of Civil Procedure 6(e) for service by mail shall also apply to service by electronic means.

C. SIGNATURES

1. Non-attorney Signature, Generally

   If the original document requires the signature of a non-attorney, e.g., an affidavit, the filing party shall scan the original document in PDF format, then electronically file it on the System.

   a. The electronically-filed document as it is maintained on the Court's servers shall constitute the official version of that record.

   b. The filing party shall retain the original document for future production, if necessary, for two years after the expiration of the time for filing a timely appeal of a final judgment or decree,or after receipt by the Clerk of Court of an order terminating the action on appeal.

2. Attorney Signature

   A pleading or other document requiring an attorney's signature shall be signed in the following manner, whether filed electronically or submitted on disk to the Clerk's Office: "s/(attorney name)." The correct format for an attorney signature is as follows:

   s/Judith Attorney

   Judith Attorney Bar Number: 12345
   Attorney for (Plaintiff†efendant)
   ABC Law Firm 123 South Street
   Charlotte, North Carolina 28202
   Telephone: (704) 123-4567
   Fax: (704)123-4567
   E-mail: judith]attorney@law.com

3. Multiple Attorney Signatures

   The following procedure applies when a stipulation or other document requires two or more signatures:

   a. The filing attorney shall confirm (1) that the content of the document is acceptable to all persons required to sign the document and (ii) that all such persons have given their explicit consent for the filing attorney to affix their respective signatures as an "s/(attorney name)" and to submit the document electronically.

   b. The filing attorney then shall file the document electronically, indicating the signatories, e.g., "s/Jane Doe," "s/John Smith," etc. A signature block shall be included for each signatory.

   c. The filing attorney shall retain any record evidencing the assent of the non-filing signatories for future production, if necessary, for two years after the expiration of the time for filing, a timely appeal of a final judgment or decree, or after receipt by the Clerk of Court of an order terminating the action on appeal.

4. Non-Attorney Signatures on Documents in Criminal Cases

   a. Certain documents in criminal cases require the signature of a non-attorney — i.e., grand jury fore person, a defendant, a third-party custodian, a United States Marshal, an officer from Pretrial Services or Probation, or some other federal officer or agent. All such documents shall be filed conventionally, i.e., in paper form.

b. Upon receipt of such document, the Clerk's Office will scan the paper document, upload it to the System, and retain the paper document. The official court record shall be the electronic file maintained on the Court's servers.

c. Documents containing personal data identifiers and/or confidential information shall be handled in II(I) of these procedures.

D. FEES PAYABLE TO THE CLERK. Any fee required for filing a pleading electronically in District Court is payable to the Clerk of the Court by credit card. The docket will reflect receipt of fees. The court will not maintain electronic billing or debit accounts for lawyers or law firms.

E. ORDERS.

1. The Clerk's Office shall electronically file all signed orders. Any order signed electronically has the same force and effect as if the judge had affixed the judge's signature and seal to a paper copy of the order and it had been entered on the docket conventionally. A document shall not be considered entered on the docket for purposes of the Federal Rules of Civil Procedure until the System generates a Notice of Electronic Filing.
2. All proposed orders should be submitted to the Court in RTF format for WordPerfect via Cyberclerk. A copy of the proposed document may also be attached to the motion in PDF format and properly identified.
3. If a judge during a hearing enters an oral order, a text-only entry will be made upon the docket. In such case, no PDF document will issue; the text-only entry shall constitute the Court's only order on the matter. The Systems will generate a "Notice of Electronic Filing" as described in II(B)(1) of these procedures.
4. The judge or the Clerk's Office, if appropriate, may grant routine orders by a text-only entry upon the docket. In such cases, no PDF document will issue; the text-only entry shall constitute the Court's only order on the matter. The System will generate a "Notice of Electronic Filing" as described in II(B)(1) of these procedures.

F. TITLE OF DOCKET ENTRIES.

The party electronically filing a pleading or other document shall be responsible for designating a docket entry title for the document by using one of the docket event categories prescribed by the Court.

G. CORRECTING DOCKET ENTRIES.

1. Once a document is submitted and becomes part of the case docket, corrections to the docket are made only by the Clerk's Office. The System will not permit the filing party to make changes to the document(s) or docket entry filed in error once the transaction has been accepted.
2. A document incorrectly filed in a case may be the result of posting the wrong PDF file to a docket entry, selecting the wrong document type from the menu, or entering the wrong case number and not catching the error before the transaction is completed. ***The filing party should not attempt to re-file the document.***
3. As soon as possible after an error is discovered, the filing party should contact the Clerk's Office with the case number and document number for which the correction is being requested. If appropriate, the Court will make an entry indicating that the document was filed in error. The filing party will be advised ***if*** the document needs to be re-filed.

H. TECHNICAL FAILURES.

The Clerk's Office shall deem the Western District of North Carolina CM/ECF site to be subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 10:00 a.m. Eastern Time that day. Known systems outages will be posted on the website if possible.

1. If the Court's CM/ECF site experiences a technical failure, a filing party may submit documents to the Court that day in an alternate manner. The following methods are acceptable alternate means for filing documents in the case of a technical failure:

   a. in person, by bringing to the Clerk's Office the documents in paper form or on a compact disk which contains the documents in PDF format; or
   b. in person, by bringing the documents in paper form or on a compact disk which contains the documents in PDF format to the drop boxes which are located outside the federal courthouses in Asheville and Charlotte.
2. Problems on the filer's end, such as phone line problems, problems with the filer's Internet Service Provider (ISP), or hardware or software problems, will not constitute a technical failure under these procedures nor excuse an untimely filing. A filer who cannot file a document electronically because of a problem on the filer's end may submit documents to the Court that day in an alternate manner provided that the documents are accompanied by the filing party's affidavit explaining the reason for not filing the documents electronically. The following methods are acceptable alternate means for filing documents in the case of a problem on the filer's end:
   a. ***in person*** — by bringing the documents to the Clerk's Office in paper form or on a compact disk which contains the document in PDF format; and, then using the public scanners located in each Clerk's Office upload and file the documents to the System.
   b. ***via fax***
   c. ***in person*** — by bringing the documents in paper form or on a compact disk which contains the documents in PDF format to the drop boxes which are located outside of the federal courthouses in Asheville and Charlotte.
3. A filing party whose filing is made untimely as a result of a technical failure of the Court's CM/ECF site may seek appropriate relief from the Court. Filing parties are cautioned that, in some circumstances, the Court lacks the authority to grant an extension of time (e.g., Rule 6(b) of the Federal Rules of Appellate Procedure.)

I. PRIVACY.

1. Redacted documents.

To comply with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, Pub. L. No. 107347, and in order to promote electronic access to case file while also protecting personal privacy and other legitimate interests, filing parties shall omit or, where inclusion is necessary, partially redact the following personal data identifiers from all pleadings, documents, and exhibits, whether filed electronically or on paper, unless the judge orders otherwise:

   a. Minors' names: use the initial of minors;
   b. Financial account numbers: Identify the name or type of account and the financial institution where maintained, but use only the last four numbers of the account number;
   c. Social Security numbers: use only the last four numbers;
   d. Dates of birth: use only the year;
   e. Home address: disclose only the city and state; and
   f. Other data as permitted by order of the Court.

2. Other redactions.
   a. Personal identifying numbers, such as a driver's license number;
   b. Medical records, treatment and diagnosis;
   c. Employment history;
   d. Individual financial information; and
   e. Proprietary or trade secret information.
3. Reference lists.
   a. The reference list shall contain the complete personal data identifier or identifiers and the corresponding redacted identifier or identifiers used in the redacted document. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete identifier.
   b. The reference list must be filed under seal and may be amended as of right.
   c. The reference list shall be retained by the Court as part of the record but will not be available for public access.
4. Responsibility for redaction.

The responsibility for redacting personal data identifiers rests solely with the counsel and the parties. The Clerk's Office will not review documents for compliance with this rule, seal on its own motion documents containing personal data identifiers, or redact documents, whether filed electronically or on paper.

III. CONVENTIONAL FILING OF DOCUMENTS.

The following procedures govern documents filed conventionally. The Court, upon application, may also authorize conventional filing of other documents otherwise subject to these procedures.

A. PRO SE PARTIES.

Parties proceeding pro se shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute. The Clerk's Office will scan these original documents into an electronic file in the System, but will also maintain a paper file.

B. DOCUMENTS FOR WHICH ELECTRONIC FILING IS IMPRACTICAL.

A party shall conventionally submit paper originals of documents which are not available in electronic form or for which electronic imaging, i.e., "scanning," is impractical. Examples include, but are not limited to, state court records, maps and other non-document type exhibits.

C. TRANSCRIPTS OF PROCEEDINGS.

Within 21 days of a proceeding of this Court during which a court reporter transcribes the proceeding, the transcript of such proceeding shall either be filed electronically using the system or submitted to the Clerk's Office on a compact disc in PDF format. The PDF is not available on the public docket.

IV. EXHIBITS.

A. EXHIBIT INDEX

A party electronically submitting more than one exhibit to the Clerk's Office shall also include a separate index listing each exhibit then being filed and identifying the motion to which the index and the exhibits relate.

B. CONVENTIONAL FILING OF EXHIBITS

A party may conventionally submit exhibits which are not available in electronic form at the discretion of the Clerk.

C. SIZE OF EXHIBITS

If possible, however, a filing party should electronically image, i.e. "scan," a paper exhibit that is less than two megabytes (approximately 50 pages) and submit the exhibit as a PDF file. Because PDF files containing scanned documents take up considerably more space on the System than PDF files containing electronically-generated documents, filing parties may submit PDF files containing scanned documents of more than two megabytes only if they are filed in separate two megabyte segments.

D. EXHIBITS IN COLOR OR WITH GRAPHICS

Because documents scanned in color or containing graphic take much longer to upload, filing parties must configure their scanners to scan documents at 200 dpi and in black and white rather than in color. Documents appearing in color in their original form such as color photographs, may be scanned in color and then uploaded to the System.

E. VERIFICATION OF EXHIBITS

The filing party is required to verify the readability of scanned documents before filing them electronically with the Court.

F. CONVENTIONAL SUBMISSION OF EXHIBITS

Exhibits submitted conventionally shall be served on other parties as if not subject to these procedures.

V. PUBLIC ACCESS TO THE SYSTEM DOCKET.

A. PUBLIC ACCESS TO THE COURT.

Electronic access to the electronic docket and documents filed in the System is available for viewing to the public at no charge at the Clerk's Office during regular business hours. A copy fee for an electronic reproduction is required in accordance with 28 U.S.C. Section 1914.

B. INTERNET ACCESS.

Remote electronic access to the System for viewing purposes is limited to subscribers to the Public Access to Court Electronic Records (PACER) system. The Judicial Conference of the United States has ruled that a user fee will be charged for remotely accessing certain detailed case information, such as filed documents and docket sheets in cases, but excluding review of calendars and similar general information.

C. CONVENTIONAL COPIES AND CERTIFIED COPIES.

Conventional copies and certified copies of electronically-filed documents may be purchased at the Clerk's Office. The fee for copying and certifying will be in accordance with 28 U.S.C. Section 1914.

VI. SOCIAL SECURITY AND ERISA ACTIONS

A. NEED FOR PROTECTIVE GUIDELINES

In light of the E-Government Act and the Privacy Act, and the requirements of Case Management/Electronic Case Files initiative of the Administrative Office of the Administrative Office of the United States Courts, and to further the congressionally-mandated goals of increased efficiency in the administration of justice while preserving personal, financial, and medical privacy of litigants, the court finds it necessary and appropriate to prevent inappropriate access to Social Security and ERISA actions.

Extensive administrative records are filed in conjunction with appeals in Social Security matters under Title 42, Section 405 of the United States Code, and civil actions under the Employee Retirement Income Security Act (ERISA), title 29 Section 1109 of United States Code.

Further, such records contain highly sensitive personal, financial, and medical information of private citizens which, in other contexts, would be subject to redaction. For example, such information includes Social Security numbers, home addresses, personal telephone numbers, account numbers, and other information that has the potential to be exploited unlawfully.

The Court has carefully considered and balanced the public's right to access documents filed with the Court and the privacy interest of litigants, and determined that this protective section coupled with a method for legitimate public access by way of motion and judicial review, is the least restrictive means to protect individual rights to privacy as provided in various statutes. Specifically, the Court has determined that redaction in such cases is impractical and would render the record unuseable for purposes of judicial review and that a blanket "Seal" would be overly protective and could intrude upon legitimate access. These protective guidelines, on the other hand, protect litigants' personal information and provides those who may have a legitimate need to review such materials an avenue for disclosure.

B. FILING.

The administrative record and/or administrative transcript shall be electronically filed in Social Security and Employee Retirement Income Security Act cases as follows:

1. The above-described records shall be appropriately marked by the submitting party by placing on the front page or cover of any such submission the words "Confidential, Subject to Section VII of Administrative Procedures Governing Filing and Service by Electronic Procedures by Electronic Means".
2. After filing, and absent direction from a judge of the Court, the clerk of this court shall not be required to disclose, copy, scan, publish, or in any manner provide to any person such above-described electronic documents, except to:

   - a party of record
   - an attorney for a party of record
   - an authorized employee of an attorney of record, or
   - an employee of the United States Courts.

Routine documents such as the complaint, answer and dispositive cross-motions or petitions for review are not part of the administrative record or transcript and are available for public viewing electronically.

3. A non-party may seek disclosure of any such protected documents through the filing of a motion in the case, properly served on all parties of record in accordance with Rule 5, Federal Rules of Civil Procedure, showing therein the non-party's particularized and legitimate need for such disclosure.
4. If disclosure is allowed to a non-party under paragraph three, such person will be required as a condition of precedent to such disclosure, to sign and return to the Clerk a confidentiality agreement bearing the caption of this case and stating in substantially the following form:

> The undersigned has read and understands the Standing Protective Order under Rule 26 for the protection of confidential information entered in this case and agrees (1) that he/she shall fully abide by the restrictions on disclosure or use said information or discuss it with any person not authorized to receive the same or not specifically allowed by an Order of this court; (3) that he/she shall not use said confidential information for any purpose other than for the purposes of this litigation or for some other purpose as may be provided by the Order of this Court; and (4) that he/she hereby submits himself/herself to the jurisdiction of this Court to enforce this agreement.
>
> Signed: Name of Recipient

5. These restrictions shall not terminate with the litigation, but shall continue until further order of the Court; provided however, that these protective guidelines shall not have any retroactive force and effect, shall not be construed as providing any person or party with rights other than those provided by statute, shall not be construed to prevent any party or counsel from making use of information which, as evidenced by written records, was lawfully in its possession or later lawfully came into its possession; is or was public knowledge at the time of or prior to disclosure hereunder; or becomes public knowledge through no fault of receiving counsel or the public knowledge through no fault of receiving counsel or the receiving persons during the course of the litigation.
6. Nothing herein shall be construed as to prevent parties to such Social Security or ERISA actions from arguing, citing, excerpting, or attaching portions of any such transcript to their pleadings and memoranda.
7. Nothing herein shall prejudice the right of any party to apply to the Court for relief from the terms of these protective guidelines, upon good cause shown, or to seek an Order to extend, modify, or limit the application of this Order.

Index to Rules of Practice and Procedure of the United States District Court for the Western District of North Carolina

A

ACCESS OF PUBLIC RESTRICTED.
Sealed documents, LocalCiv-WD Rule 6.1.

ADMISSION OF ATTORNEY TO COURT, LocalCiv-WD Rule 83.1.
Criminal cases, LocalCrim-WD Rule 44.1.

ALTERNATIVE DISPUTE RESOLUTION.
Cases not suitable for, LocalCiv-WD Rule 16.2(b).
Deadline for completion.
  Rules to include, LocalCiv-WD Rule 16.3(b).
Exceptions or deviations from rules.
  Authority of judicial officer, LocalCiv-WD Rule 16.3(b).
Favored form, LocalCiv-WD Rule 16.3(a).
Federal arbitration act or other federal law.
  ADR program not to override, LocalCiv-WD Rule 16.3(b).
Judicial settlement conference.
  Rules governing, LocalCiv-WD Rule 16.3(b).
Location for holding.
  Rules to include, LocalCiv-WD Rule 16.3(b).
Mandatory mediated settlement conference, LocalCiv-WD Rules 16.2(a), 16.3.
Rules governing, LocalCiv-WD Rule 16.3.
Selection of method, LocalCiv-WD Rule 16.3(a).

APPEARANCE BY ATTORNEY.
Party represented by multiple attorney.
  Individual entry or notice of appearance filed using ECF user ID, LocalCiv-WD Rule 83.1(b).

ATTORNEY ADMISSION AND ELIGIBILITY.
Criminal cases, LocalCrim-WD Rule 44.1.
ECF account.
  Establishment prior to admission, LocalCiv-WD Rule 83.1(a).
Eligibility for regular admission, LocalCiv-WD Rule 83.1(c).
Nunc pro tunc admission, LocalCiv-WD Rules 83.1(d), (e).
Other types of admission, LocalCiv-WD Rule 83.1(d).
  Procedures and forms, LocalCiv-WD Rule 83.1(e).
Pro hac vice admissions, LocalCiv-WD Rules 83.1(d), (e).
Special admission, LocalCiv-WD Rules 83.1(d), (e).

ATTORNEY'S SUBSTITUTION.
Notice of substitution of counsel.
  Accomplished automatically upon filing, LocalCiv-WD Rule 83.1(g).

ATTORNEY'S WITHDRAWAL.
Consent of client, LocalCiv-WD Rule 83.1(f).

B

BILL OF COSTS.
Electronic filing, LocalCiv-WD Rules 54.1(a), (b).
Failure to file.
  Waiver of claim for costs, LocalCiv-WD Rule 54.1(c).
Objections.
  Filing, time, LocalCiv-WD Rule 54.1(d).
  Review of clerk's ruling, LocalCiv-WD Rule 54.1(e).
Waiver of claim for costs.
  Failure to file, LocalCiv-WD Rule 54.1(c).

BOND OR CASH DEPOSIT.
Not required except on motion and for good cause, LocalCiv-WD Rule 3.1(a).
Securities, LocalCiv-WD Rule 3.1(b).
Sureties.
  Persons prohibited from acting as, LocalCiv-WD Rule 3.1(c).
  Restricting, LocalCiv-WD Rule 3.1(b).

BRIEFS.
Motions, LocalCiv-WD Rule 7.1(c).
  Reply briefs, LocalCiv-WD Rule 7.1(e).

BROADCASTING COURT PROCEEDINGS, LocalCiv-WD Rule 83.2.

C

CERTIFICATE OF SERVICE, LocalCiv-WD Rule 5.3(c).

CERTIFICATION OF INITIAL ATTORNEY'S CONFERENCE.
Filing, time, purpose, LocalCiv-WD Rule 16.1(b).
Form, Appx A.

CIVIL JUDICIAL FORFEITURE.
Publication of notice, LocalCiv-WD Rule 4.2.

CLERK OF COURT.
Custody of exhibits, LocalCiv-WD Rule 79.1(a).
Disposition of exhibits, sealed documents and depositions, LocalCiv-WD Rules 79.1(c), (d).
Electronic payment system.
  Training attorneys on, LocalCiv-WD Rule 3.1(f).
Orders or judgments clerk may grant, LocalCiv-WD Rule 77.1.
Payments to clerk.
  Duties, LocalCiv-WD Rule 3.1(f).
Received, receipt for tender of subpoenaed material.
  Marking, giving, LocalCiv-WD Rule 45.1(e).

COMPLAINT.
Electronic service.
  Not permitted to obtain personal jurisdiction, LocalCiv-WD Rule 4.1.

CONSENSUAL DISCOVERY, LocalCiv-WD Rule 16.1(f).

CONSENT OF CLIENT.
Withdrawal of counsel, LocalCiv-WD Rule 83.1(f).

CONSENT TO TRIAL BEFORE MAGISTRATE JUDGE, LocalCiv-WD Rule 73.1.

CONSOLIDATION.
Filing motion, LocalCiv-WD Rule 5.2.1(d).
  Criminal cases, LocalCrim-WD Rule 5.2(d).

CONTACT WITH JURORS, LocalCiv-WD Rule 47.1.

CONTINUANCE.
Motion seeking, filing, LocalCiv-WD Rule 7.1(f).

CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH DIRECT FINANCIAL INTEREST IN LITIGATION.
Disclosure, Appx C.

COSTS.
Bill of costs.
  Electronic filing, LocalCiv-WD Rules 54.1(a), (b).
  Failure to file.
    Waiver of claim for costs, LocalCiv-WD Rule 54.1(c).
  Objections.
    Filing, time, LocalCiv-WD Rule 54.1(d).
    Review of clerk's ruling, LocalCiv-WD Rule 54.1(e).
  Waiver of claim for costs.
    Failure to file, LocalCiv-WD Rule 54.1(c).
Items taxed, LocalCiv-WD Rule 54.1(f).
Non-taxable costs, LocalCiv-WD Rule 54.1(g).
Payment, LocalCiv-WD Rule 54.1(i).
Settlement agreements, LocalCiv-WD Rule 54.1(h).
Taxable costs, LocalCiv-WD Rule 54.1(f).
Waiver of claim for costs.
  Failure to file bill of costs, LocalCiv-WD Rule 54.1(c).

CRIMINAL CASES.
Admission and appearance of attorney, LocalCrim-WD Rule 44.1(a).
  Additional admissions, LocalCrim-WD Rule 44.1(b).
Appointment of attorney.
  Defendant's choice, LocalCrim-WD Rule 44.1(b).
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Arrest.
  Failure to appear.
    Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
  Field bond.
    Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(c).
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rules 58.2(b), (c).
Arrest warrant.
  Application sealed, LocalCrim-WD Rule 55.1(g).
Attorney admission and appearance, LocalCrim-WD Rule 44.1.
Birth date.
  Filing redacted document to eliminate, LocalCrim-WD Rule 5.2(e).
  Filing unredacted document under seal, LocalCrim-WD Rule 5.2(f).

CRIMINAL CASES —Cont'd
Briefs.
  Motions, LocalCrim-WD Rule 47.1(c).
Calendar court days.
  Scheduling for hearing petty and misdemeanor offenses, LocalCrim-WD Rule 58.2(b).
Central Violations Bureau.
  Petty offenses, Class A misdemeanors.
    Mailing violation notice to, LocalCrim-WD Rule 58.2(b).
Certificate of service, LocalCrim-WD Rule 5.3(c).
Charging instruments.
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Class A misdemeanors.
  Procedures applicable to processing, LocalCrim-WD Rule 58.2(b).
Collateral forfeiture.
  Effect of payment, LocalCrim-WD Rule 58.2(a).
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
  Unified collateral forfeiture schedule.
    Adoption, incorporation, LocalCrim-WD Rule 58.1.
Collateral in lieu of appearance.
  Payment, LocalCrim-WD Rules 58.1, 58.2.
Confidential information.
  Probation officer's sentencing recommendation, LocalCrim-WD Rule 32.3.
Consolidation.
  Filing motion, LocalCrim-WD Rule 5.2(d).
  Related cases, LocalCrim-WD Rule 20.1.
Court appointment of attorney.
  Defendant's choice, LocalCrim-WD Rule 44.1(b).
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Court days.
  Scheduling for hearing petty and misdemeanor offenses, LocalCrim-WD Rule 58.2(b).
Deadlines.
  Filing motions, responses and reply, LocalCrim-WD Rule 47.1(e).
    Calculation, LocalCrim-WD Rule 47.1(f).
Dismissal for insufficient address.
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Electronic filing.
  Authorized, LocalCrim-WD Rule 5.2(a).
  Mandatory filing, LocalCrim-WD Rule 5.2(b).
  Redacted pleading to eliminate personal data identifiers, LocalCrim-WD Rule 5.2(e).
  Unredacted document with personal data identifiers.
    Filing under seal, LocalCrim-WD Rule 5.2(f).
Electronic service, LocalCrim-WD Rule 5.3(a).
  Certificate of service, LocalCrim-WD Rule 5.3(c).
  Exempt from, LocalCrim-WD Rule 5.3(b).
  Notice of electronic filing.
    Proof of service, LocalCrim-WD Rule 5.3(a).
  Proof, LocalCrim-WD Rule 5.3(a).
Failure to appear.
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Fair trial.
  Release of information to public interfering with, LocalCrim-WD Rule 23.1.
Field bond.
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(c).

CRIMINAL CASES —Cont'd
Filing, LocalCrim-WD Rule 5.2.
  Deadlines.
    Motions, responses and replies, LocalCrim-WD Rule 47.1(e).
      Calculation, LocalCrim-WD Rule 47.1(f).
  Habeas corpus.
    Application for writ to be executed by United States Marshal's Service, LocalCrim-WD Rule 17.3.
  Motion for consolidation, LocalCrim-WD Rule 5.2(d).
  Place of filing, LocalCrim-WD Rule 5.2(c).
  Proposed judgments, orders and other documents, LocalCrim-WD Rules 5.2(g), 47.1(g).
  Under seal, LocalCrim-WD Rule 55.1.
Financial account numbers.
  Filing redacted document to eliminate, LocalCrim-WD Rule 5.2(e).
  Filing unredacted document under seal, LocalCrim-WD Rule 5.2(f).
Fines.
  Petty offenses, Class A misdemeanors.
    Payment, LocalCrim-WD Rule 58.2(b).
Forfeiture.
  Collateral forfeiture, LocalCrim-WD Rules 58.1, 58.2.
  Magistrate judge's authority, LocalCrim-WD Rule 32.4(a).
  Publication of notice by government, LocalCrim-WD Rule 32.4(b).
Habeas corpus.
  Application for writ to be executed by United States Marshal's Service.
    Filing, time, LocalCrim-WD Rule 17.3.
Identifying information.
  Filing redacted pleading to eliminate, LocalCrim-WD Rule 5.2(e).
  Filing unredacted document under seal, LocalCrim-WD Rule 5.2(f).
Magistrate judges.
  Authority in criminal matters, LocalCrim-WD Rule 57.1.
  Criminal forfeiture.
    Authority, LocalCrim-WD Rule 32.4(a).
Minor's name.
  Filing redacted document to eliminate, LocalCrim-WD Rule 5.2(e).
  Filing unredacted document under seal, LocalCrim-WD Rule 5.2(f).
Motions.
  Briefs, LocalCrim-WD Rule 47.1(c).
  Conference of counsel.
    Certificate, LocalCrim-WD Rule 47.1(b).
  Consolidation.
    Filing, LocalCrim-WD Rule 5.2(g).
    Related cases, LocalCrim-WD Rule 20.1.
  Deadlines for filing, LocalCrim-WD Rule 47.1(e).
    Calculation, LocalCrim-WD Rule 47.1(f).
  Filing under seal, LocalCrim-WD Rule 55.1.
  Proposed orders.
    Filing, LocalCrim-WD Rule 47.1(g).
  Pro se motions.
    Made by defendant without waiving right to counsel, LocalCrim-WD Rule 47.1(h).
  Responses by government, LocalCrim-WD Rule 47.1(d).
    Deadlines for filing, LocalCrim-WD Rule 47.1(e).
      Calculation, LocalCrim-WD Rule 47.1(f).

CRIMINAL CASES —Cont'd
Motions —Cont'd
  Subpoenas served at government expense.
    Defense motions, filing, time, LocalCrim-WD Rule 17.2.
  Transfer.
    Related cases, LocalCrim-WD Rule 20.1.
  Writing required, LocalCrim-WD Rule 47.1(a).
Personal data identifiers.
  Filing redacted pleading, LocalCrim-WD Rule 5.2(e).
  Filing unredacted document under seal, LocalCrim-WD Rule 5.2(f).
Petty offenses.
  Procedures applicable to processing, LocalCrim-WD Rule 58.2(b).
Plea negotiations.
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Pleas.
  Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Pre-sentence report.
  Filing under seal, LocalCrim-WD Rule 55.1(h).
Pretrial motions, LocalCrim-WD Rule 47.1.
Probation officer's sentencing recommendation.
  Confidential information, release, petition seeking, LocalCrim-WD Rule 32.3.
Proposed judgments, orders and other documents.
  Filing, LocalCrim-WD Rules 5.2(g), 47.1(g).
Pro se motions.
  Made by defendant without waiving right to counsel, LocalCrim-WD Rule 47.1(h).
Pro se representation.
  Defendant's choice, LocalCrim-WD Rule 44.1(b).
Publication of notice.
  Criminal forfeiture, LocalCrim-WD Rule 32.4(b).
Related cases.
  Consolidation or transfer, LocalCrim-WD Rule 20.1.
Release of information to public interfering, LocalCrim-WD Rule 23.1.
Responses by government.
  Deadlines for filing, LocalCrim-WD Rule 47.1(e).
    Calculation, LocalCrim-WD Rule 47.1(f).
  Potentially dispositive defense motions, LocalCrim-WD Rule 47.1(d).
Right to counsel.
  Defendant's choices, LocalCrim-WD Rule 44.1(b).
Rule 11 inquiry.
  Electronic recording, LocalCrim-WD Rule 11.1.
Scheduling court days.
  Hearing petty and misdemeanor offenses, LocalCrim-WD Rule 58.2(b).
Sealed documents.
  Access to, LocalCrim-WD Rule 55.1(f).
  Arrest warrant, search warrant, LocalCrim-WD Rule 55.1(g).
  Designation as filed under seal or confidential, LocalCrim-WD Rule 55.1(d).
  Marking, LocalCrim-WD Rule 55.1(d).
  Public notice.
    Motion to file under seal, LocalCrim-WD Rule 55.1(i).
  Sentencing materials, LocalCrim-WD Rule 55.1(h).

CRIMINAL CASES —Cont'd
Sealing case, LocalCrim-WD Rule 55.1(a).
Pending case, LocalCrim-WD Rule 55.1(c).
Unsealing case, LocalCrim-WD Rule 55.1(b).
After final disposition, LocalCrim-WD Rule 55.1(e).
Search warrant.
Application sealed, LocalCrim-WD Rule 55.1(g).
Sentencing.
Petty offenses, Class A misdemeanors, LocalCrim-WD Rule 58.2(b).
Sentencing materials.
Filing under seal, LocalCrim-WD Rule 55.1(h).
Service.
Certificate of service, LocalCrim-WD Rule 5.3(c).
Conventional service, LocalCrim-WD Rule 5.3(b).
Electronic service, LocalCrim-WD Rule 5.3.
Subpoenas served at government expense.
Defense motions, filing, time, LocalCrim-WD Rule 17.2.
Social security numbers.
Filing redacted document to eliminate, LocalCrim-WD Rule 5.2(e).
Filing unredacted document under seal, LocalCrim-WD Rule 5.2(f).
Subpoenas.
Service at government expense.
Defense motions, filing, time, LocalCrim-WD Rule 17.2.
Transfer of cases.
Related cases, LocalCrim-WD Rule 20.1.

CUSTODIAN OF RECORDS.
Production of subpoenaed material, LocalCiv-WD Rule 45.1.

CUSTODY.
Exhibits, LocalCiv-WD Rules 79.1(a), (b).

D

DEPOSITIONS.
Disposition of documents filed with clerk, LocalCiv-WD Rules 79.1(c), (d).
Exhibits.
Deposition read into court, LocalCiv-WD Rule 79.1(d).

DISCOVERY.
Appendix or attachment.
Labeling materials, LocalCiv-WD Rule 26.2.
Commencement, LocalCiv-WD Rule 26.1.
Consensual discovery, LocalCiv-WD Rule 16.1(f).
Disposition of filed depositions, LocalCiv-WD Rules 79.1(c), (d).
Early discovery, LocalCiv-WD Rule 16.1(f).
Exhibits.
Depositions read into court, LocalCiv-WD Rule 79.1(d).
Filing discovery materials, LocalCiv-WD Rule 26.2.
Motion.
Early court sanctioned discovery, LocalCiv-WD Rule 16.1(f).
Production of subpoenaed material by non-parties, LocalCiv-WD Rule 45.1.

E

EARLY DISCOVERY, LocalCiv-WD Rule 16.1(f).

ELECTRONIC FILING, LocalCiv-WD Rule 5.2.1.
Administrative procedures, Appx D.
Bill of costs, LocalCiv-WD Rule 54.1.
Consent of client to counsel's withdrawal, LocalCiv-WD Rule 83.1(f).
Criminal cases, LocalCrim-WD Rule 5.2.
Establishment of ECF account.
Prior to admission, LocalCiv-WD Rule 83.1(a).
Parties represented by multiple attorneys.
Individual entry or notice of appearance filed using ECF user ID, LocalCiv-WD Rule 83.1(b).

ELECTRONIC FORMAT.
Submission of date maintained in, LocalCiv-WD Rule 45.1(c).

ELECTRONIC PAYMENTS, LocalCiv-WD Rule 3.1(d).
Training attorneys on electronic payment system.
Clerk's duty, LocalCiv-WD Rule 3.1(f).

ELECTRONIC SERVICE, LocalCiv-WD Rule 5.3.
Administrative procedures, Appx D.
Criminal cases, LocalCrim-WD Rule 5.3.
Summons and complaint.
Not permitted for obtaining personal jurisdiction, LocalCiv-WD Rule 4.1.

EVIDENCE.
Originals and copies, LocalCiv-WD Rule 45.1(c).

EXHIBITS.
Custody with clerk, LocalCiv-WD Rule 79.1(a).
Custody with offering party, LocalCiv-WD Rule 79.1(b).
Depositions read into court, LocalCiv-WD Rule 79.1(d).
Disposition, LocalCiv-WD Rule 79.1(c).
Numbering and filing, LocalCiv-WD Rule 7.1(c).

F

FEE REFUNDS, LocalCiv-WD Rule 3.1(e).
Payment, LocalCiv-WD Rule 3.1(f).

FILING.
Bill of costs, LocalCiv-WD Rule 54.1.
Consent of client to counsel's withdrawal, LocalCiv-WD Rule 83.1(f).
Consolidation of cases.
Motion for, LocalCiv-WD Rule 5.2.1(d).
Criminal cases, LocalCrim-WD Rule 5.2(d).
Continuance.
Motion seeking, LocalCiv-WD Rule 7.1(e).
Criminal cases, LocalCrim-WD Rule 5.2.
Electronic filing.
Administrative procedures, Appx D.
Authorized, LocalCiv-WD Rule 5.2.1(a).
Bill of costs, LocalCiv-WD Rule 54.1.
Criminal cases, LocalCrim-WD Rule 5.2.
Mandatory filing, LocalCiv-WD Rule 5.2.1(b).
Proposed documents, LocalCiv-WD Rule 5.2.1(e).
Motions, LocalCiv-WD Rule 7.1.
Place of filing.
Conventional filing, LocalCiv-WD Rule 5.2.1(c).
Proposed orders, LocalCiv-WD Rule 7.1(e).
Responses and replies to briefs, LocalCiv-WD Rule 7.1(e).
Sealed filings, restricting public access, LocalCiv-WD Rule 6.1.

FILING FEE.
Electronic payment, LocalCiv-WD Rule 3.1(d).
Filed at time of commencement or removal, LocalCiv-WD Rule 3.1(a).

FORFEITURE.
Criminal forfeiture, LocalCrim-WD Rule 32.4.
Collateral forfeiture, LocalCrim-WD Rules 58.1, 58.2.
Publication of notice.
Civil judicial forfeiture, LocalCiv-WD Rule 4.2.

FORMS.
Certification and report of initial attorney's conference, Appx A.
Corporate affiliations and other entities with direct financial interest in litigation.
Disclosure, Appx C.
Joint stipulation of magistrate judge consent form, Appx B.

I

INITIAL ATTORNEY'S CONFERENCE.
Certification.
Filing, deadline, purpose, LocalCiv-WD Rule 16.1(b).
Form, Appx A.
Conducting, time, LocalCiv-WD Rule 16.1(a).
Form.
Certification and report, Appx A.
Magistrate jurisdiction.
Joint stipulation of consent.
Filing, LocalCiv-WD Rule 16.1(c).
Removed or transferred cases.
Issues joined prior to, LocalCiv-WD Rule 16.1(e).

INITIAL PRETRIAL CONFERENCE (IPC), LocalCiv-WD Rule 16.1(g).

INTEREST ON SETTLEMENT FUNDS.
Investment of funds for purpose of settlement, LocalCiv-WD Rule 67.1(c).

INVESTMENT OF REGISTRY FUNDS, LocalCiv-WD Rule 67.1(b).

J

JOINDER OF ISSUES, LocalCiv-WD Rule 16.1(d).
Removed or transferred cases, LocalCiv-WD Rule 16.1(e).

JOINT STIPULATION OF CONSENT TO EXERCISE OF JURISDICTION BY UNITED STATES MAGISTRATE JUDGE.
Filing, time, LocalCiv-WD Rules 16.1(c), 73.1(c), (d).
Form, Appx B.

JUDGMENTS CLERK MAY GRANT, LocalCiv-WD Rule 77.1.

JUDICIAL SETTLEMENT CONFERENCE.
Ordering parties to participate in, LocalCiv-WD Rule 16.3(d).
Person with full authority to settle.
Presence required, LocalCiv-WD Rule 16.3(d).
Presiding judicial officer, LocalCiv-WD Rule 16.3(d).
Request by party, LocalCiv-WD Rule 16.3(d).

JURY.
Contact with jurors during or after trial.
Leave of judge required, LocalCiv-WD Rule 47.1(d).
List of potential jurors.
Counsel allowed, LocalCiv-WD Rule 47.1(a).
Pretrial contact with potential jurors.
Prohibition, LocalCiv-WD Rule 47.1(b).
Questionnaire responses.
Made available to counsel, LocalCiv-WD Rule 47.1(a).
Voir dire.
Additional questions.
Authority of parties and counsel to suggest, LocalCiv-WD Rule 47.1(c).
Ordinarily court conducts, LocalCiv-WD Rule 47.1(c).

M

MAGISTRATE JUDGES.
Authority, LocalCiv-WD Rule 72.1.
Criminal forfeiture cases.
Assignment of authority, LocalCrim-WD Rule 32.4.
Criminal matters generally.
Authority, LocalCrim-WD Rule 57.1.
Functions and duties regarding civil actions, LocalCiv-WD Rule 72.1(a).
Joint stipulation to consent to jurisdiction.
Filing, time, LocalCiv-WD Rule 16.1(c).
Form, Appx B.
Memorandum and recommendations.
Objections to.
Filing, time, LocalCiv-WD Rule 72.1(c).
Standing order of reference.
Extent district judge's matters referred to, LocalCiv-WD Rule 72.1(b).
Trial by consent before.
Additional parties joined, LocalCiv-WD Rule 73.1(f).
Cases initially assigned to district judge, LocalCiv-WD Rule 73.1(a).
Certification of consent, LocalCiv-WD Rule 73.1(c).
Consent to jurisdiction, LocalCiv-WD Rule 73.1(c).
Deadline, consent after, LocalCiv-WD Rule 73.1(e).
Declination of consent.
Failure to file joint stipulation, LocalCiv-WD Rule 73.1(d).
Discussion of issue of consent.
Duties of parties and counsel, LocalCiv-WD Rule 73.1(c).
Joint stipulation of consent to exercise jurisdiction.
Filing, failure to file, LocalCiv-WD Rules 73.1(c), (d).
Parties to transferred cases.
Information provided, LocalCiv-WD Rule 73.1(g).
Plaintiff or removing party.
Duties, LocalCiv-WD Rule 73.1(b).
Presumption of declination.
Failure to file joint stipulation, LocalCiv-WD Rule 73.1(d).

MANDATORY MEDIATED SETTLEMENT CONFERENCE, LocalCiv-WD Rules 16.2(a), 16.3.

MEDIATED SETTLEMENT CONFERENCE, LocalCiv-WD Rule 16.2(a).
Appropriate facilities.
  Holding in, LocalCiv-WD Rule 16.3(b).
Attendance in person, LocalCiv-WD Rule 16.3(c).
Cases not suitable for ADR, LocalCiv-WD Rule 16.2(b).
Default selection.
  Parties' failure to agree on ADR method, LocalCiv-WD Rule 16.3(a).
Favored form of ADR, LocalCiv-WD Rule 16.3(a).
List of court-approved mediators.
  Maintained by court, LocalCiv-WD Rule 16.2(a).
Mandatory attendance, LocalCiv-WD Rule 16.2(a).
Outcome.
  Mediator's report, LocalCiv-WD Rule 16.3(c).
Pretrial conference, LocalCiv-WD Rule 16.2(a).
Procedure, LocalCiv-WD Rule 16.3.
Record not made, LocalCiv-WD Rule 16.3(c).
Report by mediator on outcome, LocalCiv-WD Rule 16.3(c).
Rules applicable, LocalCiv-WD Rule 16.3.
Rules governing, LocalCiv-WD Rule 16.3(b).
State court terms.
  Interpretation, LocalCiv-WD Rule 16.3(b).
Telephonic attendance, LocalCiv-WD Rule 16.3(c).

MEDICAL RECORDS.
Admissibility of originals and copies, LocalCiv-WD Rule 45.1(c).
Privacy protection, LocalCiv-WD Rule 45.1(d).
Production by subpoenaed custodian, LocalCiv-WD Rule 45.1(b).
Receipt by clerk, LocalCiv-WD Rule 45.1(e).

MOTIONS, LocalCiv-WD Rule 7.1.
Briefs, LocalCiv-WD Rule 7.1(c).
  Reply briefs, LocalCiv-WD Rule 7.1(e).
Consolidation.
  Filing motion, LocalCiv-WD Rule 5.2.1(d).
    Criminal cases, LocalCrim-WD Rule 5.2(d).
Consultation of counsel requirements, LocalCiv-WD Rule 7.1(b).
Continuance.
  Filing, time, LocalCiv-WD Rule 7.1(f).
Criminal cases, LocalCrim-WD Rule 47.1.
Dismissal.
  Motion contained in responsive pleading, LocalCiv-WD Rule 7.1(c).
Early discovery, LocalCiv-WD Rule 16.1(f).
Exhibits.
  Numbering and filing, LocalCiv-WD Rule 7.1(c).
Page limits, font sizes spacing, other formatting requirements, LocalCiv-WD Rule 7.1(d).
Proposed orders.
  Submitting, LocalCiv-WD Rule 7.1(g).
Reply briefs, LocalCiv-WD Rule 7.1(e).
Reply to response.
  Filing, time, LocalCiv-WD Rule 7.1(e).
Responses.
  Filing, time, LocalCiv-WD Rule 7.1(e).
Responsive briefs.
  Motions not contained in, LocalCiv-WD Rule 7.1(c).
Responsive pleadings.
  Dismissal motion contained in, LocalCiv-WD Rule 7.1(c).

MOTIONS —Cont'd
Seal materials, LocalCiv-WD Rule 6.1(c).
  Public notice, LocalCiv-WD Rule 6.1(e).
Unseal materials, LocalCiv-WD Rule 6.1(h).
Withdrawal of counsel, LocalCiv-WD Rule 83.1(f).
Writing required, LocalCiv-WD Rule 7.1(a).

MULTIPLE ATTORNEYS REPRESENTING PARTY.
Individual entry or notice of appearance filed using ECF user ID, LocalCiv-WD Rule 83.1(b).

N

NUNC PRO TUNC ATTORNEY ADMISSION, LocalCiv-WD Rules 83.1(d), (e).

O

ORDERS CLERK MAY GRANT, LocalCiv-WD Rule 77.1.

P

PARTY REPRESENTED BY MULTIPLE ATTORNEYS.
Individual entry or notice of appearance filed using ECF user ID, LocalCiv-WD Rule 83.1(b).

PERSONAL JURISDICTION.
Electronic service of summons and complaint.
  Not permitted for obtaining, LocalCiv-WD Rule 4.1.

PHOTOGRAPHING COURT PROCEEDINGS, LocalCiv-WD Rule 83.2.

PHYSICIAN-PATIENT PRIVILEGE.
Not waived, LocalCiv-WD Rule 45.1(d).

PRESUMPTION.
Trial by consent before magistrate judge.
  Declination, LocalCiv-WD Rules 73.1(d), (e).

PRETRIAL CONFERENCES.
Initial attorney's conference.
  Certification.
    Filing, time, purpose, LocalCiv-WD Rule 16.1(b).
    Form, Appx A.
  Conducting, time, LocalCiv-WD Rule 16.1(a).
  Form.
    Certification and report, Appx A.
Initial pretrial conference (IPC), LocalCiv-WD Rule 16.1(g).
Joint stipulation of consent to magistrate jurisdiction.
  Filing, time, LocalCiv-WD Rule 16.1(c).
Mediated settlement conferences, LocalCiv-WD Rules 16.2, 16.3.
Removed or transferred case, LocalCiv-WD Rule 16.1(e).

PRIVACY PROTECTION.
Public and medical records, LocalCiv-WD Rule 45.1(d).

PRIVILEGED COMMUNICATIONS.
Disclosure not required, LocalCiv-WD Rule 45.1(d).

PRODUCTION OF SUBPOENAED MATERIAL, LocalCiv-WD Rule 45.1.

PRO HAC VICE ATTORNEY ADMISSION, LocalCiv-WD Rules 83.1(d), (e).

PROOF OF SERVICE.
Electronic service.
  Notice of electronic filing serves as, LocalCiv-WD Rule 5.3(a).

PROPOSED ORDERS.
Submitting, LocalCiv-WD Rule 7.1(g).

PUBLIC ACCESS RESTRICTED.
Sealed documents, LocalCiv-WD Rule 6.1.

PUBLICATION OF NOTICE.
Civil judicial forfeiture, LocalCiv-WD Rule 4.2.

PUBLIC RECORDS.
Admissibility of originals and copies, LocalCiv-WD Rule 45.1(c).
Privacy protection, LocalCiv-WD Rule 45.1(d).
Production by subpoenaed custodian, LocalCiv-WD Rule 45.1(a).
Receipt by clerk, LocalCiv-WD Rule 45.1(e).

R

RECORDS, LocalCiv-WD Rule 45.1(e).

REFUND OF FEES, LocalCiv-WD Rule 3.1(e).
Payment, LocalCiv-WD Rule 3.1(f).

REGISTRY FUNDS.
Court registry investment system, LocalCiv-WD Rule 67.1(b).
Deposit, LocalCiv-WD Rule 67.1(a).
Disbursement.
  Person requesting.
    Proposed order, LocalCiv-WD Rule 67.1(b).
Interest.
  Funds invested for purpose of settlement, LocalCiv-WD Rule 67.1(c).
Investment in income-earning account, LocalCiv-WD Rule 67.1(b).
Proposed order.
  Person requesting disbursement, LocalCiv-WD Rule 67.1(b).
Service fee.
  Charged for investment of funds, LocalCiv-WD Rule 67.1(b).
Settlement funds.
  Interest on funds invested for purpose of settlement, LocalCiv-WD Rule 67.1(c).

REMOVED CASES.
Issues joined prior to.
  Initial attorney's conference, LocalCiv-WD Rule 16.1(e).
Issues not joined prior to.
  Outstanding discovery requests and scheduling orders, LocalCiv-WD Rule 16.1(e).

REPLY BRIEFS.
Motions, LocalCiv-WD Rule 7.1(e).

S

SEALED MATERIALS, RESTRICTING PUBLIC ACCESS.
Confidential materials.
  Not impacted, LocalCiv-WD Rule 6.1(i).
Criminal cases, LocalCrim-WD Rule 55.1.
Disposition of documents filed with clerk, LocalCiv-WD Rule 79.1(c).
Filing under seal, LocalCiv-WD Rule 6.1(b).
  Filings subsequent to entry of order, LocalCiv-WD Rule 6.1(g).
  Motion to seal, LocalCiv-WD Rule 6.1(c).
  Unredacted copy, LocalCiv-WD Rule 6.1(d).
Final disposition of case.
  Unsealing, LocalCiv-WD Rule 6.1(h).
Motion to seal, LocalCiv-WD Rule 6.1(c).
  Notice to public, LocalCiv-WD Rule 6.1(e).
Motion to unseal, LocalCiv-WD Rule 6.1(h).
Notice to public, LocalCiv-WD Rule 6.1(e).
Other orders, LocalCiv-WD Rule 6.1(f).
Scope of rule, LocalCiv-WD Rule 6.1(a).
Unsealing, LocalCiv-WD Rule 6.1(h).

SERVICE.
Civil forfeiture.
  Publication of notice, LocalCiv-WD Rule 4.1.
Conventional service.
  Persons required, LocalCiv-WD Rule 5.3(b).
Criminal cases, LocalCrim-WD Rule 5.3.
Electronic service.
  Administrative procedures, Appx D.
  Certificate of service, LocalCiv-WD Rule 5.3(c).
  Criminal cases, LocalCrim-WD Rule 5.3.
  Not permitted for obtaining personal jurisdiction, LocalCiv-WD Rule 4.1.
  Proof of service.
    Notice of electronic filing serves as, LocalCiv-WD Rule 5.3(a).
  Service through electronic case filing system, LocalCiv-WD Rule 5.3(a).
Proof.
  Electronic service.
    Notice of electronic filing serves as, LocalCiv-WD Rule 5.3(a).

SETTLEMENT.
Costs, LocalCiv-WD Rule 54.1(h).
Interest on invested settlement funds, LocalCiv-WD Rule 67.1(c).
Judicial settlement conference.
  Rules governing, LocalCiv-WD Rule 16.3(d).
Mediated settlement conference, LocalCiv-WD Rules 16.2, 16.3.

STANDING ORDERS OF REFERENCE.
Extent district judge's matters referred to magistrate judge, LocalCiv-WD Rule 72.1(b).

STIPULATION OF CONSENT TO EXERCISE OF JURISDICTION BY UNITED STATES MAGISTRATE JUDGE.
Filing, time, LocalCiv-WD Rules 16.1(c), 73.1(c), (d).
Form, Appx B.

SUBPOENA.
Production of material by non-parties, LocalCiv-WD Rule 45.1.

SUBSTITUTION OF COUNSEL.
Notice of substitution of counsel.
Accomplished automatically upon filing, LocalCiv-WD Rule 83.1(g).

SUMMONS.
Electronic service.
Not permitted to obtain personal jurisdiction, LocalCiv-WD Rule 4.1.

T

TAXATION OF COSTS.
Other than attorneys' fees, LocalCiv-WD Rule 54.1.

TELEVISING COURT PROCEEDINGS, LocalCiv-WD Rule 83.2.

TRANSFERRED CASES.
Issues joined prior to.
Initial attorney's conference, LocalCiv-WD Rule 16.1(e).

TRANSFERRED CASES —Cont'd
Issues not joined prior to.
Outstanding discovery requests and scheduling orders, LocalCiv-WD Rule 16.1(e).
Trial by consent before magistrate judge.
Information provided parties to transferred cases, LocalCiv-WD Rule 73.1(g).

V

VOIR DIRE, LocalCiv-WD Rule 47.1(c).

W

WITHDRAWAL OF COUNSEL.
Consent of client, LocalCiv-WD Rule 83.1(f).

RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Effective September 1, 2004, with amendments through July 2, 2007.

PART I
COMMENCEMENT OF CASE; PROCEEDINGS RELATED TO PETITION AND ORDER FOR RELIEF

Rule
1002-1. Protection of Personal Privacy.
1002-2. Petition — General.
1002-3. Automatic Stay as to Rental Deposits Pursuant to 11 U.S.C. § 362(l)(1).
1002-4. Chapter 11 First-Day Financing Orders.
1003-1. Involuntary Petitions.
1006-1. Filing Fee.
1007-1. Lists, Schedules, and Statements; Time Limits.
1007-2. Master Mailing Matrix.
1007-3. Compliance with Statement of Intentions.
1007-4. Payment Advices.
1007-5. Official Form 6, Summary of Schedules/Statistical Summary of Certain Liabilities and Related Data.
1014-1. Transfers of Venue Within District.
1015-1. Joint Administration and Bifurcation of a Jointly-Administered Case.
1071-1. Divisions — Bankruptcy Court.
1073-1. Assignment of Cases.

PART II
OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS; CHAPTER 13 CONFIRMATION HEARINGS

2002-1. Notice to Creditors and Service of Papers.
2002-2. Preferred Addresses Under 11 U.S.C. § 342(e) and (f) and National Creditor Registration Service.
2002-3. Objection to Confirmation of Chapter 13 Plans.
2016-1. Appointment of Professional Persons; Retainers Held by Professional Persons and Chapter 11 Attorney Fee Applications; Compensation of Chapter 13 Attorneys.
2016-2. Trustee Search Fee.
2090-1. Representation of Business Entities.
2090-2. Special Admissions.
2090-3. Attorneys — Discipline.
2091-1. Extent of an Attorney's Duty to Represent.

PART III
CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

3001-1. Claims and Equity Security Interests.
3001-2. Presumptive Interest Rates in Chapter 13 Cases.
3002-1. Chapter 13 Trustee Treatment of Certain Tax Claims.
Rule
3003-1. Chapter 11 Claims.
3009-1. Processing Returned Creditor Overpayments in a Chapter 7 Case.
3011-1. Disbursement of Unclaimed Funds.
3012-1. Pre-Confirmation Adequate Protection Payments.
3015-1. Dismissal or Conversion of Chapter 13 Cases.
3018-1. Chapter 11 Balloting.
3021-1. Authorization of Pro-Rata Monthly Payments to Secured Creditors in Chapter 13 Cases.
3021-2. Processing Returned Creditor Overpayments After Final Distribution in Chapter 13 Cases.

PART IV
THE DEBTOR: DUTIES AND BENEFITS

4001-1. Motions for Relief from Stay.
4001-2. Limitations on Creditor Contact with Debtors.
4002-1. Debtor Duties.
4003-1. Exemption Election.
4004-1. Discharge of Chapter 13 Debtor in Cases Filed on or After October 17, 2005.
4004-2. Closing Individual Chapter 11 Cases Prior to Discharge.
4008-1. Reaffirmation Agreements.

PART V
COURTS AND CLERKS

5001-1. Clerk — Office Hours.
5001-2. Clerk's Entries.
5005-1. Electronic Case Filing.
5009-1. Trustee's Duty to File Final Report.
5011-1. Abstention.

PART VI
COLLECTION AND LIQUIDATION OF THE ESTATE

6005-1. Auctioneers.

PART VII
ADVERSARY PROCEEDINGS

7003-1. Adversary Proceeding Cover Sheet.
7007-1. Motion Practice in Adversary Proceedings.
7016-1. Pretrial Procedures.
7016-2. Trials.
7026-1. Discovery — General.
7041-1. Dismissal of Actions for Lack of Prosecution.
7067-1. Deposit and Investment of Funds Held by Clerk.

PART VIII
APPEALS TO DISTRICT COURT

8001-1. Notice of Appeal.
8006-1. Record on Appeal.

PART IX
GENERAL PROVISIONS

Rule
9006-1. Time Limits.
9013-1. Motion Practice.
9013-2. Briefs in Adversary Proceedings and Contested Matters.
9014-1. Contested Matters.
9019-1. Settlements of Adversary Proceedings.
9021-1. Tender of Judgments and Orders.
9022-1. Certificate of Service for Orders.
9028-1. Disqualification of Judges.
9029-1. Telephonic Appearance at Hearings.
9035-1. Service of Papers on the Bankruptcy Administrator.

APPENDICES
APPENDIX A

Guidelines for Compensation and Expense Reimbursement of Professionals

APPENDIX B

Chapter 11 Information
Guidelines for Consensual Cash Collateral Orders: Provisions That Should Be Included

APPENDIX C

Local Forms

Index follows Rules.

Adoption of Interim Bankruptcy Rules. — On September 22, 2005, the United States Bankruptcy Court for the Western District of North Carolina adopted Interim Bankruptcy Rules amending the Federal Rules of Bankruptcy Procedure to implement the substantive and procedural changes mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pursuant to 28 U.S.C.S. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 9029 of the Federal Rules of Bankruptcy Procedure, the Interim Rules were adopted in their entirety without change by a majority of the judges of the court, effective October 17, 2005, and shall remain in effect until further order of the court. For cases and proceedings not governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court for the Western District of North Carolina, other than the Interim Rules, shall apply.

The Interim Bankruptcy Rules may be viewed at the website for the United States Bankruptcy Court for the Western District of North Carolina located at **www.uscourts.gov/rules/interim.html.**

PART I
COMMENCEMENT OF CASE; PROCEEDINGS RELATED TO PETITION AND ORDER FOR RELIEF

Rule 1002-1. Protection of Personal Privacy.

(a) *Retention/Destruction of Personally IdentifiableInformation.* Trustees are authorized in their discretion to destroy physically or otherwise dispose of any documents, or copies of such documents, in their possession, regardless of format or medium, that may contain any personally identifiable information, as that term is defined by 11 U.S.C. § 101(41A). This authorization includes, but is not limited to, the destruction or other disposition of income tax returns, social security identification cards, driver's licenses, identification cards, and payroll advices.

(b) *Compliance.* Upon Court order limiting publication, counsel and the parties to a case have the sole responsibility for making the appropriate modifications to documents before filing them and otherwise complying with the order of the Court. The Clerk will not review documents filed for compliance with this Local Rule or otherwise undertake to ensure limited publication. Counsel and the parties to a case are cautioned that it is their responsibility to ensure that documents subject to a limitation on publication are in fact so limited and that failure to comply with the Court's order in this regard will result in publication of such documents.

(c) *Transcripts.* Before the Court enters a transcript on the docket, it will allow five days for requests to redact personal identifiers including: social security numbers,financial account numbers, names of minor children, dates of birth, and home addresses of individuals. If the Court does not receive a request for redaction, it will docket the transcript in its entirety. Counsel or pro se parties who proffer a witness will be responsible for contacting the witness regarding the redaction of personal identifiers.

Editor's note. — For website, see **www.ncwb.uscourts.gov.**

Rule 1002-2. Petition — General.

(a) *Electronic Filing.* Attorneys shall file electronically all documents unless leave of Court is granted. In filing electronically or non-electronically, attorneys shall comply with Local Rule 5005-1. Filing electronically shall constitute the signature of the attorney and debtor.

(b) *Waiver Requirements.* Attorneys unable to file electronically may seek a waiver by motion and ex parte order.

(c) *Joint Petititons.* When a joint petition is filed by a husband and wife who do not share the same surname, the debtors shall append to their petition a duly executed affidavit verifying that they are legally married at the time of filing of the petition. Petitions submitted without the required affidavit will be docketed by the Clerk, subject to dismissal in accordance with Local Rule1007-1(b).

(d) *Petition Filed by a Corporation, Partnership, Limited Liability Company, Limited Partnership, or Limited Liability Partnership.* When a corporation, partnership, limited liability company, limited partnership, or limited liability partnership files a voluntary bankruptcy petition, the original or a certified copy of the resolution of the debtor's board of directors, members, or general partners authorizing the filing of the bankruptcy petition shall be filed with the petition. Petitions submitted without the required resolution will be docketed by the Clerk, subject to dismissal three days after filing without notice or opportunity for hearing.

Rule 1002-3. Automatic Stay as to Rental Deposits Pursuant to 11 U.S.C. § 362(l)(1).

a. *Automatic Stay as to Rental Deposits.* The following procedures apply when a debtor proceeds under 11 U.S.C. § 362(l)(1):

1. Any deposit of rent made by or on behalf of a debtor must be in the form of a certified check, cashier's check, or money order payable to the lessor and delivered to the Clerk of Court at the time of the filing of the petition and certification under 11 U.S.C. § 362(l)(1)(A);

2. The debtor must file a copy of the judgment for possession at the time of filing of the petition; and

3. Upon receipt of the funds and a copy of the judgment for possession, the Clerk is directed to transmit the funds to the lessor by mail to the address listed on the petition.

Rule 1002-4. Chapter 11 First-Day Financing Orders.

Guidelines. The Court has adopted certain guidelines for cash collateral orders for Chapter 11 cases, which are attached hereto as Appendix B.

Rule 1003-1. Involuntary Petitions.

Corporate Disclosure. Any petitioning corporation, partnership, limited liability company, limited partnership, or limited liability partnership in an involuntary case shall file a statement identifying all of its parent corporations and listing any public company that owns ten percent (10%) or more of its stock.

Rule 1006-1. Filing Fee.

a. *Failure to Pay Filing Fee in Installments.* When the debtor submits an application to pay the filing fee in installments and subsequently fails to pay the filing fee in installments pursuant to the terms allowed by order of this Court, the debtor's case will be subject to dismissal without further notice or opportunity for hearing.

b. *Refunding Filing Fees.* The following procedures apply to the refunding of filing fees:

1. Pursuant to the guidelines of the Bankruptcy Fee compendium, the Clerk of Court is authorized to issue the following types of refunds:

A. Fees collected without authority; and

B. Duplicate credit card payments that occurred as a result of a failed Internet credit card process.

2. Refund requests for duplicate petitions shall be filed by motion or application accompanied by a notice of hearing.

3. All other requests for filing fee refunds require a judicial determination and should be filed either by motion or application and accompanied by tender of an *ex parte* order.

4. If the Court discovers an erroneous filing for which a fee has not yet been collected, the Court may correct the erroneous filing administratively and not collect the fee.

c. *Application to Proceed* ***In Forma Pauperis***. Pursuant to 11 U.S.C. § 1930(b) and (c), when an application to proceed *in forma* pauperis (Local Form 6) is approved pursuant to 11 U.S.C. § 1930(f)(1-3), the waiver applies only to the filing fee for the petition. Waiver of additional filing fees will be considered only upon the filing of a motion and tender of an order. Such a motion and order should be tendered on an ex parte basis.

Rule 1007-1. Lists, Schedules, and Statements; Time Limits.

a. *Chapter 11.* When Chapter 11 petitions, schedules, statements, and schedule deficiencies are filed, the filer is required to serve these documents upon the following:

1. U.S. Bankruptcy Administrator
   402 W. Trade Street
   Suite 200
   Charlotte, NC 28202
2. Securities & Exchange Commission
   Branch of Reorganization
   Suite 1000
   3475 Lennox Road, NE
   Atlanta, GA 30327-1323
3. Internal Revenue Service
   P.O. Box 21126
   Philadelphia, PA 19114

b. *Failure to File Lists, Schedules, Statements, or Other Documents.* In the event a bankruptcy petition is filed with the Clerk of Court without all of the lists,schedules, statements, or other documents required to be filed in conjunction with the filing of a bankruptcy petition by the Federal Rules of Bankruptcy Procedure or these Local Rules, the Clerk of Court shall immediately serve upon the debtor, the debtor's attorney, the trustee, and the petitioning creditors, if applicable, a Notice of deficient Filing. This Notice notifies said parties that the specified documents were not filed with the petition and that the bankruptcy case will be subject to dismissal without further notice and opportunity for hearing. In the event of an involuntary petition or involuntary conversion of a case to a Chapter 7 case, the failure of the debtor to comply with this rule will not result in the automatic dismissal of the case. Rather, the Clerk will refer the matter to the Court for further consideration.

Rule 1007-2. Master Mailing Matrix.

a. *Mailing Matrix.* Attorneys filing petitions electronically are required to download into the CM/ECF system a mailing matrix containing the complete mailing address, including zip codes, for the following:

1. All creditors listed in the petition and any other parties in interest entitled to notice pursuant to Bankruptcy Rule 2002 or other applicable law.

2. Taxing authority for each parcel of real estate in which the debtor holds an interest.

3. In Chapter 13 cases, creditors or contingent creditors to whom notice should be sent must be listed on the schedule of creditors as well as on the matrix.

4. In Chapter 11 cases, in addition to the entities listed above, attorneys are required to download into the CM/ECF system a mailing matrix containing the complete mailing address, including zip code, for the Bankruptcy Administrator, 402 W. Trade Street, Suite 200, Charlotte, NC 28202.

5. If the debtor is a corporation or limited liability company, the name and title of the managing agent.

6. If the debtor is a partnership, each member of the partnership.

The filing of the mailing matrix shall serve to certify its accuracy. The filer shall be responsible for any errors in or omissions from the listing.

b. *Mailing Matrices Filed Non-Electronically.* Attorneys who have been granted a waiver from the electronic filing requirement pursuant to Local Rule 1002-2, or debtors or non-attorneys filing non-electronically, shall submit to the Clerk of Court at the time the petition is filed a printed hard copy of the mailing matrix and/or a copy in the electronic format required by the Clerk.

Rule 1007-3. Compliance with Statement of Intentions.

Evidence of Compliance. Within 45 days of the first date set for the § 341(a) meeting of creditors, the debtor or debtor's counsel shall provide the trustee evidence of delivery of the collateral, of reaffirmation of the debt, or other evidences howing compliance with the debtor's Statement of Intention. If the debtor fails to comply with the Statement of Intention such that the automatic stay under 11 U.S.C. § 362(a) is terminated with respect to personal property of the estate or of the debtor, the Court may consider on a no-protest basis pursuant to Local Rule 9013-1, a motion confirming that the stay has be enterminated. The motion and proposed order shall provide, with specificity, the basis of movant's belief that the stay has terminated.

Rule 1007-4. Payment Advices.

Filing of Payment Advices. Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv), copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition by the debtor from an employer of the debtor shall not be filed with the Court unless otherwise ordered. Nothing in this Local Rule alters the Trustee's right to request records in accordance with Local Rule 4002-1(d).

Rule 1007-5. Official Form 6, Summary of Schedules/Statistical Summary of Certain Liabilities and Related Data.

a. *Official Form 6.* Official Form 6. A completed Official Form 6 shall be attached to any amendments to Schedules A, B, D, E, F, I, or J.

b. *Official Form 6 Upon Conversion to Chapter 7.* When converting a case to a Chapter 7, if the Final Report and Schedule of Postpetition Debts Pursuant to Rule 1019(6) (the "1019 Report") lists: (1) additional unpaid debts incurred after commencement of the pre-conversion case; (2) after-acquired property; or (3) executory contracts entered into or assumed since the filing of the original case, the 1019 Report must be accompanied by a completed amended Official Form 6.

Rule 1014-1. Transfers of Venue Within District.

a. *Notice and Motion.* A request to change divisional venue of a case, adversary proceeding, or contested matter shall be made as follows:

1. By filing a motion setting forth the reasons supporting the change and evidencing the approval or disapproval of the Bankruptcy Administrator;
2. By providing notice to all creditors and other parties in interest explaining the request with a 15-day opportunity for objections;
3. By providing a certificate of service of the notice by the movant evidencing service on all creditors and other parties in interest, including all parties the Court requires on a standard matrix; and
4. By tendering a proposed order after the objection period has expired.

b. *Rescheduling and Renoticing of First Meeting.* The moving party shall be responsible for rescheduling and renoticing the § 341(a) meeting of creditors and providing a certificate of service of the notice evidencing service on all creditors and other parties in interest, including all parties the Court requires on a standard matrix.

Rule 1015-1. Joint Administration and Bifurcation of a Jointly-Administered Case.

a. *Joint Administration.* Joint cases filed pursuant to 11 U.S.C. § 302(a) shall be combined for administrative purposes only. Pursuant to § 302(b), the bankruptcy estates of joint cases may only be substantively consolidated by order of the Court after notice and ahearing.

b. *Motion to Bifurcate a Jointly-Administered Chapter 13 Case.* A debtor seeking to bifurcate a jointly-administered case when both debtors are to remain in a Chapter 13 case shall file a motion to bifurcate. The motion shall list all of the claims in the joint case, including attorneys fees, and describe the intended treatment of each claim by the bifurcating debtor. The motion shall be served on all parties in interest and may be filed on a no protest basis pursuant to Local Rule 9013-1(f).

c. *Bifurcation and Conversion of One Debtor.* A motion to bifurcate is not required when an individual debtor in a joint case seeks conversion to a case under a different chapter. The debtor may convert the case by filing the appropriate notice of conversion or obtaining an order upon motion and paying the appropriate fee to bifurcate and convert the case.

d. *Filing Fees.*

1. Upon the bifurcation of a joint case, the appropriate fee shall be paid pursuant to 11 U.S.C. § 1930.
2. When a debtor seeks both to bifurcate and to convert a case, the debtor shall pay the appropriate conversion fee in addition to the fee to bifurcate the case.

Rule 1017-1.

a. *Automatic Dismissal of Chapter 7 Cases.* Except as provided in Local Rule 1007-1(b), a Chapter 7 case shall be subject to dismissal without further notice or opportunity for hearing if the debtor fails to appear at the § 341(a) meeting of creditors.

b. *Automatic Dismissal of Chapter 13 Cases.* The Chapter 13Trustee may submit an order dismissing the case without further notice or opportunity for hearing for the debtor's failure to do any of the following:

1. Appear at the § 341(a) meeting of creditors;
2. Escrow the first plan payment within 30 days after the entry of the order for relief;
3. Escrow timely additional plan payments for each 30-day period after the due date of the first plan payment as described above, until confirmation;
4. Provide the Chapter 13 Trustee with a copy of the last filed federal income tax return that the debtor was required to file under applicable non-bankruptcy law pursuant to 11 U.S.C. § 521(e)(1);
5. Comply with the requirements for filing tax returns for the 4-year period prior to the filing of the petition pursuant to § 1308; or
6. Execute Local Form 7, Debtor(s) Certification and Affidavit — 341(a) Meeting, as required by Local Rule 4002-1(f)(6) by the date of the first scheduled § 341(a) meeting of creditors.

Rule 1071-1. Divisions — Bankruptcy Court.

There shall be five divisions of the Court. The headquarters of each division and the counties comprising each division are as follows:

Name of Division	Clerk's Office	Counties
Asheville (Case prefix 1)	Asheville	Avery, Buncombe, Haywood, Henderson, Madison, Mitchell, Transylvania, Yancey
Bryson City (Case prefix 2)	Asheville	Cherokee, Clay, Graham, Jackson, Macon, Swain
Charlotte (Case prefix 3)	Charlotte	Anson, Gaston, Mecklenburg, Union
Shelby (Case prefix 4)	Charlotte	Burke, Cleveland, McDowell, Lincoln, Polk, Rutherford
Wilkesboro(Case prefix 5)	Charlotte	Alexander, Alleghany, Ashe, Caldwell, Catawba, Iredell, Watauga, Wilkes

Rule 1073-1. Assignment of Cases.

Determination of Division for Assignment. In accordance with the divisions established in Local Rule 1071-1, the Clerk of Court shall assign all cases and proceedings to a division when the action is filed or removed. The place of filing shall be determined by the debtor's domicile, residence, principal place of business, or the location of the debtor's principal assets immediately preceding the filing of the bankruptcy case. In cases involving an affiliate, a general partner or partnership, related cases shall be assigned to the division where the original case was filed or is pending. In adversary proceedings when there is no pending bankruptcy case in this district, the division will be assigned at the discretion of the Clerk.

PART II
OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS; CHAPTER 13 CONFIRMATION HEARINGS

Rule 2002-1. Notice to Creditors and Service of Papers.

a. *Amended or Supplemental Schedules.* If additional creditors are added after the debtor's initial filing, the debtor shall serve the notice required by 11 U.S.C. § 341 on the added creditors and promptly file a certificate of service with the Clerk of Court.

b. *Change of Address.* A creditor or party in interest with a change of name and/r address, whether for receipt of payments and/or notices, shall file Local Form 12 or an amended proof of claim with the Clerk in each case in which the change is to be noted. A change of name and/r address indicated by the filing of an amended proof of claim shall not constitute a change in the claim amount, unless specifically noted.

c. *Certificates of Service.* The party filing a pleading shall serve the pleading upon appropriate parties and file with the Clerk a certificate of service either with the pleading or promptly after service. Pursuant to Local Rule 9022-1, the party obtaining relief from the Court shall serve a copy of the filed order upon the appropriate parties who did not receive service through CM/ECF as provided in Local Rule 5005-1(e).

d. *Method of Service.* Service of all pleadings and orders shall be by first class mail or electronically, consistent with Local Rule 5005-1(e).

e. *Notice by Proponent.* The proponent shall prepare and mail notices required pursuant to Rule 2002(a)(2) and (3) and Rule 2002(f)(8).

f. *Papers Required to be Served by Chapter 11 Debtors.* In Chapter 11 cases, the debtor-in-possession shall be responsible for serving the following papers and for filing a certificate of service with the Clerk's Office within five days of the date of the mailing:

1. The debtor's plan;
2. The debtor's disclosure statement as approved by the Court;
3. The ballot;
4. Notice regarding balloting and date for hearing on confirmation of the debtor's plan in a form approved by the Clerk's Office; and
5. Any other notices as the Court or Clerk shall direct in a particular case in a form approved by the Clerk's Office.

g. *Service of Chapter 11 Fee Application and Notice of Hearing.* Copies of the full applications for compensation shall be served by the applicant pursuant to Local Rule 5005-1 or as otherwise allowed by law, on the debtor, the debtor's counsel, the Bankruptcy Administrator, and the trustee, if a trustee has been appointed. In all cases in which there is a Court appointed committee, a full copy of the fee application also shall be served on counsel for the committee, if such has been appointed, or if no counsel so serves, then on all members of that committee who have accepted appointment.

h. *Service of Chapter 13 Plan.* Within five (5) days of the filing of a plan or amended plan, the debtor shall serve copies of the Chapter 13 plan, and amended plan if applicable, prepared in conformance with the Court approved local form, on all parties in interest as provided herein and in conformance with Local Rule 4002-1(f)(4). The debtor shall file with the Court a certificate of service of the plan and/or amended plan. The certificate of service shall include a copy of the mailing matrix showing the parties served.

Rule 2002-2. Preferred Addresses Under 11 U.S.C. § 342(e) and (f) and National Creditor Registration Service.

a. *Filing of Notice of Preferred Address.* The filing of anotice of preferred address pursuant to 11 U.S.C. § 342(f) by a creditor directly with the agency or agencies that provide noticing services for the Court will constitute the filing of such notice with the Court.

b. *Registration with National Creditor Registration Service.* Registration with the National Creditor Registration Service must be accomplished through the agency that provides noticing services for the Court. Forms and registration information are available at **www.ncrsuscourts.com**.

Rule 2002-3. Objection to Confirmation of Chapter 13 Plans.

a. *Hearing on Confirmation.* Absent timely objection, the § 341(a) meeting of creditors shall be deemed to be the hearing on confirmation for purposes of 11 U.S.C. § 1324.

b. *Time for Objections to Confirmation.* Provided the Chapter 13 plan is served on all parties in interest as required by Local Rule 2002-1(h), objections to confirmation must be filed no later than 15 days from the conclusion of the § 341(a) meeting of creditors.

c. *Notice of hearing on Objection to Confirmation.* If an objection to confirmation is filed with the Court, the objecting party must provide written notice to affected parties in interest of the date, time, and location of the hearing on the objection. No hearing will be held unless an objection to confirmation is filed timely.

Rule 2016-1. Appointment of Professional Persons; Retainers Held by Professional Persons and Chapter 11 Attorney Fee Applications; Compensation of Chapter 13 Attorneys.

a. *Professional Fee Guidelines.* Professionals seeking compensation are encouraged to refer to the Guidelines for Compensation which are attached hereto as Appendix A.

b. *Appointment of Professionals and Retainers.*

1. *Applications.* Absent extraordinary circumstances, attorneys and other professionals will not be appointed *nunc pro tunc.* Applications for appointment filed within 30 days of the filing of the petition or within 30 days of the date services commence, whichever occurs later, shall be considered timely.

2. *Retainers.* In a Chapter 11 case, a retainer held by a professional shall be maintained in a trust account. The professional shall not draw against the retainer postpetition except upon order of the Court.

c. *Security Interests.* Any agreements granting security interests in the debtor's property or other property for the benefit of the debtor to the debtor's attorney or any other professional employed by the debtor to secure the payment of professional fees must be fully disclosed in the petition and/or schedules and must be approved by the Court. Any party receiving such an interest must make application to the Court within 15 days of the date of filing of the petition or the date of the agreement, whichever occurs later. Such application should be served on all parties in interest, including the trustee and the Bankruptcy Administrator, and may be filed on a no protest basis pursuant to Local Rule 9013-1(f).

d. *Chapter 13 Plan and Disclosure of Attorneys Fee Procedure.* In addition to filing the petition and schedules as required by the Official Bankruptcy Forms, the debtor shall file the Chapter 13 plan in conformance with Local Form 4 and shall file an executed Disclosure to Debtor(s) of Attorneys Fee Procedure in conformance with Local Form 3.

e. *Compensation of Attorneys in Chapter 13 Cases.*

1. Subject to paragraph (f)(4), below, the amount of the fee in cases and with respect to pleadings filed electronically shall be as follows:

A. The presumptive base fee in a Chapter 13 case will not exceed $3,250 unless the Court orders otherwise.

B. Any fee for non-base services that may be rendered to a Chapter 13 debtor must be applied for and approved by the Court. For fees and expenses less than $1,000, notice need only be sent to the debtor, the trustee, and the Bankruptcy Administrator. For fees and expenses of $1,000 or more, all parties in interest must be noticed. If a no protest notice is used, it shall be given using the form appended to these Local Rules as Local Form 1.

f. *Definition of Base Fee Services.*

1. The base fee shall be presumed to compensate the debtor's attorney for a level of services to the debtor that shall, at a minimum, include the following services:

A. Providing the pre-filing notices required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

B. Preparing and filing the petition, schedules, supplemental local forms, Chapter 13 plan, amended Chapter 13 plan, and matrix;

C. Circulating a copy of the Chapter 13 plan to all creditors and interested parties as reflected in the case matrix; and service of amended plan if appropriate;

D. Drafting and mailing letters to the debtor regarding attendance at the § 341(a) meeting of creditors, escrow of first money, and other responsibilities of the debtor;

E. Preparing for and attending the § 341(a) meeting of creditors;

F. Reviewing the confirmation order and periodic case status reports from the trustee;

G. Reviewing the Report of Trustee Claims Determination;

H. Maintaining custody and control of all case files with original documents for such periods as prescribed by law or Local Rule;

I. Serving orders on all affected parties;

J. Verifying the debtor's identity and social security number; furnishing to the Chapter 13 Trustee the debtor's IDs, tax return(s), and payment advices, if required;

K. Defending objection(s) to confirmation of the debtor's plan filed by the Chapter 13 Trustee; and

L. Preparing and filing Debtor's Motion for Entry of Discharge (Local Form 8) and Debtor's Disclosure of Information Regarding Domestic Support Obligations (Local Form 9).

2. The base fee also shall include the following services to the extent they are requested or reasonably necessary for effective representation of the debtor:

A. Preparing and filing of proofs of claim on behalf of the debtor for a creditor;

B. Drafting and filing of objections to scheduled and unscheduled proofs of claim;

C. Assuming and rejecting unexpired leases and executory contracts;

D. Preparing for and attending valuation hearings;

E. Motions to transfer venue;

F. Conferring with the debtor regarding obtaining postpetition credit, where no formal application is ultimately filed;

G. Drafting motions to avoid liens pursuant to § 522(f);

H. Calculating plan payment modifications, where no formal motion is ultimately filed;

I. Responding to creditor contacts regarding plan terms, valuation of collateral, claim amounts, and the like;

J. Responding to debtor contacts regarding job losses, changes in financial circumstances, address changes, and advising the Court and the trustee of the same when appropriate;

K. Communicating with the debtor, to a degree that is reasonable, regarding mortgage payment defaults, lease defaults, insurance coverage or the lack thereof, warranties, possible credit disability, life insurance coverage, and the like;

L. Obtaining and providing the trustee with copies of documents relating to lien perfection issues, such as recorded deeds of trust, purchase money security agreements, and the like;

M. Drafting and mailing letters to creditors upon entry of discharge regarding lien releases, turnover of clear title certificates, cancellation of deeds of trust and judgments, and the like;

N. Drafting and mailing certified letters to creditors regarding matters related to alleged violations of the automatic stay;

O. Drafting and mailing letters regarding voluntary turnover of property;

P. Reviewing documents in relation to the use or sale of collateral when no formal application is ultimately filed;

Q. Providing the debtor with a list of answers to frequently asked questions and other routine communications with the debtor during the pendency of the case; and

R. Requesting plan payoffs from the trustee.

3. The following services are presumed not to be covered by the base fee, and the Court may award additional compensation for the following services. Non-base fees may not be requested of the debtor or paid by the debtor or any other person, in trust or otherwise, without prior approval of the Court:

A. Abandonment of property post-confirmation;

B. Motion for moratorium;

C. Motion for authority to sell property;
D. Motion to modify plan;
E. Motion to use cash collateral or to incur debt;
F. Defense of motion for relief from stay or codebtor stay;
G. Defense of motion to dismiss filed after confirmation of the debtor's plan;
H. Non-base fee requests;
I. Stay violation litigation, including amounts paid as fees by the creditor or other party;
J. Post-discharge injunction actions;
K. Adversary proceedings;
L. Wage garnishment orders;
M. Turnover adversaries;
N. Conversion to Chapter 7;
O. Motions to substitute collateral; and
P. Any other matter not covered by paragraph (f)(1) and (2) above.

4. In the Court's discretion, attorneys in a Chapter 13 proceeding may request, in open court, and without any further notice, non-base fees for the following services and in the amounts not exceeding those shown below. Without other notice, the debtor's attorney may also request the actual expenses of filing fees and of notice to creditors.

A. Defense of motion to dismiss	$200
B. Motion to modify and order (including motion for moratorium)	$350
C. Substitution of collateral	$450
D. Prosecution or defense of motion for relief from stay or co-debtor stay and order	$450
E. Motion for authority to sell property and order	$450
F. Motion to obtain credit	$450
G. Permission from trustee to obtain credit, to be filed as an administrative proof of claim	$200
H. Motion to continue or impose the automatic stay	$350

I. When substitute legal counsel is retained by a chapter 13 debtor, such substituted counsel is entitled to a presumptive base fee of $500 without formal application to the Court, provided that the order allowing substitute counsel specifies both the amount of the fee and whether the fee is paid direct by the debtor or through the plan.

g. *Fees Exceeding the Presumptive and Non-Base Fees.*

1. If any fee retainer and/or agreement for payment is taken by an attorney for a Chapter 13 debtor in an amount that is in excess of the presumptive base fee, within 30 days after the petition is filed, the attorney shall file an application for approval of the fee and notice the same for hearing.

2. These standard base and non-base fees are intended as a convention to reduce expense to the parties. Counsel may, alternatively, apply for non-base fees on a time and expenses basis in accordance with Local Rule 2016-1 and 11 U.S.C. § 330. In cases where the debtor and counsel elects this procedure, the election must be made within 30 days after the petition is filed, with notice and a hearing.

h. *Disclosure of Fee.* Every attorney for a Chapter 13 debtor must disclose to the debtor the procedures applicable to awards of attorneys fees in Chapter 13 cases in this district. This disclosure shall be made by reviewing with the debtor the Disclosure to Debtor(s) of Attorneys Fee Procedures for Chapter 13 Cases in the United States Bankruptcy Court for the Western District of North Carolina, Local Form 3, which is annexed to these Local Rules. Local Form 3 must be fully completed, executed as indicated, and the original must be filed with the Chapter 13 petition of the debtor. In addition, originally executed copies of Local Form 3 must be maintained by the attorney for a period of four (4) years after the closing of the case, and upon request of the Court, the filer must provide original documents for review.

i. *Payment of Attorneys Fees in Chapter 13 Cases.*

1. An attorney may accept an amount of compensation in advance of the filing of the Chapter 13 case up to the maximum of $3,250 presumptive base fee on the following conditions:

A. All Court filing fees must be paid in full at the time the case is filed (no installment fees to be applied for), and

B. The debtor must appear at the time first set for the § 341(a) meeting of creditors having tendered to the trustee no less than all plan payments due.

2. If an attorney accepts a retainer and either (1)(A) or (1)(B) above is not met, the attorney must pay any unpaid Court fee.

3. The trustee is authorized to make a lump sum disbursement at confirmation in payment toward the debtor attorney's base fee balance if the trustee has preconfirmation debtor payments available that are not required to be used for adequate protection payments or for payment of the trustee's administrative fee.

4. To the extent that a balance remains owing on the debtor attorney's base fee after the application of all payments as set forth in paragraphs (1) and (3)above, the trustee shall make monthly disbursements on account of such fee balance on a pro-rata basis, along with the payments made to creditors holding allowed secured claims.

5. Any non-base fees and expenses awarded by the Court shall be paid by the trustee on a pro-rata basis, along with the payments made to creditors holding allowed secured claims.

j. Disbursement of Base and Non-Base Fees by the Chapter 13 Trustee.

1. The Chapter 13 Trustee shall pay allowed base fees in a Chapter 13 plan in the name of the attorney of record as specified in the debtor's filed, confirmed plan.

2. The Chapter 13 Trustee shall pay allowed non-base fees to the attorney as specified in the order allowing such non-base fees.

3. If there is a change in the professional association of a debtor's attorney during the pendency of a case which will require the trustee to redirect payment of fees, the affected attorney must file with the trustee a letter of agreement. If the form and execution of the agreement is satisfactory to the trustee, the trustee will redirect payment of fees in accordance with the letter of agreement.

4. These Local Rules do not prohibit the Chapter 13 Trustee or any attorney or law firm representing the debtor from applying to the Court for an order directing the payment of allowed attorneys fees.

k. *Payment of Administrative Claims in Cases Dismissed Pre-Confirmation.* Pursuant to 11 U.S.C. § 1326(a)(2):

1. The Chapter 13 Trustee shall be allowed an administrative claim of $200 in cases dismissed prior to confirmation (the "set-up fee").

2. Unless otherwise ordered by the Court, in the event plan payments are made to the Chapter 13 Trustee prior to confirmation, upon dismissal of the case, the plan payment shall be distributed as follows:

A. Adequate protection payments provided for in 11 U.S.C § 1326(a)(2) and Local Rule 3012-1; then

B. The $200 trustee set-up fee; and then

C. Unpaid debtor attorneys fees; and any other administrative claims allowed by 11 U.S.C. § 503(b); and then

D. To the debtor.

Rule 2016-2. Trustee Search Fee.

Chapter 13 Trustee Search Fee. Chapter 13 standing trustees are authorized to impose charges not to exceed the amounts set forth in the Judicial Conference Bankruptcy Court fee schedule, 28 U.S.C. § 1930(b), in reimbursement of the irreasonable and necessary costs incurred in conducting case record searches, photocopying documents, or performing any similar services at the request of a party in interest.

Rule 2090-1. Representation of Business Entities.

a. *Representation Required.* All partnerships, corporations, limited liability companies, trusts, associations, and other business entities that appear in cases or proceedings before this Court, not including the § 341(a) meeting of creditors or filing proofs of claim, must be represented by a lawyer duly admitted to practice before this Court. For purposes of this Local Rule, an appearance shall be defined as preparing and filing papers, such as complaints and answers, petitions, applications, and motions; questioning witnesses in proceedings before the Court; and pursuing any action in this Court.

b. *Sole Proprietorships Exempt.* This Local Rule does not apply to an individual conducting business as a sole proprietorship.

Rule 2090-2. Special Admissions.

a. *Special Admission in this District.* Litigants appearing at a hearing, except counsel representing governmental agencies and parties appearing *pro se*, must be represented by at least one member of the bar of this Court or by an attorney admitted to practice by this Court pursuant to the local Rule for Procedure and Practice 83.1 of the United States District Court for the Western District of North Carolina and this Local Rule. Any lawyer who is a member in good standing of the Bar of the Supreme Court of the United States or the Bar of the Supreme Court of any state in the United States, may, in the discretion of the judges of this Court, be permitted to appear in a particular case. If special admission is granted, and if a member of the bar of this Court is not associated, the specially admitted attorney and that attorney's client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk in the appropriate division of this Court as process agent. The Court encourages out-of-state attorneys to associate a member of the bar of this Court in all cases, but will not require such association where the amount in controversy or the importance of the case do not appear to justify double employment of counsel. Special admission will be the exception and not the rule, and no out-of-state counsel will be permitted to practice frequently or regularly in this Court without the association of local counsel. Special admission granted by this Court constitutes admission to the United States District Court for the Western District of North Carolina.

b. *Filing Papers by Attorneys not Admitted in this District.* Where justice requires, the authorized deputy clerks in Asheville and Charlotte may permit the filing of papers at the request of out-of-state counsel; provided, however, that the further participation of out-of-state counsel shall be governed as provided in this Local Rule.

c. *Fee for Special Admission in this District.* All counsel, except those representing governmental agencies, must pay a fee as assessed by the District Court for each special admission or whenever *pro hac vice* admission is granted.

d. *Electronic Filing of Pleadings by Attorneys Not Admitted in this District.* The Clerk of Court may provide out-of-state counsel with an ECF login and password upon counsel's representation that he/she (i) is a lawyer in good standing of the Bar of the Supreme Court of the United States or the bar of the Supreme Court of any state in the United States, and (ii) has had prior ECF training before this or another court. Without obtaining special admission to the Court,out-of-state counsel can use the ECF login and password to file any of the following documents:

(1) a notice of appearance/request for notices;

(2) a motion seeking *pro hac vice* admission without associating local counsel, pursuant to Local Rule 2090-2(a); and

(3) a response to a claim objection.

Issuance of an ECF login and password is not a substitute for admission to practice before this Court. Accordingly, the filing of further documents requires special admission to this Court in accordance with paragraph (a) above.

Rule 2090-3. Attorneys — Discipline.

a. *Standards of Conduct.* In addition to applicable federal law, the Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct of the North Carolina State Bar adopted by the Supreme Court of North Carolina, as amended from time to time by that state court except as otherwise provided by a specific rule of this court. Acts or omissions by an attorney practicing before this Court which violate the Rules of Professional Conduct adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

b. *Disciplinary Enforcement.* For misconduct as defined in these rules, and after notice and an opportunity to be heard, any attorney practicing before this Court may be suspended from practice in this Court, reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

c. *Duty to Inform the Clerk.* Any attorney practicing before this Court shall, upon being subjected to public discipline by any court or by the state bar of any state, promptly inform the Clerk of such action.

d. *Special Appearances.* Whenever an attorney appears in this Court for purposes of a particular proceeding, the attorney shall be deemed to have conferred disciplinary jurisdiction upon this Court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

e. *Jurisdiction.* Nothing contained in these rules shall be construed to deny to this Court such powers as are necessary for the Court to maintain control over proceedings conducted before it, such as proceedings for contempt or other such sanctions under the Federal Rules of Civil Procedure, these Local Rules, or other applicable law.

Rule 2091-1. Extent of an Attorney's Duty to Represent.

a. *Duty to Represent Debtor.* Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes,including the representation of the debtor in all matters that arise in the case and conversion to another Chapter,with the following exceptions:

1. In a Chapter 7 case, the attorney is not required to represent the debtor in an adversary proceeding so long as this exception is included in the attorney's fee contract with the debtor.

2. In a case involuntarily converted to a Chapter 7, the attorney shall make a diligent effort to prepare postconversion schedules. Unless otherwise ordered, the duty to represent the debtor shall terminate at the conclusion of the first scheduled § 341(a) meeting of creditors. The attorney seeking to withdraw from representing the debtor must file a Notice of withdrawal of Representation in order to terminate representation and serve a copy on the trustee and the debtor.

b. *Relief from Duty to Represent.* An attorney is automatically deemed relieved of the duty to represent the debtor when the debtor's case is closed or substitute counsel is appointed. Alternatively, an attorney may be relieved of the duty to represent the debtor only upon motion, and after notice and a hearing, on the order of this Court.

c. *Entry or Substitution of Legal Counsel.* By and with the consent of a debtor, an attorney may file a motion with the court to become legal counsel for the debtor. If, at the time the motion is filed the debtor is without an attorney of record, such motion may be considered *ex parte*. If, at the time such motion is filed the debtor has an attorney, the motion shall be considered by the Court pursuant to Local Rule 9013-1(f).

An order allowing substitution of a debtor's attorney also may provide for the withdrawal of the debtor's previous attorney; otherwise, the prior attorney shall be relieved of further duty to represent the debtor only as provided in paragraph (b) of this rule.

d. *Substitution of Legal Counsel by Any Other Party in Interest.* Substitution of legal counsel by any other party of interest shall be effective upon the filing of a Notice of Substitution of Counsel. The notice shall be served upon the debtor, debtor's attorney, trustee, the prior legal counsel of the party of interest, and any other party of interest if the substitution concerns a pending matter before the Court or reconsideration of a matter previously pending before the Court.

e. *Duty to Represent.* An attorney allowed by order of the Court to enter a case as attorney for a debtor shall have those duties as set forth in paragraph (a) above from the time stated in the order allowing entry into the case.

PART III
CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3001-1. Claims and Equity Security Interests.

a. *Where to File a Claim.*

1. In all cases, proofs of claim shall be filed by electronic means directly with the Clerk of Court according to those guidelines established and published by the Court.

2. When filing proofs of claim, the claimant shall comply with the requirements of Bankruptcy Rule 3001(c) and (d) regarding the attachment of documentation in electronic format sufficient to establish the validity and status of the claim asserted, pursuant to the Clerk's guidelines.

3. The filing of a proof of claim by electronic means directly with the Clerk shall constitute the filing claimant's approved signature by law, and the provisions of 11 U.S.C. § 152(f) shall apply to the filing of a proof of claim under this procedure.

4. The filing of a proof of claim by electronic means in accordance with the Clerk's procedures shall constitute entry of the proof of claim pursuant to Bankruptcy Rule 5003.

b. *Filing of Claims by Debtor or Trustee.* In Chapter 13 cases, if a creditor fails to file a proof of claim on or before the first date set for the § 341(a) meeting of creditors, the debtor or trustee may do so in the name of the creditor. If the debtor or trustee does file a proof of claim on behalf of a creditor, the creditor may file an amended proof of claim pursuant to Bankruptcy Rules 3002 or 3003(c), which shall supercede the proof of claim filed by the debtor or trustee.

c. *Change of Address.* See Local Rule 2002-1(b).

d. *Electronic Filing of Transfers of Claim.* Creditors shall adhere to the following procedures when filing transfers of claim:

1. In all cases filed under all chapters of the Bankruptcy Code, transfers of claim shall be filed by electronic means directly with the Clerk of Court according to those guidelines established and published by the Clerk.

2. The filing of a transfer of claim by electronic means directly with the Clerk shall constitute the filing claimant's approved signature by law, and the provisions of 18 U.S.C. § 152(4) shall apply to the filing of a transfer of claim under this procedure.

3. The filing of a transfer of claim shall require the attachment of Official Bankruptcy Form B210. Supporting documentation may be attached within the same filing.

4. The filing of a transfer of claim by electronic means in accordance with the Clerk's procedures shall constitute entry of the transfer of claim pursuant to Bankruptcy Rule 5003.

5. Any paper "hard copy" transfer of claim filed with the Clerk that has subsequently been scanned and docketed in CM/ECF may be destroyed at any time thereafter.

Rule 3001-2. Presumptive Interest Rates in Chapter 13 Cases.

a. *The Formula Rate.* The presumptive interest rate for use in calculating the value of payments to secured creditors for the entire term of the Chapter 13 plan is the composite prime interest rate plus two percent (the "Formula Rate").

b. *Calculating the Formula Rate.* The composite prime interest rate as published on the first business day of the calendar month will be used as the basis for calculating the Formula Rate for all cases filed during the same calendar month, except that in the event that the first day of the calendar month falls on a Saturday, Sunday, or bank holiday, the composite prime interest rate effective for the last preceding business day shall be the basis for the Formula Rate in cases filed on those days.

c. *Determining Composite Prime Interest Rate.* The Court will provide appropriate links at its home website from which the composite prime interest rate can be determined.

d. *Application of Formula Rate.* Unless otherwise ordered, the Formula Rate generally applies to over secured, fully secured, and under secured claims.

e. *Contract Rate.* Where a claim is secured only by the debtor's principal residence and the contract rate is greater than the Formula Rate, the contract rate must be used.

f. *Formula Rate as Default Rate.* Paragraph (e) above notwithstanding, unless the proposed Chapter 13 plan provides specifically for the use of an interest rate other than the Formula Rate for any particular claim or claims, and specifically identifies that interest rate, the trustees are authorized to use the Formula Rate for all secured claims provided for by the plan.

g. *Otherwise Agreed Upon Interest Rate.* A different interest rate may be used if agreed upon by the debtor, the claimant, and the trustee.

h. *Departure from Contract/Formula Rate Conventions.* Notwithstanding the above, a party in interest may requestan evidentiary hearing if a departure from the contract/Formula interest rate conventions, as set forth herein, is warranted. Such request must be made by motion and notice and determined by hearing.

i. *Rate for Tax Claimants.* Any secured tax claimant desiring to invoke the provisions of 11 U.S.C. § 511(a) for payment of interest on its claim, shall expressly set out in its proof of claim the appropriate non-bankruptcy rate of interest to be used by the trustee in paying the value of its claim. Otherwise, the trustee is authorized to use the Formula Rate.

Rule 3002-1. Chapter 13 Trustee Treatment of Certain Tax Claims.

a. *Administrative Modification of Plans for Tax Claims.* When a proof of claim is filed for a tax liability in excess of the estimated amount scheduled by the debtor, and if modification of a previously confirmed plan is required, the trustee may make the necessary plan modification and provide written notice to the debtor and the debtor's attorney.

b. *Chapter 13 Trustee Treatment of Tax Claims Filed Prior to Due Date or Penalty Date.*

1. The Clerk shall accept for filing properly-executed proofs of claim from any taxing authority even when such proofs of claim are filed prior to the due date for federal and state tax returns or the penalty date for local tax obligations.

2. The trustee shall not administer such proofs of claim until the due date or penalty date as described above has passed.

3. Following the passage of the applicable date, the taxing authority must file an amended proof of claim with the Clerk and serve the debtor's attorney and the Chapter 13 Trustee with notice that the taxing authority desires to have the debts included for payment by the trustee through the Chapter 13 plan.

4. Unless the taxing authority provides such timely written notice as set forth in subparagraph 3 above, the proofs of claim in question are deemed objected to by the trustee for the reason that the debts evidenced by the proofs of claim have been satisfied by direct payment, without prejudice to reconsideration.

Rule 3003-1. Chapter 11 Claims.

Time for Filing Claims in a Chapter 11 Case. In a Chapter 11 case, a proof of claim shall be filed within 90 days after the date first set for the § 341(a) meeting of creditors, except as provided in Bankruptcy Rule 3003(c)(3) or otherwise extended by the Court.

Rule 3009-1. Processing Returned Creditor Overpayments in a Chapter 7 Case.

Returned Creditor Overpayments. Following the final distribution to creditors in a Chapter 7 case, the trustee is authorized to process returned creditor overpayments as follows:

1. If the returned creditor overpayments total $500 or more in any case, the trustee shall disburse the overpayments to creditors pursuant to the previously filed final report, excluding the overpaid creditor's share, on a pro rata basis.

2. If the returned creditor overpayments total less than $500 in any case, the overpayments shall be deemed to be abandoned to the debtor, and the trustee may disburse the funds directly to the debtor.

Rule 3011-1. Disbursement of Unclaimed Funds.

a. *Procedure for Collecting Unclaimed Funds.* The following procedure shall apply to the collection of unclaimed funds:

1. *Deposit of Unclaimed Funds into United States Treasury.* All unclaimed funds collected by the Court shall be deposited into the United States Treasury.

2. *Local Form 5.* Claimants shall use Local Form 5, Motion for Disbursement of Unclaimed Funds, to request disbursement of unclaimed funds, including the attached Notice of Hearing.

3. *Service of Local Form 5.* The claimant shall serve a copy of Local Form 5 on the United States Attorney, the Bankruptcy Administrator, and the case trustee at least fifteen (15) days prior to the hearing date.

4. *Individual Claimants.* An individual claimant may file Local Form 5 *pro se*. An individual claimant shall establish full proof of his or her right to the unclaimed funds by personally appearing at the hearing and presenting testimony in open court which convinces the Court of the claimant's right to the unclaimed funds.

A Motion for Disbursement of Unclaimed Funds by an individual claimant must be accompanied by the following:

A. Attached affidavit with the certificate of a notary public. Such affidavit shall bear the seal of the notary and explain the claimant's entitlement to the funds being requested.

B. A copy of an unexpired passport or valid drivers license to establish identity;
C. Last 4 digits of the claimant's social security number; and
D. Any additional documentation that establishes full proof of the claimant's right to the unclaimed funds and evidences identity such as a copy of a proof of claim or a copy of a utility bill from an old address.

5. *Waiver of Personal Appearance at Hearing by Individual Claimants.* In cases of extreme hardship, individual claimants may request a waiver of the requirement that they appear in person at the hearing on the Motion for Disbursement of Unclaimed Funds. Such requests will be considered by the Court on a case-by-case basis and must establish to the Court's satisfaction the claimants' identity and entitlement to the unclaimed funds.

6. *Non-individual claimants.* All non-individual claimants (such as partnerships, corporations, and governmental agencies) must be represented by an attorney who is a member in good standing of the North Carolina State Bar and who has been admitted to practice before the United States District Court for the Western District of North Carolina by taking the prescribed oath in open court, as set forth in Rule 83.1 of the Local Rules of the United States District Court for the Western District of North Carolina. A non-individual claimant shall establish full proof of its right to the unclaimed funds by having a designee personally appear at the hearing and present testimony in open court which convinces the Court of the claimant's right to the unclaimed funds. Alternatively, the non-individual claimant, in lieu of appearing in court, may file an affidavit of its designated officer, general or managing agent, stating the factual and legal basis for its claim to the funds in question, which affidavit must be presented to the Court by its attorney at the hearing on the Motion for Disbursement of Unclaimed Funds.

Rule 3012-1. Pre-Confirmation Adequate Protection Payments.

Pre-Confirmation Adequate Protection Payments. All adequate protection payments required by 11 U.S.C. § 1326(a)(1) shall be paid as follows:

1. The debtor shall pay directly to the lessor all payments scheduled in a lease of personal property for that portion of the obligation that becomes due after the order for relief. Absent a timely objection to confirmation of the proposed plan, the debtor shall be presumed to have made such payments as required by § 1326(a)(1). Because the Chapter 13 plan shall provide that payments to lessors will be made directly by the debtor, there shall be no reduction in the Chapter 13 plan payment remitted to the trustee for these direct payments.

2. The Chapter 13 plan shall provide that adequate protection payments required by 11 U.S.C. § 1326(a)(1) shall be made by the Chapter 13 Trustee, unless the Court orders otherwise.

3. The debtor shall list in the Chapter 13 plan the name, address, and last four digits of the account number for each secured creditor entitled to receive adequate protection payments. For purposes of this provision, the trustee shall make such adequate protection payments to the address duly noted on the sworn proof of claim. The use of such address shall be deemed proper notice to the creditor for the purposes of adequate protection payments.

4. All adequate protection payments paid through the Chapter 13 Trustee shall be subject to an administrative fee in favor of the trustee equal to the trustee's statutory percentage commission then in effect, and the trustee shall collect such fee at the time of the distribution of the adequate protection payment to the claimant.

5. No adequate protection payment shall be disbursed until a properly-executed proof of claim is filed by electronic means with the Clerk and has been deemed allowed pursuant to 11 U.S.C. § 502(a) and the Chapter 13 plan has been confirmed.

6. The trustee shall not be required to make adequate protection payments on account of any claim for which the secured value of said claim as provided in the plan is less than $2,000.

7. Unless otherwise ordered by the Court pursuant to § 1326(a)(3), the amount of the adequate protection payment(s) required to be made by the trustee shall be based on a monthly calculation of one percent (1%) of the lesser of (1) the plan value of the collateral securing the affected claim or (2) the total amount of the asserted claim.

Rule 3015-1. Dismissal or Conversion of Chapter 13 Cases.

a. *Funds Held by the Trustee at Dismissal or Conversion.* In the event of the dismissal or conversion of a Chapter 13 case, the trustee shall dispose of any debtor funds in the trustee's custody as follows:

1. *Cases Dismissed Prior to Confirmation.* See Local Rule 2016-1(k).

2. *Cases Dismissed After Confirmation.* The trustee shall disburse any funds received prior to entry of the order of dismissal pursuant to the terms of the confirmed plan. Any funds received by the trustee subsequent to entry of the order of dismissal shall bere funded to the debtor in care of the debtor's attorney.

3. *Cases Converted to Another Charter Prior to Confirmation.* Any funds received by the trustee subsequent to the notice of conversion shall be distributed to:

A. Adequate protection payments provided for in 11 U.S.C. § 1326(a)(2) and Local Rule 3012-1; then, and in the discretion of the trustee, to:

B. The $200 trustee set-up fee as provided for in Local Rule 2016-1(k); then,

C. If the remaining funds are less than $2,500; to the debtor in care of the debtor's attorney. If the remaining funds are $2,500 or more, to the Chapter 7 Trustee, or to the debtor-in-possession.

4. *Cases Converted to Another Chapter After Confirmation.* The trustee shall disburse any funds received prior to entry of the notice of conversion pursuant to the terms of the confirmed plan. Any funds received by the trustee subsequent to the notice of conversion shall be distributed as follows:

A. If the remaining funds are less than $2,500; to the debtor in care of the debtor's attorney. If the remaining funds are $2,500 or more, to the Chapter 7 Trustee or to the debtor-in-possession.

b. *Trustee's Right to Seek Court Determination.* The provisions of paragraph (a) above are subject to the trustee's right to seek a Court determination of the disposition of funds in any particular case when, in the trustee's judgment, such a determination is appropriate.

Rule 3018-1. Chapter 11 Balloting.

Filing with Clerk. Unless otherwise ordered, all original ballots must be filed with the Clerk of Court by the voting parties. Any proponent of a plan shall file a summary of ballots as they appear in the Court record. The summary shall be filed with the Clerk not later than three business days prior to the hearing on confirmation.

Rule 3021-1. Authorization of Pro-Rata Monthly Payments to Secured Creditors in Chapter 13 Cases.

Payments to Secured Creditors. The debtor and the Chapter 13 Trustee shall be deemed to be in compliance with the requirements of 11 U.S.C. § 1325(a)(5)(B)(iii) as long as the trustee makes regular monthly payments to each affected secured creditor on a *pro-rata* basis in amounts that are sufficient to provide adequate protection.

Rule 3021-2. Processing Returned Creditor Overpayments After Final Distribution in Chapter 13 Cases.

a. *Returned Creditor Overpayments.* Following the final distribution to creditors in a Chapter 13 case, the trustee is authorized to process returned creditor overpayments as follows:

1. *Composition (or "Percentage") Plans.* The returned creditor overpayments shall be refunded to the debtor following the filing of the trustee's final report and account.

2. *Base (or "Pot") Plans.*

A. *Plans paying all claims in full.* The returned creditor overpayments shall be refunded to the debtor following the filing of the trustee's final report and account.

B. *Plans paying less than all claims in full.* If the returned creditor overpayments total $500 or more in any case, the trustee shall disburse the overpayments to creditors pursuant to the confirmed plan, with any excess funds then remaining to be refunded to the debtor following the filing of the trustee's final report and account.

If creditor overpayments total less than $500 in any case, the overpayments shall be deemed to be abandoned to the trustee upon the closing of the case for the purpose of deferring future costs of administration.

PART IV
THE DEBTOR: DUTIES AND BENEFITS

Rule 4001-1. Motions for Relief from Stay.

a. *Motion Requirements.* In a motion for relief from stay, the following shall be included:

1. Amount of the movant's debt;
2. Description of security interest, if applicable, with copies of documents evidencing the security interest and perfection;
3. Description of the property encumbered by the stay, including serial number, vehicle identification number, legal description, physical address, lot and block number, and the like; failure to describe adequately the property may result in denial of the motion, even absent objection;
4. Basis for relief, i.e., property not necessary for reorganization, debtor has no equity, property is not property of the estate; or, if brought for cause, specific facts constituting cause;
5. Valuation of property and basis and date of valuation, e.g., appraisal, blue book, etc., including applicable copies; and
6. In Chapter 13 cases, when a creditor whose claim is secured by an interest in real property or personal property that is the debtor's principal residence, is seeking relief from stay on the grounds of postpetition default by the debtor, the creditor must include with the motion for relief from stay a statement of all postpetition account activity that is readable, reasonably understandable, and stated in plain English and substantially consistent with Local Form 10; and
7. In the event the debtor disputes the payment history, within five (5) days of the initial hearing, the debtor shall prepare and serve a postpetition account payment history in a form consistent with Local Form 11.

b. *Application of 11 U.S.C. § 362(e).* If a movant seeks application of the provisions of § 362(e), the movant must so state both in the caption and in the body of its motion. Otherwise, the movant will be deemed to have waived the application of § 362(e), and the stay shall remain effective notwithstanding the expiration of the 30-day period. Similarly, if the movant seeks application of § 362(e) but selects a hearing date outside the 30-day period of § 362(e), the movant will be deemed to have waived the application of § 362(e), and the stay shall remain effective at least until the Court considers the matter at the hearing and thereafter upon such terms as the Court orders. If the movant seeks application of § 362(e) and so notifies the Court and the adverse party, the Court will schedule the initial hearing within the applicable 30-day period.

c. *Standing Modification of the Automatic Stay.* The automatic stay provided in § 362(a) is modified in bankruptcy cases so as to authorize the Internal Revenue Service to:

1. Make income tax refunds, in the ordinary course of business, directly to debtors, unless otherwise ordered by the Court or otherwise instructed by the trustee.
2. Offset against any prepetition refund due a debtor any prepetition tax obligation owing by the debtor to the United States government.

d. *Proposed Orders.* Every proposed order granting any relief stemming from a motion for relief from stay shall:

1. Include a description of the property encumbered by the stay as described in Local Rule 4001-1(a)(3);
2. State whether the relief from stay is conditional or absolute;
3. If conditional, set-forth separately and with specificity each condition upon which relief is to be granted; and
4. State that the creditor has 120 days to file a deficiency claim from the time the subject property is removed from the protection of the stay; however,
   A. In the case where the subject property is real estate or manufactured housing, the deadline for filing a deficiency claim shall be 180 days; and
   B. For good cause shown, an extension of time to file a deficiency claim may be granted by the Court so long as application therefore is made within the applicable deficiency filing period.

When an order terminating the automatic stay is entered or a notice of termination of automatic stay is filed, then the trustee is authorized to cease payments upon any and all claims in that case where any creditor holds a security interest in the same property.

e. *Secured Creditor Duties in All Title 11 Proceedings.*

1. A secured creditor shall send all payment coupons or statements of account that the creditor provides to its non-bankruptcy debtors to Chapter 7 debtors who have indicated, in their Statement of Intention, their intent to retain the secured creditor's collateral by complying with the terms of the contract, or to any debtor who so requests. The act of sending such payment coupons or statements of account shall not be considered a violation of the automatic stay or of the debtor's discharge injunction.

2. If a secured creditor does not provide payment coupons and statements of account referred to in paragraph (1) above, then upon request by the debtor, that secured creditor shall provide the debtor with a telephone number or other means to access account information that would normally be provided by the payment coupons or statements of account referred to in paragraph (1) above.

3. A secured creditor shall respond promptly to a trustee's or debtor's reasonable requests for account information.

4. The automatic stay provided in 11 U.S.C. § 326(a) is modified as follows: affected secured creditors may contact the debtor about payment of property taxes due and the status of insurance coverage on property used as collateral. If there are direct payments to creditors, the creditor may contact the debtor in writing about any payment in default; and, if technically possible, shall send to the debtor statements, payment coupons, or other correspondence that the creditor sends to its non-debtor customers. See Local Rule 4001-2.

5. For escrowed loans, no less than once a year, each secured creditor shall provide written notice to the debtor and debtor's attorney of any and all amounts due or paid in that year or the coming year, if known, for all escrowed items. If such payment or advance results in a shortage in the escrow account, the creditor shall determine or analyze the amount necessary to cure that shortage and provide the debtor with written notice thereof. Should the analysis result in a payment change, then written notice of the payment change shall be provided to the debtor and debtor's attorney at least thirty (30) days in advance of the due date of the payment change. Direct contact by the creditor to the debtor under this provision shall not be a violation of the automatic stay.

6. For non-escrowed loans, and if allowed under nonbankruptcy law, should a creditor determine it will advance and pay entities for taxes and/or insurance to protect its security interest, then it shall provide at least thirty (30) days written notice thereof to the debtor and debtor's attorney before the funds are paid or advanced, unless the creditor suffers an immediate loss during the thirty (30) days. In such a case, notice to the debtor and debtor's attorney shall be given contemporaneously with the advance or payment. Said payment or advance shall be reimbursed to the creditor, as allowed under non-bankruptcy law or agreement. Should the creditor determine that it will thereafter escrow the loan as provided under the security instrument, note, contract, or deed of trust, then the creditor shall thereafter comply with the provisions of Local Rule 4001-1(e)(5).

Rule 4001-2. Limitations on Creditor Contact with Debtors.

a. *Compliance with Non-Bankruptcy Law.* Any creditor contact with debtors must also comply with any applicable nonbankruptcy law.

b. *Creditor's Responses to Debtors.* A creditor may respond freely to any inquiry from a debtor on any subject matter.

c. *Secured Creditor Duties.* See the provisions of Local Rule 4001-1(e).

Rule 4002-1. Debtor Duties.

a. *Debtor's Duties in General.* The duties of the debtor filing a petition pursuant to the United States Bankruptcy Code shall specifically include those listed in this Local Rule. These duties apply in addition to those imposed by law or regulation.

b. *Filing of Tax Returns.* Copies of debtor's tax returns shall not be filed with the Clerk of Court unless requested by the Court, Bankruptcy Administrator, or an interested party or otherwise ordered by the Court. If the debtor's tax returns are tendered to the Court other than pursuant to a proper request or Court order, then the Clerk's Office shall not accept the returns but shall return them to the debtor.

c. *Interpreters.* Should a debtor require interpreters, the following provisions apply:

1. *Language Interpreters.* The debtor must provide a competent language interpreter at any § 341(a) meeting of creditors in which the debtor will require language interpretation. If, in the trustee or the Bankruptcy Administrator's discretion, a disinterested language interpreter is required, the trustee or Bankruptcy Administrator will continue the meeting of creditors. The debtor must provide a qualified, disinterested language interpreter at the continued meeting of creditors.

2. *Interpreters for Hearing Impaired.* The Bankruptcy Administrator is required to provide interpretation services for hearing impaired interpretation at §341(a) first meetings of creditors. The debtor's attorney should contact the Bankruptcy Administrator's office at least five business days prior to the date of the first meeting to arrange for hearing impaired interpretation.

3. *Oath.* The following oath shall be administered to the language interpreter or hearing impaired interpreter: *Do you solemnly swear that in the first meeting of creditors in the bankruptcy case of ________________, you will translate the testimony of the debtor(s) from the ________________ language into the English language, and the questions and instructions of all parties from the English language into the ________________ language, and make such other translations as may be required, according to the best of your ability, so help you God?*

d. *Duties of Chapter 7 Debtor.* A debtor filing a petition requesting relief under Chapter 7 of the Code shall comply with the following:

1. *Compliance with Trustee's Requests.* . The debtor shall comply with any request by the trustee for turnover of property or production of documents within 15 days of the date of the request.

2. *Statement of Intention.* . The debtor shall provide to the trustee evidence of compliance with the Statement of Intention as required by Local Rule 1007-3.

3. *Inventory or Equipment.* When a stock of goods or business equipment is listed in the debtor's schedules, immediately after the general description thereof, the debtor shall:

A. List the assets in need of attention including the nature and value of such assets;

B. Append a short explanation of the assets' exact location;

C. List the name and address of the custodian thereof;

D. State the protection being given such property and the amount and duration of fire and theft insurance, if any; and

E. List whether the assets are subject to any environmental hazards or concerns.

4. *Need for Immediate Attention.* Where assets are in need of immediate attention, the debtor's attorney (or the debtor if *pro se*) shall immediately contact the Bankruptcy Administrator to ascertain the name of the trustee assigned to the case. If no trustee has been assigned, the attorney shall notify the Bankruptcy Administrator of the necessity for immediate assignment. Upon determining the assigned trustee, the attorney shall then contact the trustee and notify the trustee of the need for immediate attention and of the items listed in paragraph (d)(3) above.

e. *Duties of Chapter 11 Debtor.* Unless otherwise ordered by the Court after proper notice and hearing, Chapter 11 debtors-in-possession shall comply with the following requirements:

1. *Monthly Reports.* In accordance with 11 U.S.C. §§ 704(8) and 1107(a) and Bankruptcy Rule 2015, the debtor-in-possession or, if applicable, the trustee ina Chapter 11 case, shall file with the Clerk, not later than the last day of each month, the written financial report for the preceding month in a format approved by the Bankruptcy Administrator. The report must be signed by the debtor or, if applicable, the trustee, and counsel for the debtor or trustee. The first report shall include the period between the date the petition was filed and the last day of the calendar month and shall be due within 30 days after entry of the Order for Relief. All subsequent reports shall be for the entire calendar month and shall be due within 30 days following the entry of the Order for Relief.

2. *Quarterly Fees.* Quarterly fees are due in all Chapter 11 cases filed on or after April 1, 2002. Information concerning these fees may be obtained from the Court's website, **www.ncwb.uscourts.gov**, or by contacting the office of the Bankruptcy Administrator. These fees are due to the Bankruptcy Administrator and must be paid no later than the last day of the month immediately following the end of the calendar quarter for which they are due in accordance with 28 U.S.C. §1930(a)(6). Payments must be mailed so as to ensure they are received by the due date. Payment shall be made to: Clerk, U.S. Bankruptcy Court, with payment verification made to the

Bankruptcy Administrator.All plans of reorganization must provide for the payment of quarterly fees until the case is closed, dismissed, or converted.

3. *Insurance.* The debtor must provide to the Bankruptcy Administrator within 10 days of the date of the filing date, copies of the declaration pages for all insurance policies maintained by the debtor. At all times, the debtor must maintain adequate hazard and liability insurance on all of the debtor's property as well as any other insurance required by applicable law or Court order, i.e., worker's compensation insurance and dram shop insurance. Within two business days, the debtor must notify the Bankruptcy Administrator of any changes in the terms of the policy(s), including cancellation or non-renewal.

4. *Tax Returns.* In cases involving individual Chapter 11 debtors, the debtor shall not file copies of tax returns with the Court unless requested to do so by the Court, the Bankruptcy Administrator, or an interested party, or otherwise ordered by the Court.

5. *Bank Accounts.* The debtor's prepetition bank accounts should be closed and new postpetition bank accounts opened as of the date of the filing of the petition. At a minimum, the debtor will maintain a general or operating account and a tax deposit account. The signature cards for the new accounts shall clearly indicate that the debtor is a Chapter 11 debtor-in-possession. The debtor shall use only federally insured banking institutions and shall immediately inform the Bankruptcy Administrator if the total deposits in any one bank at any time exceed the FDIC coverage of $100,000. Upon notification, the Bankruptcy Administrator shall ensure the posting of collateral or bonds to secure amounts exceeding the FDIC coverage.

6. *Books, Records, and Inspections.* The debtor shall close its prepetition books and records and open new books and records as of the petition filing date. The debtor shall permit the Bankruptcy Administrator, or designee, reasonable inspection of its business premises, properties, books, and records.

7. *Taxes.* The debtor shall segregate and hold in a separate bank account all taxes deducted and withheld from employees or monies collected under any law of the United States, or any state or subdivision thereof, and the state of North Carolina. The debtor shall pay all postpetition taxes timely. Evidence of payment of taxes shall be included in the Monthly Status Report for the period paid. The debtor shall file all delinquent tax returns within 90 days of the filing date. The debtor shall file all postpetition returns timely. The Internal Revenue Service and the North Carolina Department of Revenue are authorized to contact the debtor to verify the deposit and payment of all taxes and the filing of all tax returns.

8. *Compensation and Compensation Plans.* The debtor may not increase compensation to management or insiders or modify compensation plans without prior Court order.

9. *Post Confirmation.* Following the entry of an order confirming a plan of reorganization, the debtor,pursuant to Bankruptcy Rule 2015(a), shall continue to file monthly operating reports until such time as the case is closed by the Clerk. These reports shall be in a form satisfactory to the Bankruptcy Administrator. The original and one copy of the report shall be filed with the Clerk. The debtor shall state in each report any action taken toward consummation of the plan. The debtor shall also, upon substantial consummation of the confirmed plan, as that term is defined in 11 U.S.C. § 1101(2), file with the Clerk a final report and accounting of the administration of the bankruptcy estate on the official form supplied by the Clerk. If this final report and accounting is not filed within sixty (60)days of the date of the Order in Aid of Consummation,the Court will conduct a status hearing to address issues pertinent to closing the case.

f. *Duties of Chapter 13 Debtor.* The debtor filing a petition requesting relief under Chapter 13 of the Code shall comply with the following:

1. *Disposition of Non-Exempt Property.* The debtor shall not dispose of non-exempt property having a fair market value of more than $2,500 by sale or otherwise without prior approval of the Court. This shall be acumulative, rather than a per-transaction, dollar limitation over the life of the plan.

2. *Obtaining Credit.* The trustee may approve debtor requests to incur credit not to exceed $15,000 provided that the proposed credit transaction will be unsecured or secured only by personal property. All other debtor requests to incur credit must be approved by the Court.

3. *Domestic Support Obligations.* The debtor shall schedule, and provide for the payment as required, of all domestic support obligation claims, as the term is defined

by 11 U.S.C. § 101(14A), during the pendency of the case. In order for the trustee to comply with the noticing requirements of § 1302(b)(6), the debtor shall schedule the correct and complete mailing address and telephone number for each domestic support obligation claimant. If the debtor is unable to obtain the mailing address despite all reasonable efforts to do so, the trustee is authorized to send all required notices to the domestic support obligation claimant in care of the appropriate state child support enforcement agency.

4. *Pre-Confirmation Plan Modifications.* If it is determined at the meeting of creditors that a proposed plan must be modified prior to confirmation pursuant to 11 U.S.C. § 1323, the trustee shall continue the meeting for such period of time as is necessary for the debtor to file an amended plan and serve the amended plan on all affected parties in interest. The amended plan shall identify only those particular provisions that are the subject of the proposed modification(s) and shall conform substantially to Local Form 4A. The debtor shall be responsible for the proper service of the amended plan. This provision shall apply only to those proposed plan modifications that adversely affect the rights of a party in interest other than the debtor.

5. *Proof of Adequate Insurance for Debtors Engaged in Business.* If requested by the trustee, a debtor engaged in business as defined in 11 U.S.C. § 1304 shall obtain promptly and maintain continually in full force and effect a comprehensive business insurance policy with personal liability and physical damage coverage limits commensurate with the nature and scope of the debtor's business. The debtor shall list the trustee as a loss payee on such policy and provide the trustee with such written documentation of the required coverage as may be requested from time to time.

6. *Debtor Certification at § 341(a) Meeting of Creditors.* At the meeting of creditors, each debtor shall execute under penalties of perjury a written certification on Local Form 7 concerning, among others, the following matters:

A. That the debtor is current on the payment of all postpetition domestic support obligations, if any, as required by 11 U.S.C. § 1325(a)(8);

B. That the debtor has complied with all of the tax return filing requirements of 11 U.S.C. § 1308(a);

C. That the statement of the debtor's average income for the six-month period ending on the last day of the calendar month immediately preceding the date of the commencement of the case isconsistent with the amount as reflected on all payment advices, payroll records, checks, deposits, and any other sources of income; and

D. That confirmation of the debtor's proposed plan shall be deemed a finding by the Court that the debtor has so complied with these documentation and certification requirements.

The trustee shall cause the executed Local Form 7 to be filed with the Court.

7. *Commencement of Payments.* The debtor shall commence payments to the Chapter 13 Trustee within the first 15 days after the filing of the petition, regardless of whether 11 U.S.C. § 1326 applies.

Rule 4003-1. Exemption Election.

a. *Content of Exemption Election.* The exemption election must comply with the Official Bankruptcy Form and shall include the following:

1. *Property Description.* Each item of property claimed as exempt, except clothing, shall be specifically and individually listed. Generic terms, such as "household goods," "real property," and "jewelry," are not adequate descriptions of property. Real property shall be described by at least the full street address thereof, including the county and state. Vehicles shall be described by at least the make, model, year, and body type thereof. Vehicle descriptions should also include the approximate accumulated mileage as of the petition filing date, any optional equipment, vehicle identification number, and any other factors which should be considered by the Court in determining the value of the asset.

2. *Statute or Law Creating Exemption.* Each item of property claimed as exempt shall be accompanied by a reference to the specific law providing for the exemption, including applicable subparagraphs of statutes.

b. *Time Limit for Amending or Objecting to Exemption Election.* The debtor shall have up to and including the day of the § 341(a) meeting of creditors in which to amend the exemption election. An amendment to the exemption election announced at the § 341(a) meeting of creditors and filed with the Court in writing no later than 10 business days thereafter, shall be deemed filed within the time set forth above. Any subsequent amendments, except those dealing with after-acquired property, shall be by motion and notice pursuant to Local Rule 9013-1.

c. *Exemption Election Respecting After Acquired Property.* A debtor may amend the exemption election to claim an allowable exemption interest in property (or interest therein) acquired postpetition. Such exemption claim shall be served upon the trustee who shall then have 30 days from the date of service to object thereto. The filing of an objection by the trustee shall be a contested matter as contemplated by these Local Rules.

Rule 4004-1. Discharge of Chapter 13 Debtor in Cases Filed on or After October 17, 2005.

a. *Chapter 13 Trustee's Report.* Upon receipt of the debtor's final plan payment by the Chapter 13 Trustee, the trustee will file with the Court a Report of Completion of Plan Payments (the "Chapter 13 Trustee's Report"). The trustee will serve the Chapter 13 Trustee's Report on the debtor and the debtor's attorney.

b. *Debtor's Motion for Entry of Discharge and Certification Regarding Plan Completion.* Unless the debtor is not entitled to a discharge, the filing of the Chapter 13 Trustee's Report will constitute notice that each debtor must file, under penalties of perjury, Local Form 8, Debtor's Motion for Entry of Discharge and Certification Regarding Plan Completion. Local Form 8 must be signed, filed, and served on all creditors and other parties in interest included on the Clerk's mailing matrix within 60 days of the date of filing of the Chapter 13 Trustee's Report. Failure to file timely Local Form 8 may result in the closing of the case without the entry of a discharge.

c. *Debtor's Disclosure of Information Regarding Domestic Support Obligations.* Within the same 60 day period, if applicable, the debtor must file Local Form 9, Debtor's Disclosure of Information Regarding Domestic Support Obligations, which will provide the trustee with the necessary information to give notice of the discharge to all holders of domestic support obligations pursuant to 11 U.S.C. § 1302(d).

d. *Verifications In Local Form 8.* Local Form 8 shall include verifications by the debtor regarding satisfaction of plan requirements, entitlement to a discharge and, if applicable, the status of all domestic support obligations. Local Form 8 will also verify that the debtor is not disqualified by the provisions of 11 U.S.C. § 1328(h) from receiving a discharge.

e. *Entry of the Debtor's Discharge.* Notice of the filing of Local Form 8 shall be provided in accordance with Bankruptcy Rules 9006 and 9007 and Local Rule 9013-1. Unless an objection to discharge is filed with the Court within eighteen (18) days after service of notice of the filing of Local Form 8 — and provided that the debtor is otherwise entitled to receipt of a discharge — the Court will enter the debtor's discharge. Entry of the discharge without objection constitutes a finding that 11 U.S.C. § 1328(h) has been satisfied by the debtor. If the provisions of 11 U.S.C. § 522(q) are applicable to the debtor, notice of Local Form 8 shall be given in accordance with Interim Bankruptcy Rules 1007(b)(8) and 4004(c)(3).

f. *Hardship Discharge.* In the event the debtor seeks a hardship discharge pursuant to 11 U.S.C. § 1328(b), the debtor's motion shall include certifications regarding the status of Domestic Support Obligations and that the debtor is not disqualified by the provisions of 11 U.S.C. § 1328(h) from receiving a discharge. Notice shall be given as set forth in paragraph (e) above. The trustee will not file the "Chapter 13 Trustee's Report."

g. *Trustee;s Final Report and Account.* As soon as possible after the final distribution to creditors has been made and all checks processed, the Chapter 13 Trustee will file a Final Report and Account which certifies that the case has been fully administered and requests release from liability and bond in the case. Thereafter, the Clerk of Court will enter the Final Decree.

Rule 4004-2. Closing Individual Chapter 11 Cases Prior to Discharge.

Closing Individual Chapter 11 Cases. In a Chapter 11 case involving an individual debtor, after the effective date of a confirmed Chapter 11 plan, the debtor may, upon motion and opportunity for hearing, close the Chapter 11 case; provided,however, that the debtor's case shall not be closed if any related adversary proceeding remains pending. Upon satisfaction of the requirements of 11 U.S.C. § 1141(d)(5), the debtor may move to reopen the Chapter 11 case and request a discharge. The requirements of Local Rule 4002-1(e)(1) and (2) shall be suspended while the debtor's case is closed.

Rule 4008-1. Reaffirmation Agreements.

a. *Official Form B240.* Parties are directed to file Official Form B240 relative to reaffirmation agreements. If the contents of a nonstandard form do not comply with Official Form B240, the Court will set the matter on for hearing.

b. *Electronic Filing of Reaffirmation Agreements.* In all cases filed under all chapters of the Bankruptcy Code, reaffirmation agreements shall be filed by electronic means directly with the Clerk of Court according to the guidelines established and published by the Clerk. The filing of a reaffirmation agreement by electronic means shall constitute the filing claimant's approved signature by law, and the provisions of 18 U.S.C. § 152(4) shall apply to the filing of a reaffirmation agreement under this procedure. The filing of a reaffirmation agreement by electronic means shall also constitute the entry of the reaffirmation agreement pursuant to Bankruptcy Rule 5003. Any paper "hard copy" reaffirmation agreement filed with the Clerk that has subsequently been scanned and reduced to an electronic image may be destroyed at any time thereafter.

c. *Pro Se Debtors.* All reaffirmation agreements involving *pro se* debtors will be set for hearing. The debtor must appear in person at the hearing.

d. *Debtors Represented by Counsel.* Because reaffirmation agreements are routine in Chapter 7 cases, the Court expects the debtor's counsel to represent their clients regarding reaffirmation agreements, completing the necessary paperwork, and if the attorney can do so in good conscience and within the bounds of Bankruptcy Rule 9011, making the attorney certifications required by 11 U.S.C. § 524(k)(5).

When a debtor is represented by counsel, the Court will consider a proposed reaffirmation agreement on the pleadings and no hearing will be necessary, provided:

1. The reaffirmation agreement has been completed in its entirety and meets the requirements of 11 U.S.C. § 524(k);
2. All necessary attorney certifications have been made pursuant to § 524(k)(5); and
3. No presumption of undue hardship exists under 11 U.S.C. § 524(m).

Subject to paragraph (e) below, in all other cases in which a debtor is represented by counsel, the Court will conduct a hearing. Both the debtor and debtor's counsel are required to attend that hearing. Counsel for the debtor shall promptly submit an order to the Court following the hearing on the reaffirmation agreement. The Court will not await entry of the order on the reaffirmation agreement to issue the discharge and close the case.

e. *Hearings on Reaffirmation Agreements Where Presumption of Undue Hardship Arises.* In cases where a debtor is represented by counsel, if a reaffirmation agreement pursuant to 11 U.S.C. § 524(c) is filed with the Court and a presumption of undue hardship arises pursuant to 11 U.S.C. § 524(m)(1), the Court will schedule a hearing. The presumption of undue hardship may be rebutted by the debtor filing a Representation of Ability to Pay (Local Form 2). Local Form 2 shall be filed at least seven (7) business days prior to the hearing scheduled by the Court. Upon review of Local Form 2, the Court may enter an order finding that the presumption is rebutted by Local Form 2and that a hearing is not necessary. Upon docketing of this order, the parties may submit an order approving the reaffirmation agreement. If the Court does not enter such an order prior to the hearing, the Court will conduct the hearing on the reaffirmation agreement, and debtor's counsel may present Local Form 2 in lieu of the debtor's appearance. The Court may require the debtor's appearance at a future hearing if Local Form 2 is not satisfactory to the Court.

PART V
COURTS AND CLERKS

Rule 5001-1. Clerk — Office Hours.

a. *Charlotte Office.* The Charlotte Clerk's Office shall be open to the public from 8:30 a.m. until 4:30 p.m. on all days except Saturdays, Sundays, and the legal holidays listed in the Fed. R. Civ. P. 6(a), or as otherwise directed.

b. *Asheville Office.* The Asheville Division Clerk's Office shall be open to the public during the same operating hours as the Charlotte Office; however, this Office shall be closed daily from 12:30 p.m. until 1:30 p.m.

c. *Access to Electronic Filing System.* Authorized filers may file documents at any time through the Court's official CM/ECF filing system.

Rule 5001-2. Clerk's Entries.

a. *Orders Entered by Clerk.* Pursuant to the provisions of Fed. R. Civ. P. 77(c), the Clerk of Court and designated deputy clerks at the Charlotte and Asheville Offices are authorized to grant and enter the following orders and judgments without further direction by the Court:

1. Judgments of default as provided for in Fed. R. Civ. P. 55(a) and 55(b)(1) and Bankruptcy Rule 7055.
2. Entry of *ex parte* order granting an additional 30 days within which to answer or respond to a complaint pursuant to Bankruptcy Rule 7012.

b. *Suspension, Alteration, or Rescission by the Court.* Any such action may be suspended, altered, or rescinded by the Court for good cause shown.

Rule 5005-1. Electronic Case Filing.

a. *Electronic Filing.* The Court authorizes registered users to file petitions, motions, and submit documents to the Court through the use of the official Case Management/ Electronic Case Filing System (CM/ECF).

b. *Attorney Signatures.* The electronic filing of a petition, pleading, motion, claim, or other papers by an attorney who is a registered participant in CM/ECF shall constitute the signature of that attorney under Bankruptcy Rule 9011. Use of a login and password also shall constitute certification by the registered participant in CM/ECF, and any agent authorized by the registered participant, that: (1) all persons indicated to have signed the document have actually executed the original or a copy of the original prior to electronic filing; and (2) the registered participant has authorized the electronic filing of the executed document.

c. *Passwords.* No attorney shall knowingly permit or cause to permit his/her password to be utilized by anyone other than an authorized employee of his/her law firm.

d. *Official Court Record.* CM/ECF shall constitute the official Court record in electronic form. The electronic filing of a pleading or other paper in accordance with CM/ECF procedures shall constitute entry of the same on the docket kept by the Clerk pursuant to Bankruptcy Rule 5003. The Court will not maintain case files with the following exceptions:

1. Documents filed under seal.
2. *Pro se* debtor's petition, lists, schedules, statements, amendments, pleadings, affidavits, and other documents which contain the signature of a *pro se* debtor.

e. *Notice and Service.* If the recipient of notice or service is a registered participant in the CM/ECF, service by electronic notification shall be the equivalent of service of the pleading or other papers by first class mail, postage pre-paid pursuant to Bankruptcy Rules 9006(f) and 9022, and Fed. R. Civ. P. 5(b), 6(e) and 77(d). Participation in CM/ECF and receipt of a password shall constitute agreement to receive notice and service electronically.

f. *Orders.* Any order signed electronically by a judge shall have the same force and effect as if the judge had signed a paper copy of the order.

g. *Original Documents.* When an attorney files a pleading (electronically or non-electronically) with the debtor's original signature or any notarized affidavit, the attorney will thereafter maintain the original document for a period ending four years after the case is closed. Original documents so maintained shall be presented to the Court upon request.

h. *Electronic Filings and Paper Documents.* In the event a paper petition, pleading, motion, claim, or other paper document is filed contemporaneously with an electronic version which contains the same data, the data received electronically will supersede the paper version.

Rule 5009-1. Trustee's Duty to File Final Report.

Final Report for Dismissed or Converted Cases. In the event a Chapter 7, 11, 12, or 13 case is dismissed or converted to a case under a different chapter of the Code, the trustee in the original case will not be required to file a Final Report unless funds or assets are actually received by the trustee.

Rule 5011-1. Abstention.

a. *Adversary Proceedings.* In adversary proceedings, any motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be filed no later than the time allowed for a response or answer to the complaint.

b. *Contested Matters.* In contested matters, any motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be filed no later than the time allowed for response or objection.

c. *Where to File.* Whether the requested abstention is mandatory or discretionary, motions to abstain pursuant to 28 U.S.C. § 1334(c), shall be directed to the Bankruptcy Court. However, motions to abstain in cases involving claims within 28 U.S.C. § 157(b)(5) shall be directed to the United States District Court.

PART VI
COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6005-1. Auctioneers.

(a) *Employment Without Application to the Court.* In a Chapter 7 case where the gross sales proceeds of an auction conducted pursuant to this rule are reasonably anticipated by the trustee to be less than $50,000, the trustee may elect to employ an auctioneer without application to the Court and shall be authorized to pay the auctioneer a commission of up to 15 percent of gross sales of the auction.

(b) *Conditions Precedent to Employment.* The trustee may employ and compensate an auctioneer without application to the Court if the following conditions are satisfied in advance:

(1) The auctioneer must be licensed and in good standing with the North Carolina Auctioneer's Commission consistent with N.C. GEN. STAT. § 85-B-3 and 4 or in such other jurisdiction where the auctioneer's services are to be performed;

(2) The auctioneer must execute and deliver to the trustee the same affidavit that would be required in support of an application for employment of auctioneer otherwise filed with the Court; and

(3) The affidavit executed by the auctioneer must affirmatively set out compliance with the conditions above.

(c) *Auctioneer's Report of Sale.* An auctioneer employed to conduct a sale on behalf of the bankruptcy estate shall submit a report of sale to the trustee within 20 days following the conclusion of any sale in the format as prescribed by the Bankruptcy Administrator.

(d) *Trustee's Report of Sale.* The trustee shall prepare a report of sale that includes fees paid to the auctioneer, and it shall be accompanied by the auctioneer's affidavit. The trustee shall file such report of sale with the Clerk and serve it upon the Bankruptcy Administrator.

PART VII
ADVERSARY PROCEEDINGS

Rule 7003-1. Adversary Proceeding Cover Sheet.

Cover Sheet. All complaints initiating adversary proceedings in bankruptcy cases shall be accompanied by an Adversary Proceeding Cover Sheet, Official Bankruptcy Form B 104.

Rule 7007-1. Motion Practice in Adversary Proceedings.

(a) *General Requirements.* All motions in adversary proceedings shall state with particularity the facts supporting the motion and shall state the relief requested. Any brief or memorandum in support of the motion shall state the relief requested and shall be filed in accordance with Local Rule 9013-2.

(b) *Responses to Motions.* Any party in interest may file a written response to any motion within 15 days after service of the motion unless otherwise ordered by the Court or prescribed by the applicable Federal Rules of Bankruptcy Procedure. The response may be accompanied by affidavits or other supporting documents. Briefs, if any, shall be filed in accordance with Local Rule 9013-2. In the event no response is filed, the Court may proceed to rule on the motion without further notice or opportunity to be heard.

(c) *Hearings on Motions.* Hearings shall be scheduled so that opposing counsel has an opportunity to respond to the motion in accordance with this Local Rule. Each motion shall be accompanied by a separate notice of the time, date, and place of the hearing on the motion in accordance with Local Rule 9013-1.

Rule 7016-1. Pretrial Procedures.

Pretrial Orders. In adversary proceedings, the Court will enter an Initial Pretrial Order setting certain requirements and deadlines. At the conclusion of the period for discovery, the Court will send a Notice of Pretrial Conference that schedules a pretrial conference between the Court and the parties. If a date is selected for trial at the pretrial conference, the Court will enter a Final Pretrial Order and Notice of Trial which will require supplementation of disclosure and discovery, exchange of exhibits, identification of witnesses, and which will set a time certain for trial. After entry of that Order, continuances will be granted only for compelling circumstances. If a date is not selected for trial at the pretrial conference, the Court will continue the matter so the parties can select a trial date at the continued hearing.

Rule 7016-2. Trials.

(a) *Opening Statements.* At the beginning of the trial, each party, beginning with the party having the burden of proof on the first issue, may, without argument and in such reasonable time as the Court allows, state to the Court the following:

(1) The substance of the claim, counterclaim, cross claim, or defense; and

(2) What counsel contends the evidence will show.

Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

(b) *Witnesses.* Counsel may not release a person from a subpoena without notice to opposing counsel and leave of Court. A party objecting to the release of a witness shall bear all costs incident to the witness which arise subsequent to the request for release. The Court, in its discretion and in the interest of justice, may permit a party to call and examine a witness not listed in accordance with the Final Pretrial Order.

(c) *Exhibits.* Exhibits shall be presented as follows:

(1) All exhibits shall be marked in advance with numbers.

(2) Copies of all exhibits, properly bound, shall be provided to the Court at the beginning of the trial. Copies of exhibits shall be provided to opposing counsel prior to the trial consistent with the Final Pretrial Order or other order of the Court.

(3) The original exhibit shall bear a number. After receipt into evidence, it shall remain in the custody of the courtroom deputy, except when being used by a witness.

(4) Copies of all exhibits shall bear the like number of the exhibit.

(5) At the discretion of the Court, exhibits will be returned to the tendering party upon the conclusion of the trial. It is the responsibility of the retrieving attorney and/or law firm to maintain the referenced exhibits for purposes of appeal.

(d) *Closing Argument.* The Court will set the times for closing argument after consultation with parties. Unless otherwise ordered by the Court, the party with the burden of proof shall open and close the arguments. The opening argument may be waived.

Rule 7026-1. Discovery — General.

(a) *Procedures for Handling Discovery Materials.* The following materials shall not be filed with the Clerk except by order of the Court or when used in a proceeding:

(1) Transcripts of depositions upon oral examination and interrogatories;

(2) Requests for production of documents;

(3) Requests for admissions; and

(4) Answers and responses thereto.

(b) *Preservation and Delivery.* The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

Rule 7041-1. Dismissal of Actions for Lack of Prosecution.

(a) *When Action May be Dismissed.* Except where a complaint objecting to a discharge has been filed, an adversary proceeding may be dismissed by the Court for lack of prosecution as follows:

(1) Where no service of process has been made and certified to the Court within 30 days after the filing of the complaint; or

(2) Where no responsive pleadings have been filed and plaintiff has not moved for entry of default within 30 days after the time for filing responsive pleadings has expired;

(3) Where there has been no activity in the adversary proceeding for four months; or

(4) Where the parties have failed to tender a final judgment or order.

(b) *Dismissal Without Prejudice.* Dismissal pursuant to this Local Rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

Rule 7067-1. Deposit and Investment of Funds Held by Clerk.

(a) *Clerk's Review of Proposed Orders.* Parties seeking a Court order to have the Clerk of Court deposit funds in an interest-bearing account shall personally submit the proposed order to the Clerk or financial deputy who will inspect the proposed order for proper form and content and compliance with this Local Rule prior to the proposed order being submitted to the judge for whom the order was prepared.

(b) *Required Provisions.* Any order obtained by a party or parties in an action that directs the Clerk to invest, in an interest-bearing account or instrument, funds deposited in the registry of the Court pursuant to 28 U.S.C. § 2041 shall include the following:

(1) The amount to be invested;

(2) The name of the depository approved by the Treasurer of the United States as a depository in which funds may be deposited;

(3) A designation of the type of account or instrument in which the funds shall be invested; and

(4) Wording which directs the Clerk to deduct from the income earned on the investment the fee authorized by law, not exceeding that authorized by the Judicial Conference of the United States and set by the director of the Administrative Office whenever such income becomes available for deduction in the investment so held and without further order of the Court.

(c) *Clerk's Retention of Funds.* In the event that a depository intended by the Court to receive registry funds is not able to pledge sufficient collateral for receipt of those funds immediately upon the Court's receipt of the said funds, the Clerk may, in the Clerk's discretion, temporarily retain such funds or direct the party tendering such funds to temporarily retain them as necessary to arrange for their deposit in an interest-bearing registry account.

PART VIII
APPEALS TO DISTRICT COURT

Rule 8001-1. Notice of Appeal.

Service of Notice of Appeal. An appellant shall file a notice of appeal electronically and serve the same on all appellants and appellees. In compliance with Bankruptcy Rule 8004, the Clerk shall serve notice of the filing of the notice of appeal by mailing a copy of the docketed notice of appeal.

Rule 8006-1. Record on Appeal.

(a) *Designation of Items for Record on Appeal.* For appeals to the District Court, any designation of items to be included in a record on appeal filed by an appellant or a designation of additional items to be included in the record made by an appellee shall reference the docket numbers for the items so designated, the date such item was entered on the docket, and the name of the designated docket entry.

(b) *Providing Copies of Designated Items to the Clerk.* For appeals to the District Court, filing of the designation of items for the record on appeal and, if applicable, any designation of additional items to be included in the record on appeal in conformance with this Local Rule shall constitute providing the Clerk with a copy of the record on appeal as required by Bankruptcy Rule 8006.

PART IX
GENERAL PROVISIONS

Rule 9006-1. Time Limits.

(a) *Shortening of Notice.* The Court will consider shortening prescribed notice for a hearing on contested matters upon the following conditions:

(1) The request to shorten notice must be made by written motion which states the reasons why shortened notice is necessary, identifies the parties affected by the request, and describes the service of notice of the request on interested parties.

(2) The movant shall serve and provide notice of the motion 24 hours in advance of submitting an order shortening notice. Service and notice for the purpose of this Local Rule is accomplished upon actualdelivery of the motion to the office of the party served, and service must be made upon the following parties or their counsel:

(A) In a consumer case, the trustee, Bankruptcy Administrator, debtor, and any party with a direct interest in the matter; and

(B) In a non-consumer case, the debtor, trustee, Bankruptcy Administrator, examiner, and any official committee.

(3) The movant may be excused from the requirement of 24 hours advance notice of the request to shorten notice upon demonstration of an emergency not of the movant's own creation and the inability to notify affected parties in advance.

(b) *Objection to Timing of Hearing on Shortened Notice.* If, at or before the hearing on the substantive motion, any opposing party objects to the shortened notice, the moving party shall have the burden of demonstrating good cause for the shortened notice or the Court shall grant a continuance.

(c) *Adversary Proceedings-Extensions of Time to Respond to Complaint.* Any motion for an extension of time to respond to a complaint shall be filed prior to the expiration of the initial period for filing the answer. The responding party is entitled to one extension of up to 30 days from the expiration of the original deadline. The Clerk may enter an ex parte order granting an additional 30 days within which to answer or respond. Any other extension shall be for cause shown with notice to the opposing party.

Rule 9013-1. Motion Practice.

(a) *Service on Trustee and Attorney for Debtor in Possession.* Any and all filings, except claims, in all proceedings and cases must be served on the trustee for the debtor, including the standing Chapter 13 Trustee, whether or not the trustee is a party to the proceeding. In Chapter 11 cases, the attorney for the debtor-in-possession is to be served in like manner. Service upon the Chapter 13 Trustee shall be by electronic means only.

(b) *Service on Bankruptcy Administrator.* Any and all filings,except claims, in Chapter 7 and Chapter 11 cases must be served on the Bankruptcy Administrator.

(c) *Certificate of Service.* Each pleading or document to beserved on any party shall have attached a certificate reflecting that service has been made on that party. The certificate of service shall indicate the names and addresses of the specific parties served.

(d) *Corporate Disclosure.* Any corporation, partnership,limited liability company, limited partnership, or limited liability partnership that is a party to any contested matter which arises in any pending bankruptcy case shall file a statement identifying all of its parent corporations and listing any public company that owns ten percent (10%) or more of its stock.

(e) *Hearings.* Information about the Court's hearing schedules can be found at its website, **www.ncwb.uscourts.gov**, at the CALENDARS designation in the legend on the homepage. *Weekly Calendars* displays weekly Court calendars in pdf format for each judge. First Meeting calendars are displayed at the same location. *Monthly Calendars* displays a 12-month grid; each month is a hyperlink to first meeting and judges' hearing schedules, including chapter and location. *Dispositions of Hearings* directs reporting of dispositions of matters already set on calendars to an email address at the Court.

The Court will post notices of any changes to these schedules on its website. Motions may be set on other days with advance permission of the Court. The Court may set matters on its own initiative.

(f) *Negative Notice Motions.* A hearing on those motions listed in (1) through (26) below may be noticed by no protest notice upon notice to the parties as required by the Bankruptcy Rules. The no protest notice must specifically advise any interested party that it must file and serve any response, including an objection or request for a hearing, within the 15-day period from service of the notice, and that if no hearing is requested, the Court may decide the matter on the record before it. A hearing shall be requested by filing and serving a response, including an objection and request for hearing, within 15 days of the date of the service of the notice. Any response must specify exactly what motion is contested, and the response should comply with this Local Rule. The following is the exclusive list of motions which may be noticed by the use of no protest notices and determined by the Court without a hearing unless a hearing is specifically requested:

1. Motions to use, sell, or lease property pursuant to 11 U.S.C. § 363(b)(1), except for sales of all or substantially all of the assets in a Chapter 9, 11, or13 case.
2. Subject to the provisions of Bankruptcy Rule 6007, motions to abandon property of the estate by the trustee or debtor-in-possession pursuant to § 554.
3. Motions to assume executory contracts or leases pursuant to § 365, if the other parties to the contract or lease stipulate to the assumption.
4. Motions pursuant to § 365 to reject executory contracts or leases, except collective bargaining agreements pursuant to § 1113.
5. Motions to avoid liens pursuant to § 522(f).
6. Motions for relief from stay pursuant to § 362, except that notices thereof shall state a specific hearing date in the event a hearing is requested.
7. Applications to pay compensation of professional persons, including applications pursuant to § 506(b).
8. Motions to change venue of a case or proceeding to another division within this district.
9. Motions to obtain postpetition credit in Chapter 13 cases.
10. Objections to claims. Pursuant to Bankruptcy Rule 3007, the minimum time period for notice of a hearing on an objection to claim is 30 days.
11. Motions for relief from the co-debtor stay provided in §§ 1201 and 1301.
12. Motions for approval of final report and account of trustee, application for commission and reimbursement of trustee expenses, application to disburse funds of the estate, application to abandon, and to discharge trustee.
13. Motions to modify Chapter 13 plans without a request for other relief.
14. Motions or applications to approve security interests as set forth in Local Rule 2016-1(c).
15. Motions for moratoriums in Chapter 13 cases.
16. Motions to reopen bankruptcy cases.
17. Motion to amend exemption elections.
18. Motions to approve settlements.
19. Motions to substitute counsel.
20. Motions for exemption from credit counseling and declarations of exemption from credit counseling.
21. Motions for continuation of the automatic stay and requests for confirmation that the automatic stay has been terminated under §§ 362(c)(3)(B) and 362(j).
22. Motions to redeem.
23. Motions to bifurcate.
24. Motions to extend time to object to discharge and dischargeability.
25. Motions to extend time to object to exemption elections.
26. Motions to close Chapter 11 cases of individual debtors pending satisfaction of § 1141(d)(5).
27. Motions for entry of discharge in Chapter 13 cases.

(g) *Ex Parte Motions.* The motions listed below may be determined, at the discretion of the Court, on an ex parte basis. Upon entry of an order granting any relief requested on an ex parte basis, the movant shall promptly thereafter provide notice in accordance with the Bankruptcy Rules of the entry of the order. In addition to advising of the entry of the ex parte relief, such notice must specifically advise any interested party that it may object to the relief granted by filing a request for hearing orobjection within 15 days of service of the notice. Any request or objection must specify the relief that is contested and comply with the provisions of this Local Rule. Any party shall be entitled to request a hearing or to request that the Court reconsider any ex parte relief upon a request filed within 15 days of service of notice of the entry of ex parte relief.

1. Motions that may be considered on an ex parte basis pursuant to the Bankruptcy Rules, including motions for enlargement of time pursuant to Bankruptcy Rule 9006(b) and Local Rule 9006-1(c).
2. Motions to reopen a case without additional relief requested unless the relief requested is to file the financial management certificate and obtain issuance of the discharge.
3. Motions for an additional 30 days within which to answer or respond to a complaint pursuant to Bankruptcy Rule 7012 and Local Rule 9006-1.
4. Motions to waive the electronic filing requirement pursuant to Local Rule 1002-2(b).
5. Motions for substitution of counsel pursuant to Local Rule 2091-1(c).
6. Motions to refund a filing fee pursuant to Local Rule 1006-1(b)(3).
7. Motions to waive additional filing fees pursuant to Local Rule 1006-1(c).

Rule 9013-2. Briefs in Adversary Proceedings and Contested Matters.

(a) *Requirements.* Briefs filed in adversary proceedings or contested matters shall include:

1. A concise statement of the facts of the case;
2. All admissions and stipulations, if applicable;
3. A summary of the points of law involved, citing authorities in support thereof; and
4. Any anticipated evidentiary problems, if applicable.

(b) *When to File.* Unless otherwise ordered, briefs shall be filed with the Clerk and received by opposing counsel at least three business days prior to the hearing. Reply briefs, if any, shall be filed with the Clerk and received by opposing counsel at least one business day prior to the hearing. A certificate of service must be filed with the original brief verifying the required service.

Rule 9014-1. Contested Matters.

(a) *Requirements of Motion.* A motion shall be accompanied by all exhibits and attachments referred to in the motion, together with a notice of motion and certification of service. The notice of motion shall give notice of the filing of the motion and allow for a specific response time to the motion.

(b) *Time for Response.* A response and accompanying affidavits, if any, to any motion shall be filed within 15 days from the date of the service of the motion, unless otherwise ordered or provided in the Bankruptcy Rules or these Local Rules.

(c) *Service of Motion.* The moving party shall serve copies of the motion, together with all exhibits and attachments, accompanied by a notice of the motion in the manner prescribed in Bankruptcy Rule 7004 contemporaneously with the filing of the motion, notice, and certificate of service with the Court. Bankruptcy Rule 7004, particularly subsections (b) and (h), and other applicable rules or law set forth special service requirements. Unless special service rules apply, general service on creditors shall be made to addresses contained on the most recent mailing matrix maintained by the Clerk. Service may be accomplished electronically by complying with Local Rule 5005-1(e).

(d) *Response.* Any party against whom relief is sought may file a written response to the motion. The response may be accompanied by affidavits and other supporting documents and shall be served on all interested parties and service shall be certified to the Court.

(e) *Content of Response.* All responses shall contain sufficient information to reasonably disclose the basis for the party's position and what specific issues are contested.

(f) *Hearing on Motion.* The provisions of Local Rule 9013-1 apply to contested matters.

(g) *Disclosure Requirements Inapplicable.* The disclosure requirements imposed by Bankruptcy Rule 7026(a) are inapplicable to contested matters.

(h) *Corporate Disclosure.* Any corporation, partnership, limited liability company, limited partnership, or limited liability partnership that is a party to any adversary proceeding shall file a statement identifying all of its parent corporations and listing any public company that owns ten percent (10%) or more of its stock.

Rule 9019-1. Settlements of Adversary Proceedings.

(a) *Filing of Documents.* All documents settling adversary proceedings shall be filed in each adversary proceeding at issue regardless of whether the adversary proceeding is pending or closed.

(b) *Service.* All creditors and interested parties in the base case and the adversary proceeding shall be served with notice of settlement that should be accompanied by a certificate of service. The notice of settlement and the certificate of service should be filed in the adversary proceeding.

(c) *Notice.* Settlements in adversary proceedings may be noticed by the use of no protest notices as set forth in Local Rule 9013-1.

Rule 9021-1. Tender of Judgments and Orders.

(a) *No Protest Orders.* When applicable any no protest response periods plus three mailing days shall pass before a proposed order or judgment is submitted to the Court.

(b) *Consent Orders.* Consent orders will not be entered unless also signed by the trustee in the case. For purposes of this rule, a signature shall be defined as any mark, letter or writing, physical or electronic, the intention of which is to bind or constitute acceptance of the terms of the order. Consent orders shall be signed by the method designated by the party to be bound and such signature shall be maintained of record by the party submitting the consent order. The submitting party shall present the documents evidencing all parties acceptance of the terms of the consent order upon request of the Court.

(c) *Orders submitted electronically.* Orders submitted electronically shall be served electronically upon the tendering party. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Bankruptcy Rule 9022 and constitutes service of the document to registered participants in CM/ECF.

Rule 9022-1. Certificate of Service for Orders.

Service of Orders. When a submitting party receives a signed order from the Court, the submitting party shall immediately serve a copy of the order upon the appropriate parties who did not receive service pursuant to Local Rule 5005-1(e) and file a certificate of service with the Court.

Rule 9028-1. Disqualification of Judges.

(a) *Disqualification Procedure.* Pursuant to 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, the Court has adopted procedures for administration of cases in which a judge is disqualified for any reason. Any circumstance that requires disqualification of the assigned judge should be brought to the Court's attention at the earliest opportunity by the filing and service of a motion seeking disqualification, except that no motion is required with respect to events listed in paragraph (c) of this Local Rule.

(b) *Contested Matters.* In any contested matter where the Court is aware of an event requiring disqualification or is made aware of such an event by any party, the Court will reassign the matter to another judge. Where the disqualification applies only to an isolated contested matter, reassignment of the base case is not necessary. The court will determine whether reassignment shall apply to the contested matter only or to the entire case.

(c) *Disqualification Events.* Judge Hodges does not hear contested matters involving General Electric or its subsidiaries.

(d) *Uncontested Settlements and Consent Orders.* Approval of uncontested settlements and agreed orders in cases which would otherwise require disqualification will not require reassignment.

(e) *Orders in Reassigned Matters.* Orders in contested matters that are reassigned may end up with the signature of the disqualified judge even though the matter was reassigned and heard by another judge. In such event, the order is in fact the order of the reassigned judge who determined the matter.

Rule 9029-1. Telephonic Appearance at Hearings.

(a) *Consent.* Counsel who are unable to attend hearings in person may appear before the Court by telephone only with the consent of the Court and opposing counsel and provided that arrangements are made in advance.

(b) *Arrangements.* The attorney requesting permission to appear by phone shall make all necessary conference call arrangements, shall communicate with the Court as to calling instructions, and shall initiate the call. The Court may set a time-certain for any telephonic hearing requested so as to avoid delaying other matters on the hearing calendar.

(c) *Assumption of Risk.* The risk of poor reception is borne by the attorney requesting and initiating the telephone hearing.

(d) *Limits on Availability.* Telephonic appearances are not permitted for matters scheduled for hearing in Shelby and Wilkesboro. In addition, telephonic appearances are not allowed in evidentiary hearings.

Rule 9035-1. Service of Papers on the Bankruptcy Administrator.

(a) *Service Required.* All parties are required to serve upon the Bankruptcy Administrator, by electronic service, regular mail, hand delivery, overnight courier, or facsimile, the papers specified in this Local Rule which are filed with the Bankruptcy Court or an appellate court. Appropriate certificates of service shall be filed.

(b) *Documents that Must be Served:*

1. *Chapter 11.* All papers in Chapter 11 cases and in related adversary proceedings, except exhibits to be used at trials or hearings.
2. *Bankruptcy Rule 2002 Requests.* All papers in cases and adversary proceedings in which the Bankruptcy Administrator has filed a request for notice pursuant to Bankruptcy Rule 2002(i).
3. *Appointment and Removal of Trustee or Examiner.* All papers related to the appointment or removal of a trustee or examiner.
4. *Compensation Applications.* Applications for compensation in all cases and adversary proceedings.
5. *Fraud or Criminal Activity.* All papers in any case or adversary proceeding in which fraud or criminal activity is alleged on the part of any party.
6. *Chapter 7 Trustee Filings.* All papers filed in cases and adversary proceedings by Chapter 7 trustees, except as the Bankruptcy Administrator may from time to time otherwise direct by notice to the trustees on an *ad hoc* basis.
7. *Conversions.* All orders relating to conversions of a case to a case under another Chapter.

APPENDICES

APPENDIX A

GUIDELINES FOR COMPENSATION AND EXPENSE REIMBURSEMENT OF PROFESSIONALS

United States Bankruptcy Court for the
Western District of North Carolina

Introduction

Congress has established the standard for professional compensation to be: "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Congress also has established relevant factors for the courts to use in determining the amount of reasonable compensation in § 330(a)(3) as follows:

3. In determining the amount of reasonable compensation to be awarded, the Court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including —

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title. 11 U.S.C. § 330(a)(3).

The purpose of these Guidelines is to assist parties in providing information necessary for the Court to make the determination of reasonable compensation as outlined by Congress. These Guidelines are **NOT** requirements for the Court or parties'ue . Following these Guidelines should reduce, if not eliminate, objections as to the form or format of the application. The Guidelines are also intended to assist parties in addressing their respective burdens of proof with respect to an application for compensation.

Narrative

A narrative explanation of the status of the case and the professional's contribution to the estate is useful to the Court. The degree of detail included in the narrative is in the discretion of the applicant as a proponent/advocate of the application. "Boilerplate" narratives are of no use to the Court. However, the use of a "boilerplate" curriculum vitae is permitted.

The narrative portion of the application provides an opportunity for the applicant to persuade the Court that the compensation requested is reasonable. The applicant should describe and highlight particular problems that were present and what was done to resolve those problems. The benefits to the estate of the services rendered should be reported in detail. Any extraordinary problems or benefits should be described in the narrative. Describe the anticipated development and progression of any litigation. For example, has all of the work to date been in preparation of lawsuits, but none has been filed? Has a substantial amount of time been spent in settlement negotiations and what were the results of the negotiations? Anytime entries discounted or "written-down" should be specifically identified. For interim applications it is especially helpful to provide a case history, projected future activity, and a statement of the actions necessary to conclude the case.

Billing Summary

Summary of time and expenses applied for in this and prior applications.

Rates

This part of the application should show the hourly rates charged by each professional and include the background and experience of the professional. Unless the applicant specifically states otherwise, the rate shown is the actual rate charged the client and was the rate in effect at the time the service was rendered.

Time Increments

The applicant should use discretion in determining the increment. Generally, a "safe harbor" for the applicant is to charge an increment no greater than that generally accepted in the market (currently .1 hour). The applicant should be prepared to demonstrate that any greater increment does not operate to inflate the time billed.

Time Entries

Generally, time entries should be sufficiently descriptive to enable the Court and third parties to determine the nature and extent of the service rendered. At a minimum, the time entry should describe who provided the service, when the service was provided, where (if travel is involved), and what service was provided. To the extent the applicant believes that detailed descriptions will violate the attorney-client privilege or other applicable privilege, the applicant must assert the privilege specifically. Even where a privilege is asserted, the time entry should reflect the general topic area as specifically as possible without violating the privilege.

Even when tasks are performed on the same day or time block, separate tasks should be set forth in separate time entries. When different tasks are included in the same time entry, the Court cannot make a proper determination under 11 U.S.C. § 330. Any significant amount of time spent on adversary proceedings should be set out separately from the base application. The applicant should segregate time entries in adversary proceeding litigation such that the Court can evaluate the results obtained and benefit to the estate of the services as related to the costs incurred. Time entries which are not adequately descriptive or are "lumped" are subject to disallowance.

Conferences and Multiple Professionals

All conferences should identify the purpose, all attendees, and the nature of the matters discussed or accomplished. Because of the opportunity for "double-teaming," explanations should be given whenever more than one professional attends a conference, hearing or meeting.

Office Tasks

"Secretarial" tasks performed by professionals should be demonstrated to be both necessary and expeditious.

Travel Time

Time entries billed for non-working travel time and for work done during travel time should be identified separately. Compensation for travel time alone (where no other work was accomplished for the client), should be highlighted and explained. Travel time should not be billed when substantive work was simultaneously performed and billed. Travel time should be categorized with the category best reflecting the purpose of the travel.

Request for Compensation Other than Time Billed x Hourly Rate

The Court is not adverse to considering methods of compensation other than time billed times hourly rate charged. Any requests for compensation other than hourly rate times hours billed must be set forth clearly and conspicuously so the Court can determine the basis for the compensation request and the reasonableness thereof.

Burdens of Proof and Objections

The burden of persuasion is on the movant. The burden of going forward with the evidence begins with the movant, shifts to the objector, then back to the movant who must, in the final analysis, show the reasonableness of the compensation. Objections should be factual and should demonstrate specific objectionable time.

Project Categories

The Court may require categorization of time entries in certain cases, and where required, will do so by order. The Court encourages the use and designation of the following categories even in the absence of an order. When used, these categories should be imbedded as codes into each time entry, such that the Court can use the codes to sort and review the time entries in an automated fashion. An applicant may substitute the number of the category instead of the full title of the category. Where project categories are used and the application's time entries are submitted on computer diskette, the Court will expedite the review of the fee application.

1. **Asset Transactions:** Identification and review of potential assets including causes of actions, sales, leases and abandonment.
2. **Case Administration and Business Operations:** Issues related to the debtor-in-possession business and activities related to case administration including schedules, financial reports, creditor contacts, § 341(a) meetings of creditors and employee relations.
3. **Fee Proceedings:** Preparation of fee applications and review and objections to fee applications.
4. **Financing and Relief from Stay Proceedings:** Matters pertaining to debtor-in-possession financing and relief from stay motions.
5. **Litigation:** Matters pertaining to litigation.
6. **Plan and Disclosure:** Matters pertaining to the formulation, presentation, confirmation, compliance and closing of a plan.
7. **Claims Administration:** Analysis, bar date motions, objection and allowance of claims.
8. **Other:** The application should include an explanation of the specific type of project or category for time entries included under this category.

EXPENSES

The general practice is to find as reasonable and necessarythose expenses and expense billing practices that are acceptedin the relevant market. Expense items should be set outseparately and should reflect the actual cost. Even when usingthe actual cost, certain items must be justified as necessary,such as overnight delivery, messenger service and meals. Any conventions used, i.e. per page charge for copying, should be identified and explained. Certain "safe harbors" for expense conventions are listed below.

Copies

In-house copies billed at $.25 or less are presumed reasonable. For copies prepared by a copying service, the actual billed amount should be listed.

Air Travel

The actual cost of the ticket at coach fare.

Auto Travel

The mileage rate set by the Internal Revenue Service at the time of the travel is presumed reasonable.

APPENDIX B
CHAPTER 11 INFORMATION
GUIDELINES FOR CONSENSUAL CASH COLLATERAL ORDERS: PROVISIONS THAT SHOULD BE INCLUDED

The Court has determined that these Guidelines for Consensual Cash Collateral Orders would be useful to the bar in improving the content of first-day debtor-in-possession financing orders. The following is a general description of those factual findings and decretal provisions that the Court will ordinarily approve on an ex parte basis in connection with an emergency showing of the necessity for the use of cash collateral. At the end of these guidelines, there is a list of provisions that the Court will not ordinarily approve without prior notice and an opportunity for objection. For purposes of these guidelines, ex parte means without notice to all creditors and parties in interest. The Court expects that every effort will be made to provide notice to the Bankruptcy Administrator and any creditor directly affected by any relief sought on an emergency basis.

Findings of Fact. The following findings of fact are generally appropriate for inclusion in an emergency debtor-in-possession financing order:

- That there has been compliance with all applicable service requirements, including an attempt to notify the Bankruptcy Administrator, other secured creditors, and the 20 largest unsecured creditors.
- That the secured creditor asserts a priority lien in cash collateral, together with a specific identification of the assets that are or will generate cash collateral, i.e., cash on hand, proceeds of inventory sales, etc., and that amount of the indebtedness allegedly secured.
- That the debtor has an immediate need for the use of cash collateral to preserve its assets, fund its business operations, purchase inventory, etc.
- That the debtor reaffirms the existing terms and conditions of existing financing documents with secured creditors.

Decretal Provisions. The following decretal provisions are generally appropriate for inclusion in a debtor-in- possession financing order:

- Grant and define adequate protection to secured creditor, and its successors and assigns, pursuant to 11 U.S.C. §§ 361 and 363, including monthly adequate protection payments, if appropriate.
- Grant secured creditor replacement liens in post petition assets to the same extent and priority as existed prepetition.
- Grant secured creditor super-priority administrative claim to the extent that adequate protection proves inadequate.
- Provide for creation of a segregated DIP account into which cash collateral shall be deposited.
- Restrict use of cash collateral to pay specified categories of operating expenses, per budgets to be attached to the order or subsequently filed with the Court.
- Require that the debtor maintain insurance.
- Require submission of periodic (e.g., weekly, bi-weekly, monthly) reports regarding use of cash, aging of accounts receivable, etc.
- Provide equality of treatment for carve-outs as between professionals for the debtor and professionals for the Committee of Unsecured Creditors, and limiting the use of carve-outs to exclude the pursuit, but not investigation, of claims against the secured creditor providing financing.
- Provide that the order is sufficient and conclusive evidence of the priority and validity of the security interest in and liens, including replacement liens, on the debtor's assets granted to secured creditor without the necessity of filing, recording, or serving any financing statements or other documents which may otherwise be required under federal or state law in any jurisdiction or the taking of any action to validate or perfect the security interests and liens granted to secured creditor, but provided secured creditor may, in its discretion, file such financing statements or other documents with respect to such security interests and liens and that the debtor is authorized and directed to execute, or cause to be executed, all such financing statements or other documents upon secured creditor's reasonable request and the filing, recording, or service.
- Identify the time period to which the order is applicable and provide that, even if authorization to use cash collateral expires, adequate protection/liens will continue to be effective unless or until otherwise modified by the Court.

- Set a final hearing date and set a deadline by which the documents relied upon by the secured creditor in asserting a perfected security interest be filed with the Clerk.

Inappropriate Provisions. The following provisions should not be included on an emergency basis:

- Stipulations which reduce the time period within which parties in interest may challenge the perfection, validity, priority, or amount of secured claims to less than 60 days from the engagement of counsel for the Committee of Unsecured Creditors, or, if no counsel or Committee is appointed, less than 90 days after the case is filed.
- Stipulations as to the perfection, validity, or priority of secured claims that are binding on any party other than the debtor, without affording other interested parties a reasonable time to challenge the same.
- In cases where the secured creditor asserts liens on accounts receivable pursuant to asset based revolving credit facilities, provisions which re-characterize the "use of cash collateral" as "post petition advance," without regard to whether the "post petition advance" is a new loan or the use of a prepetition receivable.
- Provisions which release potential claims or causes of action by the estate against the lender, without the passage of the time periods identified above.
- Provisions which grant automatic relief from stay upon a material default under the cash collateral order; however, the secured creditor's entitlement to an emergency hearing in the event of a material default could be recognized.
- Provisions which grant cross collateralization on unencumbered assets, absent extraordinary circumstances.
- Provisions that grant a postpetition lien on avoidance actions.

The foregoing limitations are not designed to limit the provisions of financing orders that may be presented to the Court after notice and with an opportunity for a hearing. Rather, these limitations apply to orders that are presented on a first day, emergency basis, without notice to all creditors and parties in interest.

APPENDIX C

LOCAL FORMS

Local Form 1 **2002**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_______ DIVISION

IN RE:) Case No. __________
) Chapter __
)
) **NOTICE OF**
) **OPPORTUNITY FOR HEARING**
) (No-Protest Notice: No Hearing
Tax I.D. No.) Will Be Held Unless Request
Debtor(s).) For Hearing Is Filed)
__________________________)

TAKE NOTICE that [name of moving party] has filed papers with the Court to [relief sought in motion or objection]. A copy of these paper(s) are included with this Notice or copied on the reverse side of this Notice.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to order [relief sought in motion or objection], or if you want the Court to consider your views on the [motion][objection], then on or before **[DATE RESPONSE DUE]** from the date of this Notice, you or your attorney must do three (3) things:

1. **File with the Court a written response requesting that the Court hold a hearing and explaining your position. File the response at:**

   U.S. Bankruptcy Court
   [Courtroom #]
   [Address]

If you mail your request to the Court for filing, you must mail it early enough so the Court will **receive** it on or before the date stated above.

2. **On or before the date stated above for written responses, you must also mail or fax a copy of your written request to:**

   [Name/address/fax # of movant's attorney]

[Name/address/fax # of other parties to be served]

3. **Attend the hearing scheduled for [date], [year], at [time] a.m./p.m.** in Courtroom [#], United States Bankruptcy Court, [Court address].

If you or your attorney do not take these steps, **A HEARING WILL NOT BE HELD**, and the Court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: ____________. ________________________________

[Attorney Name]
[Address]
[Telephone/Fax #s}
[State Bar #]

Local Form 2 **July 2007**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	)	Chapter
	)	Case No.
Debtor(s).	)	

REPRESENTATION OF ABILITY TO PAY

The undersigned debtor(s) in the above referenced case hereby represents to the Court that the debtor(s) has the ability to make the payments prescribed by the Reaffirmation Agreement with ______________________. The source of additional funds and/or changed circumstances permitting the debtor(s) to make the agreed upon payments is:

____

____

Subject to Court approval, this Representation may serve to rebut any presumption of undue hardship arising pursuant to 11 U.S.C. § 524(m)(1) and may be filed by the debtor(s) before, with, or after the relevant Reaffirmation Agreement.

______________________ ______________
(Debtor) Date

Local Form 3 **July 2007**

Debtor(s) ____________________

DISCLOSURE TO DEBTOR(S) OF ATTORNEYS FEE PROCEDURE FOR CHAPTER 13 CASES IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

After consultation with the undersigned attorney, you have decided to file a petition for relief under Chapter 13 of the United States Bankruptcy Code. Accordingly, you are hereby given notice that pursuant to the local rules of the Bankruptcy Court, the base fee for a Chapter 13 case is established at $____________. Payment of all or part of this fee is included in your payments to the Trustee. The attorney's services included in the base fee are those normally contemplated in a Chapter 13 case. They are as follows:

(a) Providing the pre-filing notices required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
(b) Preparation and filing of your petition, schedules, supplemental local forms, Chapter 13 Plan, and mailing matrix.
(c) Drafting and mailing notice to creditors advising of filing of case, including a copy of your Chapter 13 Plan.
(d) Drafting and mailing to you a letter regarding your attendance at the Section 341 meeting and your other responsibilities.
(e) Preparation for and attendance at Section 341 meeting.
(f) Review of order confirming plan and periodic reports.
(g) Review of Trustee's report of allowance of claims.
(h) Maintaining custody and control of case files.
(i) Service of orders on all affected parties.
(j) Verification of your identity and social security number
(k) Defending objections to confirmation of your Chapter 13 Plan filed by the Trustee.
(l) Preparing and filing Local Form 8 and Local Form 9.

The base fee shall also include the following services to the extent they are requested or reasonably necessary for your effective representation:

(a) Preparation and filing of proofs of claim on your behalf for your creditors.
(b) Drafting and filing objections to scheduled and unscheduled proofs of claim.
(c) Assumptions and rejections of unexpired leases and executory contracts.
(d) Preparation for and attendance at valuation hearings.
(e) Motions to transfer venue.
(f) Consultation with you regarding obtaining postpetition credit (no motion filed).
(g) Motions to avoid liens.
(h) Calculation of plan payment modifications (no motion filed).
(i) Responding to written creditor contacts regarding plan terms, valuation of collateral, claim amounts, and the like.
(j) Responding to your contacts regarding changes in your financial and personal circumstances and advising the Court and the Trustee of the same.
(k) Communicating with you regarding payment defaults, insurance coverage, credit disability, and the like.
(l) Obtaining and providing the Trustee with copies of documents relating to lien perfection issues.
(m) Notifying creditors of entry of discharge.
(n) Notifying creditors by certified mail of alleged violations of the automatic stay.
(o) Drafting and mailing letters regarding voluntary turnover of property.
(p) Defense of objection to confirmation filed by any party other than the Trustee.
(q) Review of documents in relation to the use or sale of collateral (no motion filed).
(r) Providing you with a list of answers to frequently asked questions and other routine communications with you.

In some Chapter 13 cases, legal services which are beyond those normally contemplated must be performed. These legal services are not covered by the base fee. These "non-base" services include the following:

(a) Abandonment of property post-confirmation.
(b) Motion for moratorium.
(c) Motion for authority to sell property.
(d) Motion to modify plan.
(e) Motion to use cash collateral or to incur debt.
(f) Defense of motion for relief from stay or co-debtor stay.
(g) Defense of motion to dismiss filed after confirmation of your plan.
(h) Non-base fee requests.
(i) Stay violation litigation, including amounts paid as fees by the creditor or other party.
(j) Post-discharge injunction actions.
(k) Adversary proceedings.
(l) Wage garnishment orders.
(m) Turnover adversaries.
(n) Conversion to Chapter 7.
(o) Motions to substitute collateral.
(p) Any other matter not covered by the base fee.

For such "non-base" services you will be charged on the basis of attorney's time expended at the rate of $ per hour plus the amount of expenses incurred (such as court fees, travel, long distance telephone, photocopying, postage, etc.). Such "non-base" fees are chargeable only after the same are approved by the Bankruptcy Court. Except as set forth below, before any such fees are charged you will receive a copy of my motion filed in the Court requesting approval of any such "non-base" fees as well as a notice explaining your opportunity to object if you do not agree with the fee applied for. Any fees awarded for "non-base" services will be paid to the undersigned attorney from your payments to the Trustee in the same way as payment of "base" fees. **It is possible that "non-base" fees approved by the Court may cause your payment to the Trustee to be increased, or the term of your Chapter 13 plan extended**. Whether or not a payment increase or an extension will be necessary depends upon the facts of your case. If a payment increase is necessary because of a court- approved "non-base" fee, the Trustee will notify you of the amount of the increase.

In the Court's discretion, a debtor's attorney in a Chapter 13 proceeding may request, in open court, and without any other notice, "non-base" fees for the following services in amounts not exceeding those shown below. Without other notice, the debtor's attorney may also request up to $1.00 for each item noticed to creditors as expense for postage, copying, and envelopes. These fees may be adjusted (increased) by the Court at a later date, and, if so, those adjusted fees will then be charged.

(a)	Defense of motion to dismiss.	$200
(b)	Motion to modify and order, including motion for moratorium.	$350
(c)	Substitution of collateral.	$450
(d)	Prosecution or defense of motion for relief from stay or co-debtor stay and order.	$450
(e)	Motion for authority to sell property and order.	$450
(f)	Motion to obtain credit	$450
(g)	Permission from trustee to obtain credit, to be filed as an administrative proof of claim	$200
(h)	Motion to continue or impose the automatic stay	$350
(i)	When substitute legal counsel is retained by a Chapter 13 debtor, such substituted counsel is entitled to a presumptive base fee of $500 without formal application to the Court, provided that the order allowing substitute counsel specifies both the amount of the fee and whether the fee is paid direct by the debtor or through the plan.	

ACKNOWLEDGMENT

I hereby certify that I have read this notice and that I have received a copy of this notice.

Dated: ____________________ ____________________
Debtor's Signature

Dated: ____________________ ____________________
Spouse's Signature

I hereby certify that I have reviewed this notice with the debtor(s) and that the debtor(s) have received a copy of this notice.

Dated: ____________________ ____________________
Attorney

LOCAL FORM 4 **JULY 2007**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[insert correct division name] DIVISION

In re:) Case No. - - -
)
) Chapter 13
)
)
Debtor(s))

CHAPTER 13 PLAN INCLUDING NOTICE AND MOTION(S) FOR VALUATION; MOTION(S) TO AVOID CERTAIN LIENS; MOTION(S) FORASSUMPTION AND REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES. NOTICE OF OPPORTUNITY FOR HEARING ON CONFIRMATION OF THE PLAN INCLUDING ALL MATTERS AS SET FORTH IN THE PLAN

FOR CASES FILED ON OR AFTER JULY 2, 2007

The following is the Chapter 13 plan proposed by the above-named debtor(s). The plan may also include in its provisions certain motions to avoid liens, motions for valuation of collateral securing claims, and motions to assume or reject executory contracts and unexpired leases. (Check the motions applicable to this plan.)

( ) **Motion to Value Liens Includes Valuation of Property Securing A Claim**
( ) **Motion to Value Liens includes Valuation of Property Securing A Claim in an Amount Less than the Amount of the Claim**
( ) **Motion to Avoid Liens §522(f)**
( ) **Motion to Assume Executory Contract(s) and Unexpired Leases**
( ) **Motion to Reject Executory Contract(s) and Unexpired Leases**
( ) **No Motions Applicable to this Plan**

TAKE NOTICE: Your rights may be affected. You should read the plan carefully, including any motions contained in the plan, and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to confirm the proposed plan of the debtor(s), including any of the motions included in the plan, or if you want the court to consider your views on these matters, then you or your attorney must file with the Court a written objection to confirmation and request for hearing on confirmation at one of the following addresses:

Cases filed in the **Charlotte, Shelby or Wilkesboro** Divisions:
Clerk, U.S. Bankruptcy Court, P.O. Box 34189, Charlotte, N.C. 28234-4189

Cases filed in the **Asheville or Bryson City** Divisions:
Clerk, U.S. Bankruptcy Court, Room #112, 100 Otis Street, Asheville, N.C. 28801

Your objection to confirmation and request for hearing must include the specific reasons for your objection, and must be filed with the Court no later than fifteen (15) days following the conclusion of the Section 341(a) meeting of creditors. If you mail your objection to confirmation to the Court for filing, you must mail it early enough so that the Court will receive it on or before the deadline stated above. You must also serve a copy of your objection to confirmation on the debtor(s), the attorney for the debtor(s), and the Chapter 13 trustee at their addresses as they are listed in the notice of the meeting of creditors. If any objections to confirmation are filed with the Court, the objecting party will provide written notice of the date, time and location of the hearing on the objection. No hearing will be held unless an objection to confirmation is filed.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the proposed plan of the debtor(s), including any motions contained in the plan, and may enter an order confirming the plan and granting the motions. **Any creditor's failure to object to confirmation of the proposed plan shall constitute the creditor's acceptance of the treatment of its claim as proposed, pursuant to 11 U.S.C. Section 1325(a)(5)(A).**

STANDING STAY MODIFICATION: The automatic stay provided in 11 U.S.C. § 362(a) is modified in Chapter 13 cases as follows: Affected secured creditors may contact the debtor about the status of insurance coverage on property used as collateral. If there are direct payments to creditors, affected secured creditors may contact the debtor in writing about any payment in default; and shall send to the debtor statements, payment coupons or other correspondence that the creditor sends to its non-debtor customers. Such actions do not constitute violations of 11 U.S.C. § 362(a).

PLAN PAYMENTS; ADMINISTRATIVE COSTS; PROOFS OF CLAIM

1. a. The base plan proposes payments of $_____ per month for _____ months (estimated percent payment to general unsecured creditors_______%) or

   b. The percentage plan proposes payments of $_______ per month for _____% (percentage) payment to general unsecured creditors.

   c. If applicable, the plan will also be funded by:______________________________
   ____

2. Administrative Costs -

a. Attorney's Fees. The attorney for the debtor(s) has received $___________ of the total base attorney fee of $____________. The remainder of the base fee shall be paid through the plan by the trustee on a pro rata basis with required monthly payments to allowed secured claimants.

b. Trustee's Costs. The trustee shall be entitled to reimbursement of fees and costs up to the statutory maximum on each disbursement made by the trustee, regardless of whether it is paid prior to or following confirmation.

3. Filing of Proofs of Claim

a. The trustee shall only distribute payments, including adequate protection payments, to creditors who have actually filed proofs of claim (including adequate proof of security) with the Court that are deemed allowed pursuant to 11 U.S.C. Section 502(a). However, if a creditor does not file a timely proof of such creditor's claim, then either the debtor(s) or the trustee may file such a claim as provided for by 11 U.S.C. Section 501(c) and in that event such claim shall be deemed the claim for all purposes under the plan.

b. The trustee shall mail payments and provide notices to the address provided on the filed proof of claim or amended proof of claim or filed name or address change or assignment or transfer of claim filed with the Court

CLASSIFICATION AND TREATMENT OF CLAIMS

4. PRIORITY CLAIMS. All claims entitled to priority under 11 U.S.C. Section 507 and 1322 shall be paid in full in deferred cash payments, except for priority claims under Section 507(a)(1)(B), unless the holder of the particular claim agrees to a different treatment of such claim.

a. Domestic Support Obligations ("DSOs")

All postpetition DSOs, including postpetition DSOs assigned to a governmental unit, will be paid directly to the holder by the debtor(s) or to the assignee of the claim and not through the Chapter 13 Trustee unless otherwise specified under the "Special Terms" section of the plan.

i. [ ] None

ii. The name, address and phone number including area code of the holder of any DSO as defined in 11 U.S.C. Section 101(14A). Pursuant to 11 U.S.C. Section 112, the names of minor children should not be disclosed. Include in this list all DSOs as defined by the statute, notwithstanding the fact that the debtor may believe the obligation to be voluntary or contingent in nature.

Name	Address (incl. city, state, zip code)	Telephone
1.		
2.		

b. DSO Prepetition Arrearages Owed to DSO Holders Under 11 U.S.C. Section 507(a)(1)(A), or assigned to a governmental unit, to be paid in full through the Chapter 13 plan on a pro-rata basis after payment of secured claims and the attorney fee and prior to payment of any non-DSO priority claim, unless a different treatment is proposed under the "Special Terms" section of the plan:

i. [ ] None

ii. Name of holder	Amount of Arrearage
1.	
2.	

c. Priority Claims Other Than DSOs

All priority claims other than DSOs shall be paid in full on a pro rata basis after the payment in full of all DSO priority claims.

i. [ ] None

ii. The names and amounts of all claims entitled to priority under 11 U.S.C. Section 507, other than DSOs:

Name	Claim Amount
1.	
2.	

5. SECURED CLAIMS

Other than secured claims that are to be paid as long-term debts pursuant to 11 U.S.C. Section 1322(b)(5), or that are to be paid directly by the debtor(s), the trustee shall pay the value of all allowed secured claims, on a pro rata basis in monthly amounts sufficient to provide adequate protection.

a. For purposes of the plan, the treatment of each claim is specified below. Treatment shall be one of the following: (1) Direct payment by the debtor(s): "**Direct**";

(2) Payment in full by the Chapter 13 Trustee through the plan where Section 506(a) does not apply: "**910/365**"; (3) Payment of the value of the collateral by the Chapter 13 Trustee through the plan where Section 506(a) does apply: **"As valued"**; (4) Debtor(s) will surrender the collateral: "**Surrender**", or (5) File proceeding to determine validity of lien: "**Avoidance.**"

	Creditor	Collateral	Value of Coll.	Claim Amt.	Treatment	Int. Rate
1.						
2.						
3.						
4.						

To the extent that any of the claims referred to above are secured by mortgage loans on real property, and such claims are scheduled to be paid by the Trustee, then and in that event the Debtors will no longer be making any mortgage payments to any of the designated mortgage servicers and/or their successors and assigns and all such entities are hereby authorized to provide account information to the Chapter 13 Trustee.

b. For secured claims to be paid directly by the debtor(s), state below the amount of prepetition arrearages to be paid through the Chapter 13 Trustee:

	Creditor	Collateral	Pre-pet. arrearage	Int. Rate.
1.				
2.				
3.				

If the treatment option for secured claims is "**Surrender**", the debtor(s) surrenders any interest in the collateral securing the claims of the specified creditors. Upon confirmation, the automatic stay will be deemed lifted for the collateral and the creditor need not file a motion for relief from stay in order to repossess, foreclose upon or sell the collateral. Nothing herein is intended to lift any applicable co-debtor(s) stay, or to abrogate the debtor(s)' state law contract rights.

c. For claims secured by improved real property or motor vehicles, state below requested insurance information, vehicle mileage, and vehicle identification number.

	Collateral	Insurance Agent and Address	Vehicle Mileage	VIN.
1.				
2.				
3.				

6. General Unsecured Claims Not Separately Classified. General unsecured claims shall be paid on a pro rata basis with payments to commence after the payment of all administrative, secured and priority unsecured claims in full.

7. Special Terms

a. [ ] None

b. Special Treatment of Unsecured Claims

c. Other Direct Payments to Creditors Other than Section 5.

d. Other Special Terms

8. Plan Motions:

Motion to Value All Liens in Paragraph #5a

The debtor(s) hereby moves the Court to value the collateral of each of the creditors described in paragraph 5a. (except those creditors whose claims are classified to be paid directly or to be paid in full by the Chapter 13 Trustee where Section 506(a) does not apply) at the collateral value stated. To the extent that the amount of the debt of any such creditor exceeds the stated collateral value, the debtor(s) hereby moves the Court that said difference be treated in the Chapter 13 plan as a general unsecured claim without priority. The debtor(s) further moves the Court that the lien of each creditor listed upon the collateral listed hereinabove be satisfied upon payment of the collateral value and the issuance of the debtor(s) discharge.

Motion to Avoid Non-Possessory, Non-Purchase Money Security Interests in Household Goods and Personal Items

The debtor(s) is indebted to the following creditors in the amounts stated. As security for the debt, each such creditor insisted upon, and the debtor(s) executed, a waiver of exemption of certain property, and a security agreement granting said creditors a non-possessory, non-purchase money security interest in household goods which is property delineated by 11 U.S.C. Section 522(f)(2) and which is held primarily for the personal, family or household use of the debtor(s) or a dependent of the debtor(s). The debtor(s) believes that a financing statement may have been properly filed evidencing each such creditor's security interest and liens:

Creditor	Last 4 Digits of Account/I.D.	Debt Amount	Description of Property
1.			
2.			

The debtor(s)' interest in any item of property referred to above does not exceed the value claimed as exempt. The money borrowed from each such creditor does not represent any part of the purchase money of any of the items covered by each such creditor's security agreement. The existence of each such creditor's lien on the debtor(s)' household goods and personal items impairs the exemptions to which the debtor(s) would be entitled under Section 1C-1601 of the North Carolina General Statutes or as otherwise applied under applicable state law. The debtor(s) moves the Court for the cancellation and avoidance of the security interest of each such creditor in the debtor(s)' personal and household goods, effective upon discharge.

Motion to Avoid Judicial Liens

Judgments were obtained by the creditors listed below in cases before the General Court of Justice of the State of North Carolina, and said judgments have been recorded in the Public Registry as follows:

Creditor	Judgment Book And Page	Registry	Judgment Date	Judgment Lien Amount
1.				
2.				

The above-stated judgments created liens on the real property in which the debtor(s) has an interest, which real property is more specifically described as ______________________. The value of the debtor(s)'s interest in this real property is $______________. The aforesaid liens constitute judicial liens under 11 U.S.C. Section 522(f)(1). The property which this judicial lien encumbers is property which the debtor(s) is entitled to exempt under 11 U.S.C. Section 522 and the claimed amount of this exemption is $______________. The existence of this judicial lien impairs the exemption to which the debtor(s) is entitled under Section 1C-1601 of the North Carolina General Statutes or as otherwise applied under applicable state law.

The debtor(s) respectfully moves the Court to issue an order compelling the above-stated creditors to cancel and avoid their judicial liens upon the real property described herein, effective upon discharge.

Motion to Assume or Reject Executory Contracts and Unexpired Leases

a. The debtor(s) moves to assume or reject the following executory contracts and unexpired leases. If assumed, payments due after the filing of the case will be paid directly by the debtor(s) rather than by the trustee.

b. Unless otherwise provided, the debtor(s) proposes to promptly cure any pre-bankruptcy defaults on the assumed leases or contracts over a period of __________months, with said payments to be made by the trustee.

Creditor	Assume or Reject	If Assumed, Amount of Arrearage paid in Plan
1.		
2.		

General Provisions

1. To receive payment from the trustee, either prior to or following confirmation, a secured creditor must file a proof of claim. Secured claims which are not filed within the time period required by Federal Bankruptcy Rule 3002(c) may be disallowed or subordinated to other claims upon further order of the Court.

2. Confirmation of this plan does not bar a party in interest from objecting to a claim which is not filed in accordance with Federal Bankruptcy Rules 3001 or 3002.

3. Unless otherwise ordered, any creditor holding a claim secured by property which is removed from the protection of the automatic stay, whether by judicial action, voluntary surrender, or through operation of the plan, will receive no further distribution from the trustee, unless an itemized proof of claim for any deficiency is filed within one-hundred twenty (120) days (or such other period as the Court orders) after the removal of the property from the protection of the automatic stay. For purposes hereof, the removal date shall be the date of the entry of the order confirming the plan, modifying the plan, or granting relief from stay. This also applies to creditors who may claim an interest in, or lien upon, property which is removed from the protection of the automatic stay of another lien holder or release to another lien holder.

4. If a claim is listed in the plan as secured and the creditor files a proof of claim as an unsecured creditor, the creditor shall be treated as unsecured for purposes of distribution and for any other purpose under the plan.

5. Property of the estate includes all of the property specified in 11 U.S.C. Section 541 and all property of the kind specified in such section acquired by the debtor(s) after commencement of the case but before the case is closed, dismissed or likewise converted to one under another chapter of the Code. All property of the debtor remains vested in the estate until completion of the plan.

6. Confirmation of the plan shall impose a duty on the holders and/or servicers of claims secured by liens on real property to apply the payments received from the trustee on the prepetition arrearages, if any, only to such arrearages; to deem the prepetition arrearages as contractually cured by confirmation; to apply the direct mortgage payments, if any, paid by the trustee or by the debtor(s) to the month in which they were

made under the plan or directly by the debtor(s), whether such payments are immediately applied to the loan or placed into some type of suspense account; to notify the trustee, the debtor(s) and the attorney for the debtor(s) of any changes in the interest rate for an adjustable rate mortgage and the effective date of the adjustment; to notify the trustee, the debtor(s) and attorney for the debtor(s) of any change in the taxes and insurance that would either increase or reduce the escrow portion of the monthly mortgage payment; and to otherwise comply with 11 U.S.C. Section 524(i). See Local Rule 4001-1(e).

7. All contractual provisions regarding arbitration or alternative dispute resolution are rejected in connection with the administration of this Chapter 13 case.

I declare under penalty of perjury that the information provided in the Chapter 13 Plan, including Motion(s) for Valuation; Motion(s) to Avoid Certain Liens; and Motion(s) for Assumption and Rejection of Executory Contracts and Unexpired Leases; as to all matters set forth herein are true and correct.

Dated____________________ ____________________________
Debtor's Signature

Dated____________________ ____________________________
Debtor's Signature

I hereby certify that I have reviewed this document with the debtor(s) and that the debtor(s) have received a copy of this document.

Dated____________________ ____________________________
Attorney for the Debtor(s)

Local Form 4A **July 2007**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
[insert correct division name] DIVISION

In re:	)	Case No. - - -
	)	
	)	
	)	Chapter 13
	)	
	)	
Debtor(s)	)	

AMENDMENT TO:

CHAPTER 13 PLAN, INCLUDING NOTICE OF MOTION(S) FOR VALUATION; MOTION(S) TO AVOID CERTAIN LIENS; MOTION(S) FOR ASSUMPTION AND REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND NOTICE OF OPPORTUNITY FOR HEARING ON CONFIRMATION OF THE PLAN INCLUDING ALL MATTERS AS SET FORTH IN THE PLAN, FOR CASES FILED ON OR AFTER JULY 2, 2007

Check for motions applicable to this plan amendment:

( ) **Motion to Value Liens Includes Valuation of Property Securing A Claim**
( ) **Motion to Value Liens includes Valuation of Property Securing A Claim in an Amount Less than the Amount of the Claim**
( ) **Motion to Avoid Liens §522(f)**
( ) **Motion to Assume Executory Contracts(s) and Unexpired Leases**
( ) **Motion to Reject Executory Contract(s) and Unexpired Leases**
( ) **No motions applicable to this plan amendment**

The Chapter 13 Plan, including certain motions and other provisions, is hereby amended as follows:

TAKE NOTICE: Your rights may be affected. You should read this amendment to the Chapter 13 Plan carefully, including any motions contained in the amended plan, and discuss them with your attorney, if you have one, in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to confirm the proposed plan of the debtor(s) as amended, including any of the motions included in the amended plan, or if you want the court to consider your views on these matters, then you or your attorney must file with the Court a written objection to confirmation and request for hearing on confirmation at the following addresses:

Cases filed in the **Charlotte, Shelby or Wilkesboro** Divisions:

Clerk, U.S. Bankruptcy Court, P.O. Box 34189, Charlotte, N.C. 28234-4189.

Cases filed in the **Asheville or Bryson City** Divisions:

Clerk, U.S. Bankruptcy Court, Room #112, 100 Otis Street, Asheville, N.C. 28801

Your objection to confirmation and request for hearing must include the specific reasons for your objection, and must be filed with the Court no later than fifteen (15) days following the conclusion of the Section 341(a) meeting of creditors, or within fifteen (15) days of service of the amendment, whichever is later. If you mail your objection to confirmation to the Court for filing, you must mail it early enough so that the Court will receive it on or before the deadline stated above. You must also serve a copy of your objection to confirmation on the debtor(s), the attorney for the debtor(s), and the Chapter 13 trustee at their addresses as they are listed in the notice of the meeting of creditors. If any objections to confirmation are filed with the Court, the objecting party will provide written notice of the date, time and location of the hearing. No hearing will be held unless an objection to confirmation is filed.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the proposed plan of the debtor(s) as amended, including any motions contained in the amended plan, and may enter an order confirming the amended plan and granting the motions. **Any creditor's failure to object to confirmation of the proposed plan as amended shall constitute the creditor's acceptance of the treatment of its claim as proposed, pursuant to 11 U.S.C. Section 1325(a)(5)(A).**

I declare under penalty of perjury that the information provided in the **Amendment** to Chapter 13 Plan, including Notice of Motion(s) for Valuation; Motion(s) to Avoid Certain Liens; and Motion(s) for Assumption and Rejection of Executory Contracts and Unexpired Leases; as to all matters set forth herein are true and correct.

Dated____________________ ____________________________
Debtor's Signature

Dated____________________ ____________________________
Debtor's Signature

I hereby certify that I have reviewed this document with the debtor(s) and that the debtor(s) have received a copy of this document.

Dated_________________________ ____________________________________
Attorney for the Debtor

Local Form 5 July 2007

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
_______________ Divison

In re:	)	Case No.:
	)	
	)	Chapter:
	)	
	)	
	)	
	)	
Debtor(s)	)	
______________________________	)	

MOTION FOR DISBURSEMENT OF UNCLAIMED FUNDS

______________________ hereby moves the Court for an order
(Claimant(s) Name)

directing the United States Bankruptcy Court to disburse the sum of $______________
(Enter amount of claim)

from the Court's registry fund, payable to ______________________, representing
(Claimant(s) Name)

unclaimed funds previously deposited with the Court.

Date ______________

Supporting documentation attached ____yes ____no

I understand that pursuant to 11 U.S.C. §§ 152 and 3571, I may be fined up to $500,000, imprisoned for up to 5 years or both if I have knowingly and fraudulently made any false statements in this document or provided false and fraudulent documentation as part of this application.

____
Signature of Claimant

____
Typed or printed name of Claimant

____
Address of Claimant

____
Daytime Telephone Number of Claimant

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
______________ DIVISION

In re:) Case No.:
)
)
) Chapter:
)
Debtor(s).)
)

NOTICE OF HEARING AND CERTIFICATE OF SERVICE

NOTICE IS HEREBY GIVEN that the Court will conduct a hearing on ____________ at __________ (a.m./p.m.) in Courtroom number _______ located at ________________ to consider the Motion for Disbursement of Unclaimed Funds filed by ________________.
(Claimant(s) Name)

NOTICE IS FURTHER GIVEN to the Court that on __________________, the
(Enter date parties served)
United States Attorney, the case trustee, and the Bankruptcy Administrator were served a copy of the Motion for Disbursement of Unclaimed Funds and this Notice of Hearing by U. S. Mail.

____
Signature of Claimant(s)

____
Typed or printed name of Claimant(s)

Date ______________________

Local Form 6

UNITED STATES BANKRUPTCY COURT
Western District of North Carolina

Instructions for Filing an
Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments

The fee for filing a case under chapter 7 of the Bankruptcy Code is $299.

If you cannot afford to pay the fee either in full at the time of filing or in installments, then you may request a waiver of the filing fee by completing this application (NCWD Local Form 6) and filing it with the Clerk of Court.

A judge will decide whether you have to pay the fee. By law, the judge may waive the fee **only if** your income is less than 150 percent of the official poverty line applicable to your family size and you are unable to pay the fee in installments. **The poverty guidelines for 2008 are attached.** You may obtain additional information about the poverty guidelines at the United States Department of Health and Human Services website at http://aspe.hhs.gov/poverty.

Required information. All items in the application and attached requested schedules must be answered in order for a proper determination to be made regarding allowance of your waiver of fee. If the question does not apply; write in not applicable or **n/a.** If the amount is zero or none use: **zero, -0-, none**. Sign the application on the last page. If you and your spouse are filing a joint bankruptcy petition, each of you must provide information as requested and sign the application. Your failure to timely comply with these requirements may result in the application being **denied.**

If your application is denied, an order will be entered directing the payment of the filing fee in installments.

2008 HHS Poverty Guidelines

Persons in Family or Household	48 Contiguous States and D.C.	Alaska	Hawaii	150%
1	$10,400	$13,000	$11,960	15,600
2	14,000	17,500	16,100	21,000
3	17,600	22,000	20,240	26,400
4	21,200	26,500	24,380	31,800
5	24,800	31,000	28,520	37,200
6	28,400	35,500	32,660	42,600
7	32,000	40,000	36,800	48,000
8	35,600	44,500	40,940	53,400
For each additional person, add	3,600	4,500	4,140	5,400

SOURCE: *Federal Register*, January 23, 2008

January 2008

Local Form 6 **Feb. 2006**

UNITED STATES BANKRUPTCY COURT
Western District of North Carolina

In re:

Chapter 7

Debtor(s). Case No._______________

Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments

Part A. Family Size and Income

1. Including yourself, your spouse, and dependents you have listed or will list on **Schedule I, Current Income of Individual Debtors**, how many people are in your family? (Do not include your spouse if you are separated AND are not filing a joint petition.)

   Number of people in family: _______________

2. Restate the following information that you provided, or will provide, on **Line 16 of Schedule I, Current Income of Individual Debtor**. Attach a completed copy of Schedule I, if it is available.

   Total Combined Monthly Income (line 16 of Schedule I): $_______________

3. State the monthly net income, if any, of dependents included in Question 1 above. Do not include income already reported in Question 2. If none, enter $0.

   Monthly net income of dependants: $_______________

4. Add the "Total Combined Monthly Income" reported in Question 2 to your dependents' monthly net income from Question 3.

   Total of amounts in question 2 and question 3: $_______________

5. Do you expect the amount in Question 4 to increase or decrease by more than 10% during the next 6 months?

   Yes ____ No _____ If yes, explain: ______________________________________

   ____

Part B. Monthly Expenses

6. EITHER (a) attach a completed copy of Schedule J (Schedule of Monthly Expenses), and state your total monthly expenses reported on Line 18 of that Schedule, OR (b) if you have not yet completed Schedule J, provide an estimate of your total monthly expenses.

Total monthly expenses from Schedule J or estimate: $____________

7. Do you expect the amount in Question 6 to increase or decrease by more than 10% during the next 6 months?

Yes ____ No _____ If yes, explain: ________________________________

____

Part C. Real and Personal Property

Either (1) attach completed copies of Schedule A (Real Property) and Schedule B (Personal Property), OR (2) if you have not yet completed those schedules, answer the following questions.

8. State the amount of cash you have on hand: $________________

9. State below any money you have in savings, checking, or other accounts in a bank or other financial institution.

Name of Financial Institution	Type of Account	Amount
____________________	________________	$______________
____________________	________________	$______________

10. State below the assets owned by you. **Do not list ordinary furnishings and clothing.**

Home Address:

____________________________________ Value: $______________

________________ Amount owed on mortgages and liens: $______________

Other real estate address:

____________________________________ Value: $______________

________________ Amount owed on mortgages and liens: $______________

Motor Vehicle Model/year: ____________________ Value: $______________

Amount Owed: $______________

Motor Vehicle Model/year: ____________________ Value: $______________

Amount Owed: $______________

Other (Describe):________________________ Value: $____________

________________________ Amount Owed: $____________

11. State below any person, business, organization, or governmental unit that owes you money and the amount that is owed.

Name of Person, Business, or Organization that Owes You Money	Amount Owed:
________________________________	$____________
________________________________	$____________

Part D. Additional Information

12. Have you paid an attorney any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules?

Yes _____ No _____ If yes, how much have you paid? $____________

13. Have you promised to pay or do you anticipate paying an attorney in connections with your bankruptcy case?

Yes _____ No _____

If yes, how much have you promised to pay or do you anticipate paying?
$____________

14. Have you paid **anyone other than an attorney** (such as bankruptcy petition preparer, paralegal, typing service, or other person) any money for services in connection with this case, including the competition of this form, the bankruptcy petition, or schedules?

Yes _____ No _____ If yes, how much have you paid? $____________

15. Have you promised to pay **anyone other than an attorney** (such as bankruptcy petition preparer, paralegal, typing service, or other person) any money for services in connection with this case, including the competition of this form, the bankruptcy petition, or schedules?

Yes _____ No _____

If yes, how much have you promised to pay or do you anticipate paying?
$____________

16. Has anyone paid an attorney or other person or service in connection with this case, on your behalf?

Yes _____ No ______

If yes, explain: ____

____

17. Have you previously filed for bankruptcy relief during the past eight years?

Yes _______ No ________

Case Number (If known)	Year filed	Location of filing	Did you obtain a discharge? (if known)
______________	________	______________	Yes___ No_____ Don't know _____
______________	________	______________	Yes ___ No ____ Don't know _____

18. Please provide any other information that helps to explain why you are unable to pay the filing fee in full or in installments.

19. I (we) declare under penalty of perjury that I (we) cannot currently afford to pay the filing fee in full or in installments and that the foregoing information is true and correct.

Executed on: ________________ ________________________________
Date Signature of Debtor

________________ ________________________________
Date Signature of Debtor

Declaration and Signature of Bankruptcy Petition Preparer (See 11 U.S.C. §110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. §110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. §110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required under that section.

____
Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

____
Social Security No. (Required by 11 U.S.C. §110).

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs the document.

____

____
Address

x______________________________ ____________________
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; U.S.C. § 156

Local Form 7 **July 2007**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
***[insert correct division name]* DIVISION**

IN THE MATTER OF:)
)
) Case Number___________________
)
SSN: xxx-xx-_______)
SSN: xxx-xx-_______)
Debtor(s)

DEBTOR(S) CERTIFICATION AND AFFIDAVIT – 341(a) MEETING

The undersigned, being the Debtor(s) referenced above, do hereby certify under oath administered by the Standing Trustee at the 341 meeting of creditors conducted on the date noted below, the following (Check the appropriate option, filling in the information requested as needed.)

DOMESTIC SUPPORT OBLIGATION CERTIFICATION

Male Female

1. ( ) ( ) I am not presently required by any judicial or administrative order or statute to pay any domestic support obligation (as defined in 11 U.S.C. Section 101(14A)); or,

2. ( ) ( ) I am required to pay under a domestic support order, and the full information as required by law as to the identity of the holder of this claim is already included in my petition, including the name and full mailing address of the holder, and ages and custodian of any children relating to the support order, and,

3. ( ) ( ) As of the date of this affidavit, I am current under any obligation created therein; and I agree to notify my trustee should I miss any payments due or otherwise become delinquent under any support obligation from this day until my confirmation order is entered.

4. ( ) ( ) I am presently in arrears as of the date of this Affidavit as follows:

( ) I have only those arrears as listed in my petition, and, I am current postpetition through today; or,

( ) In addition to any arrears listed in my petition, I have incurred the following postpetition arrearage:

____

____

TAX RETURN CERTIFICATION

Male Female

1. ( ) ( ) I was not required to file any Federal, State or local tax returns for the 4-year period ending on the date of the filing of my Chapter 13 petition for the following reason(s):

____

____.

2. ( ) ( ) I was not required to file Federal, State or local tax returns for the following years during the 4-year period ending on the date of the filing of my Chapter 13 petition for the following reason(s):

____

____.

3. ( ) ( ) I was required to file Federal, State and local tax returns for the 4-year period ending on the date of the filing of my Chapter 13 petition and I have filed all of the returns that I was required to file during that 4-year period.

4. ( ) ( ) I was required to file Federal, State and local tax returns for the 4-year period ending on the date of the filing of my Chapter 13 petition but I have not filed the following required return(s):

____

____.

CERTIFICATION OF WAGES

Male Female

1. ( ) ( ) My Chapter 13 petition contains valid and accurate information as regards the payment of wages to me by my employer for the 60-day period ending on the date of the filing of my petition, and my petition contains valid and accurate information as to my average income for the six-month period ending on the last day of the calendar month immediately preceding the filing of my petition; or,

2. ( ) ( ) The information as contained in my petition has changed as follows:

____

____

By signing this affidavit, I acknowledge that all of the statements contained herein are true and accurate, and the Trustee and Court may rely on these statements for purposes of determining if confirmation of my proposed Plan is allowed under the provisions of the Bankruptcy Code. Any inaccuracy in this affidavit may be grounds for revocation or denial of my confirmation.

Dated this the _____ day of __________________, 200__.

____
Male Debtor

____
Female Debtor

Local Form 8 **July 2007**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	)	
	)	Chapter 13
Debtor(s)	)	Case No.

DEBTOR'S MOTION FOR ENTRY OF DISCHARGE and CERTIFICATION REGARDING PLAN COMPLETION, and Interim Rule 1007(b)(8) Statement

The debtor makes the following certifications regarding the completion of the plan:

1. I have satisfied all plan requirements.

2. _____ I am not required to pay any Domestic Support Obligations.

   _____ I am required to pay Domestic Support Obligations and all amounts payable under such obligations are paid as of this date, including amounts that were due before the petition was filed, to the extent provided for by the plan.

3. The provisions of 11 U.S.C. §522(q)(1) are not applicable to me.

4. There is not pending a proceeding in which I may be found guilty of a felony of the kind described in Section 522(q)(1)(A) or liable for a debt of the kind described in Section 522(q)(1)(B).

5. I am entitled to a discharge under 11 U.S.C. §1328.

I declare under penalty of perjury that the information provided in this certification and motion is true and correct and move the Court to enter a discharge in this case.

Dated:___________

____
Debtor

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE: Debtor(s)	Chapter 13 Case No.

NOTICE OF OPPORTUNITY FOR HEARING on DEBTOR'S MOTION FOR ENTRY OF DISCHARGE and CERTIFICATION REGARDING PLAN COMPLETION,

[Notice of Interim Bankruptcy Rule 1007(b)(8) Statement
Given Pursuant to Interim Bankruptcy Rule 2002(f)(11)]

To: [all creditors on the Court's mailing matrix]:

PLEASE TAKE NOTICE that the debtor has filed a Motion for Entry of Discharge and Certification Regarding Plan Completion. A copy of said pleading is attached hereto.

Any objection must be filed in writing with the Bankruptcy Court and a copy served on the debtor and the attorney for the debtor within 15 days of the date of this notice. If no objections are filed and served in a timely manner, the Court will enter a discharge.

A hearing on any objections filed and served in a timely manner will be held on ________, the _______ day of _______________, 2006 at 9:30 a.m. in ______________ ____.

Dated:

Attorney Name	or	Pro Se Debtor
Attorney Address		Debtor address
Attorney Tel. No.		(if debtor has
Attorney Bar No.		no attorney)

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of this pleading on the attorneys, creditors, and interested parties of record included on the most recent version of the Clerk's mailing matrix, a copy of which is attached hereto. Non-ECF users were served by depositing a copy of same in a properly addressed envelope with first class postage thereon. ECF users were served electronically.

Dated:

____
Attorney for Debtor/Pro Se Debtor

Local Form 9 **November 2006**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	)	
	)	Chapter **13**
Debtor(s)	)	Case No.

DEBTOR'S DISCLOSURE OF INFORMATION REGARDING DOMESTIC SUPPORT OBLIGATIONS

Pursuant to 11 U.S.C. §1302(d), the Chapter 13 debtor provides the following information to the Chapter 13 Trustee:

Debtor's Current Address:______________________________

Debtor's Current Employer:______________________________

Debtor's Current Employer's Address:______________________________

____

List of debts not discharged under Paragraph 2 or 4 of 11 U.S.C. §523(a):__________

____

List of debts reaffirmed under 11 U.S.C. §524(c):______________________________

____

I disclose under the penalties of perjury that the information provided in this disclosure is true and accurate.

Dated:__________________ ______________________________
Debtor

Mail to: Chapter 13 Trustee, [address].

LOCAL FORM 10

MOTION FOR RELIEF FROM STAY – POSTPETITION TRANSACTION HISTORY CREDITOR FORM

(MAY BE PREPARED IN SPREADSHEET FORMAT)

DEBTOR NAME:
BANKRUPTCY CASE NO.:
DATE CASE FILED

MORTGAGEE
LOAN #

DATE:
PREPARED BY:

PMT. DUE DATE (Beg. 1st post-pet pmt due)	P & I	TAX ESCROW	INS. ESCROW	PMI	L/C	TOTAL	AMOUNT RECEIVED	DATE POSTED

July 2007

LOCAL FORM 11

MOTION FOR RELIEF FROM STAY - POSTPETITION TRANSACTION HISTORY
DEBTOR FORM
(MAY BE PREPARED IN SPREADSHEET FORMAT)

DEBTOR NAME:
BANKRUPTCY CASE NO.:
DATE CASE FILED

MORTGAGEE
LOAN #

DATE:
PREPARED BY:

AMOUNT PAID	MONEY ORDER/CHECK DATE	MONEY ORDER/CHECK NUMBER

LOCAL FORM 12 **DECEMBER 2007**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In re:)
) Case No.
) Chapter
)
Debtor(s))
______________________________)

NOTICE OF CASE SPECIFIC NAME AND/OR ADDRESS CHANGE PURSUANT TO 11 U.S.C. § 342(e) AND LOCAL RULES 2002-1 and 3001-1

Pursuant to 11 U.S.C § 342(e) and Local Rules 2002-1 and 3001-1, (creditors name) files this notice of address to be used to provide notice in the above-captioned case. (Creditors name) is aware that, pursuant to 11 U.S.C. § 342(e)(2), any notice in this case required to be provided to the creditor by the debtor or the court will not be provided to the address designated herein until after five (5) days following receipt of this notice of address change by the court and the debtor(s).

Current creditor name and address:

Name: ______________________________
Address 1: ______________________________
Address 2: ______________________________
Address 3: ______________________________
Address 4: ______________________________
City, State, Zip ______________________________

Revised creditor name and address:

[ ] for payment purposes only
[ ] for notice purposes only
[ ] for both payment and notice purposes

Name: ______________________________
Address 1: ______________________________
Address 2: ______________________________
Address 3: ______________________________
Address 4: ______________________________
City, State, Zip ______________________________

Authorization: Under penalty of perjury, I, the undersigned, affirm that I am authorized to request this address change.

Name and position: ______________________________
(Print or Type)

Signature: ______________________________________

Date:

B104 (FORM 104) (08/07)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)
PLAINTIFFS	**DEFENDANTS**
ATTORNEYS (Firm Name, Address, and Telephone No.)	**ATTORNEYS** (If Known)
PARTY (Check One Box Only) ☒ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

NATURE OF SUIT

(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $

Other Relief Sought

B104 (FORM 104) (08/07), Page 2

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR	BANKRUPTCY CASE NO.	
DISTRICT IN WHICH CASE IS PENDING	DIVISION OFFICE Other	NAME OF JUDGE Other
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF)		
DATE	PRINT NAME OF ATTORNEY (OR PLAINTIFF)	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and **Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

Index to Rules of the United States Bankruptcy Court for the Western District of North Carolina

A

ABSTENTION.
Motions, filing, USBank-WD Rule 5011-1.

ADVERSARY PROCEEDING.
Briefs, USBank-WD Rule 9013-2.
Cover sheet, USBank-WD Rule 7003-1.
Deposit and investment of funds held by clerk, USBank-WD Rule 7067-1.
Discovery, USBank-WD Rule 7026-1.
Extension of time to respond to complaint, USBank-WD Rule 9006-1.
Lack of prosecution.
  Dismissal, USBank-WD Rule 7041-1.
Motion practice, USBank-WD Rule 7007-1.
Pretrial conferences and orders, USBank-WD Rule 7016-1.
Settlements, USBank-WD Rule 9019-1.
Trial procedure, USBank-WD Rule 7016-2.

ASSIGNMENT OF CASES.
Determination of division, USBank-WD Rule 1073-1.

ATTACHMENTS TO DOCUMENTS, USBank-WD Rule 5005-2.

ATTORNEYS AND OTHER PROFESSIONALS.
Application for appointment, USBank-WD Rule 2016-1.
Business entities, representing, USBank-WD Rule 2090-1.
Chapter 11.
  Retainers, trust account, USBank-WD Rule 2016-1.
Chapter 13.
  Compensation of attorneys.
    Base fee services, USBank-WD Rule 2016-1.
    Disclosure of fee, USBank-WD Rule 2016-1.
    Fees exceeding base fee, USBank-WD Rule 2016-1.
    Payment of fee, USBank-WD Rule 2016-1.
Compensation.
  Chapter 11.
    Retainers, trust account, USBank-WD Rule 2016-1.
  Chapter 13.
    Base fee services, USBank-WD Rule 2016-1.
    Disclosure of attorneys fee procedure, USBank-WD Rule 2016-1.
    Fees exceeding base fee, USBank-WD Rule 2016-1.
    Payment of fee, USBank-WD Rule 2016-1.
  Fee guidelines, USBank-WD Rule 2016-1.
  Guidelines for compensation and expenses, USBank-WD Appx A.
Extent of duty to represent, USBank-WD Rule 2091-1.
Retainers.
  Chapter 11 case, trust account, USBank-WD Rule 2016-1.

ATTORNEYS AND OTHER PROFESSIONALS —Cont'd
Security interest in debtor's property, USBank-WD Rule 2016-1.
Signature of attorney.
  Electronic filing to constitute, USBank-WD Rules 1002-2, 5005-1.
Special admission in district, USBank-WD Rule 2090-2.

ATTORNEYS' FEES, USBank-WD Rule 2016-1.
Guidelines for compensation and expenses, USBank-WD Appx A.

AUCTIONEERS.
Chapter 7 case.
  Employment, report of sale, USBank-WD Rule 6005-1.

AUTOMATIC STAY.
Motions for relief from stay, USBank-WD Rule 4001-1.

B

BALLOTS.
Filing with clerk, USBank-WD Rule 3018-1.

BANKRUPTCY ADMINISTRATOR.
Service on.
  Documents required to be served on, USBank-WD Rule 9035-1.
  Filings served on, USBank-WD Rule 9013-1.
  Service on required, USBank-WD Rule 9035-1.

BASE FEE SERVICES.
Chapter 13.
  Compensation of attorneys, USBank-WD Rule 2016-1.

BIRTH DATE.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

BRIEFS.
Adversary proceedings and contested matters, USBank-WD Rule 9013-2.

BUSINESS ENTITIES.
Representation by lawyer, USBank-WD Rule 2090-1.

C

CASE MANAGEMENT/ELECTRONIC CASE FILING SYSTEM, USBank-WD Rule 5005-1.

CASH COLLATERAL ORDERS.
Chapter 11.
  Guidelines, USBank-WD Rule 1002-3.

CERTIFICATE OF DISCHARGE, USBank-WD Rule 4004-1.

CERTIFICATE OF SERVICE, USBank-WD Rule 2002-1.

CHAPTER 7.
Auctioneers.
  Employment, report of sale, USBank-WD Rule 6005-1.
Claims, filing, USBank-WD Rule 3001-1.
Conversion of deconsolidated case to, USBank-WD Rule 1015-1.
Duties of debtor, USBank-WD Rule 4002-1.

CHAPTER 11.
Cash collateral orders.
  Guidelines, USBank-WD Rule 1002-3.
  Provisions to be included in consenual orders, USBank-WD Appx B.
Claims, filing, USBank-WD Rule 3001-1.
Duties of debtor, USBank-WD Rule 4002-1.
Exclusivity period.
  Motion to extend, hearing, USBank-WD Rule 3016-1.
Fee application and notice of hearing.
  Service, USBank-WD Rule 2002-1.
Retainers held by professionals.
  Trust account, USBank-WD Rule 2016-1.
Service.
  Fee application and notice of hearing, USBank-WD Rule 2002-1.
  Papers required to be served, USBank-WD Rule 2002-1.
  Petitions, schedules, statements and schedule deficiencies, USBank-WD Rule 1007-1.

CHAPTER 13.
Automatic stay.
  Motions for relief from stay, USBank-WD Rule 4001-1.
Claims, filing, USBank-WD Rule 3001-1.
Compensation of attorneys.
  Base fee services, USBank-WD Rule 2016-1.
  Disclosure of fee, USBank-WD Rule 2016-1.
  Fees exceeding base fee, USBank-WD Rule 2016-1.
  Payment of fee, USBank-WD Rule 2016-1.
Disclosure of attorney's fee procedure, USBank-WD Rule 2016-1.
Dismissal or conversion.
  Funds held by trustee, disposition, determination sought by trustee, USBank-WD Rule 3015-1.
Duties of debtor, USBank-WD Rule 4002-1.
Monthly reports, USBank-WD Rule 3001-1.
Plan, filing, USBank-WD Rule 2016-1.
Service.
  Plan, USBank-WD Rule 2002-1.
Trustee search fee, USBank-WD Rule 2016-2.

CHILD'S NAME.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

CLAIMS.
Filing, USBank-WD Rule 3001-1.

CLERKS.
Deposit and investment of funds held by clerk, USBank-WD Rule 7067-1.
Granting and entering order, USBank-WD Rule 5001-2.
  Suspension, alteration or rescission by courts, USBank-WD Rule 5001-2.
Office hours, USBank-WD Rule 5001-1.

CLOSING ARGUMENTS.
Trial procedure, USBank-WD Rule 7016-2.

COMPENSATION.
Attorneys and other professionals, USBank-WD Rule 2016-1.
  Guidelines, USBank-WD Appx A.

COMPLIANCE WITH DEBTOR'S STATEMENT OF INTENTION.
Evidence of, USBank-WD Rule 1007-3.

CONSENT ORDERS, USBank-WD Rule 9021-1.
Reassignment not required in cases requiring disqualification, USBank-WD Rule 9028-1.

CONSOLIDATED CASE.
Deconsolidation, USBank-WD Rule 1015-1.

CONTESTED MATTERS.
Briefs, USBank-WD Rule 9013-2.
Disqualification of judges, USBank-WD Rule 9028-1.
Motions, USBank-WD Rule 9014-1.
Orders.
  Reassigned maters, USBank-WD Rule 9028-1.

CONTINGENT CLAIMS.
Notice, USBank-WD Rule 3001-1.

CONVERSION OF CHAPTER 7 CASE.
Deconsolidation of case, USBank-WD Rule 1015-1.
Final report not required, USBank-WD Rule 5009-1.

CONVERSION OF CHAPTER 13 CASE.
Final report not required, USBank-WD Rule 5009-1.
Funds held by trustee, disposition, determination sought by trustee, USBank-WD Rule 3015-1.

COPIES.
Two-sided documents, USBank-WD Rule 5005-2.

CORPORATIONS.
Petitions, filing, USBank-WD Rule 1002-2.
Representation by lawyer, USBank-WD Rule 2090-1.

COURT RECORDS.
Case management/electronic case filing system, USBank-WD Rule 5005-1.
Public records, limiting publication, USBank-WD Rule 1002-1.

COVER SHEET.
Adversary proceeding, USBank-WD Rule 7003-1.

CREDITOR CONTACTS WITH DEBTOR, USBank-WD Rule 4071-1.

CREDITORS' MEETING.
Dismissal, failure to appear, USBank-WD Rule 1017-1.
  Final report not required, USBank-WD Rule 5009-1.
Removal and resetting.
  Transfer of venue within district, USBank-WD Rule 1014-1.

D

DATE OF BIRTH.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

DEBTOR'S CERTIFICATION AND AFFIDAVIT.
341(a) meeting, USBank-WD Appx C Form 7.

DEBTOR'S DUTIES, USBank-WD Rule 4002-1.

DEBTOR'S STATEMENT OF INTENTION.
Evidence of compliance, USBank-WD Rule 1007-3.

DECONSOLIDATION OF CASE, USBank-WD Rule 1015-1.

DEPOSIT AND INVESTMENT OF FUNDS HELD BY CLERK, USBank-WD Rule 7067-1.

DEPOSITION TAKEN PURSUANT TO FED. R. CIV. P. 30.
Time limitation, USBank-WD Rule 7030-1.

DISCHARGE.
Certificate, USBank-WD Rule 4004-1.

DISCOVERY, USBank-WD Rule 7026-1.
Deposition taken pursuant to Fed. R. Civ. P. 30.
  Time limitation, USBank-WD Rule 7030-1.

DISMISSAL.
Chapter 13 case.
  Funds held by trustee, disposition, determination sought by trustee, USBank-WD Rule 3015-1.
Failure to appear at first creditors' meeting, USBank-WD Rule 1017-1.
  Final report not required, USBank-WD Rule 5009-1.
Lack of prosecution, USBank-WD Rule 7041-1.

DISPUTED CLAIMS.
Notice, USBank-WD Rule 3001-1.

DISQUALIFICATION OF JUDGES, USBank-WD Rule 9028-1.

DIVISIONS OF COURT, USBank-WD Rule 1071-1.

E

ELECTRONIC FILING.
Access to system, USBank-WD Rule 5001-1.
Case filing, USBank-WD Rule 5005-1.
Mailing matrix, USBank-WD Rule 1007-2.
Petitions, schedules and statements, USBank-WD Rule 1002-2.
Service electronically, USBank-WD Rule 2002-1.

EVIDENCE.
Discovery, USBank-WD Rule 7026-1.
Exhibits, presenting, USBank-WD Rule 7016-2.

EXAMINATION.
Time, USBank-WD Rule 2004-1.

EXCLUSIVITY PERIOD.
Chapter 11 case.
  Motion to extend, hearing, USBank-WD Rule 3016-1.

EXEMPTION ELECTION, USBank-WD Rule 4003-1.

EXHIBITS, USBank-WD Rule 7016-2.

EX PARTE MOTIONS, USBank-WD Rule 9013-1.

EXTENSION OF TIME TO RESPOND TO COMPLAINT, USBank-WD Rule 9006-1.

F

FAILURE TO APPEAR AT FIRST CREDITORS' MEETING.
Dismissal, USBank-WD Rule 1017-1.

FEE GUIDELINES.
Attorneys and other professionals, USBank-WD Appx A, USBank-WD Rule 2016-1.

FEES.
Compensation of attorneys and other professionals, USBank-WD Rule 2016-1.
  Guidelines, USBank-WD Appx A.
Deconsolidation of case, USBank-WD Rule 1015-1.
Filing.
  Failure to pay in installments, USBank-WD Rule 1006-1.
Trustee search fee.
  Chapter 13, USBank-WD Rule 2016-2.

FILING.
Abstention, motions, USBank-WD Rule 5011-1.
Access to electronic filing system, USBank-WD Rule 5001-1.
Attorneys and other professionals.
  Application for appointment, USBank-WD Rule 2016-1.
  Attorneys not admitted in district, USBank-WD Rule 2090-2.
Ballots, USBank-WD Rule 3018-1.
Briefs in adversary proceedings or contested matters, USBank-WD Rule 9013-2.
Claims, USBank-WD Rule 3001-1.
Electronic filing.
  Petitions, schedules and statements, USBank-WD Rules 1002-2, 3001-1.
Fee.
  Failure to pay in installments, USBank-WD Rule 1006-1.
Mailing matrix, USBank-WD Rule 1007-2.
Non-attorneys.
  Petitions, copies required, USBank-WD Rule 1002-2.
Notice of deficient filing, USBank-WD Rule 1007-1.
Pro se filing.
  Duties of debtor, USBank-WD Rule 4002-1.

FINAL PRETRIAL CONFERENCE, USBank-WD Rule 7016-1.

FINAL REPORT.
Dismissal or conversion, not required, USBank-WD Rule 5009-1.

FINANCIAL ACCOUNT NUMBERS.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

FIRST-DAY FINANCING ORDERS.
Chapter 11.
  Guidelines, USBank-WD Rule 1002-3.

FIRST MEETING OF CREDITORS.
Dismissal, failure to appear, USBank-WD Rule 1017-1.
  Final report not required, USBank-WD Rule 5009-1.

FIRST MEETING OF CREDITORS —Cont'd
Removal and resetting.
Transfer of venue within district, USBank-WD Rule 1014-1.

FORMS.
Attorneys' fee procedure.
Disclosure to debtor in chapter 13 cases, USBank-WD Appx C Form 3.
Chapter 13 plan summary, USBank-WD Appx C Form 4.
Amendment to chapter 13 plan, USBank-WD Appx C Form 4A.
Debtor's disclosure re: domestic support obligations, USBank-WD Appx C Form 9.
Debtor's motion for entry of discharge and certificate, USBank-WD Appx C Form 8.
Debtor's certification and affidavit.
341(a) meeting, USBank-WD Appx C Form 7.
Tender of order or judgment, USBank-WD Appx C Form 2.

FRIVOLOUS OR DELAYING MOTIONS, USBank-WD Rule 9014-1.

H

HEARING IMPAIRED.
Interpreters.
Debtor requiring, USBank-WD Rule 4002-1.

HEARINGS.
Motions.
Adversary proceeding, USBank-WD Rule 7007-1.
Contested matters, USBank-WD Rule 9014-1.
Standard dates for setting, USBank-WD Rule 9013-1.
Notice for hearing on contested matters.
Shortening time for giving, USBank-WD Rule 9006-1.

HUSBAND AND WIFE.
Joint petitions.
Surname not same, USBank-WD Rule 1002-2.

I

INQUIRIES BY DEBTOR.
Response by creditor, USBank-WD Rule 4071-1.

INTERNET.
Court records available to public, USBank-WD Rule 1002-1.

INTERPRETERS.
Debtor requiring, USBank-WD Rule 4002-1.

J

JOINT CASE.
Deconsolidation, USBank-WD Rule 1015-1.

JUDGES.
Disqualification of judges, USBank-WD Rule 9028-1.

JUDGMENTS.
Tender of judgment or order, USBank-WD Rule 9021-1.

L

LACK OF PROSECUTION.
Dismissal, USBank-WD Rule 7041-1.

M

MAILING MATRIX, USBank-WD Rule 1007-2.

MAIL, SERVICE BY, USBank-WD Rule 2002-1.

MEETING OF CREDITORS.
Dismissal, failure to appear, USBank-WD Rule 1017-1.
Final report not required, USBank-WD Rule 5009-1.
Removal and resetting.
Transfer of venue within district, USBank-WD Rule 1014-1.

MINOR'S NAME.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

MONTHLY REPORTS, USBank-WD Rule 3001-1.

MOTIONS, USBank-WD Rule 9013-1.
Abstention, USBank-WD Rule 5011-1.
Adversary proceeding, USBank-WD Rule 7007-1.
Contested matters, USBank-WD Rule 9014-1.
Deconsolidation of case, USBank-WD Rule 1015-1.
Ex parte motions, USBank-WD Rule 9013-1.
Frivolous or delaying motions, USBank-WD Rule 9014-1.
Negative notice motions, USBank-WD Rule 9013-1.
No-protest notice, USBank-WD Rule 9013-1.
Personal identifiers.
Redaction, USBank-WD Rule 1002-1.
Relief from stay, USBank-WD Rule 4001-1.
Standard dates for setting hearings, USBank-WD Rule 9013-1.
Transfer within district, USBank-WD Rule 1014-1.

N

NAMES OF MINOR CHILD.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

NEGATIVE NOTICE MOTIONS, USBank-WD Rule 9013-1.

NO-PROTEST NOTICE.
Motions, USBank-WD Rule 9013-1.

NOTICE BY ELECTRONIC FILING, USBank-WD Rule 5005-1.

NOTICE FOR HEARING ON CONTESTED MATTERS.
Shortening time for giving, USBank-WD Rule 9006-1.

NOTICE OF DEFICIENT FILING, USBank-WD Rule 1007-1.

NOTICE OF DISPUTED, CONTINGENT OR UNLIQUIDATED CLAIMS, USBank-WD Rule 3001-1.

NOTICE OF PRETRIAL CONFERENCE, USBank-WD Rule 7016-1.

NOTICE OF TRANSFER OF VENUE WITHIN DISTRICT, USBank-WD Rule 1014-1.

NOTICE TO CREDITORS, USBank-WD Rule 2002-1.

O

OFFICE HOURS.
Clerks' offices, USBank-WD Rule 5001-1.

OPENING STATEMENTS.
Trial procedure, USBank-WD Rule 7016-2.

ORDERS.
Consent orders, USBank-WD Rule 9021-1.
  Reassignment not required in cases requiring disqualification, USBank-WD Rule 9028-1.
Entered by clerk, USBank-WD Rule 5001-2.
  Suspension, alteration or rescission by courts, USBank-WD Rule 5001-2.
Reassigned maters, USBank-WD Rule 9028-1.
Service of certificate, USBank-WD Rule 9022-1.
Signed electronically, USBank-WD Rule 5005-1.
Tender of judgment or order, USBank-WD Rule 9021-1.

P

PAPER SIZE.
Documents and papers submitted to court, USBank-WD Rule 5005-2.

PARTNERSHIPS.
Representation by lawyer, USBank-WD Rule 2090-1.

PERSONAL IDENTIFIERS.
Redaction, USBank-WD Rule 1002-1.

PETITIONS.
Copies.
  Non-attorneys filing, USBank-WD Rule 1002-2.
Corporations filing, USBank-WD Rule 1002-2.
Electronic filing, USBank-WD Rule 1002-2.
Joint petitions by husband and wife.
  Surname not same, USBank-WD Rule 1002-2.
Mailing matrix, USBank-WD Rule 1007-2.
Non-attorneys filing.
  Copies required, USBank-WD Rule 1002-2.
Notice of deficient filing, USBank-WD Rule 1007-1.
Service on certain government agencies.
  Chapter 11 petition, USBank-WD Rule 1007-1.

PRELIMINARY PRETRIAL CONFERENCE, USBank-WD Rule 7016-1.

PRETRIAL CONFERENCES AND ORDERS, USBank-WD Rule 7016-1.

PRIVACY OF DEBTOR.
Personal identifiers, redaction, USBank-WD Rule 1002-1.
Responsibility of debitor, USBank-WD Rule 1002-1.

PRO SE FILING.
Duties of debtor, USBank-WD Rule 4002-1.

PUBLIC RECORDS.
Filings with court deemed, USBank-WD Rule 1002-1.

R

REPORTS.
Auctioneer's and trustee's report of sale.
  Chapter 7 cases, USBank-WD Rule 6005-1.
Final report.
  Dismissal or conversion, not required, USBank-WD Rule 5009-1.
Monthly reports, USBank-WD Rule 3001-1.
Pretrial conference, USBank-WD Rule 7016-1.

RESPONSE BY CREDITOR.
Inquiries by debtor, USBank-WD Rule 4071-1.

RESPONSE TO MOTION.
Contested matters, USBank-WD Rule 9014-1.

RETAINERS.
Attorneys and other professionals.
  Chapter 11 case, trust account, USBank-WD Rule 2016-1.

RETURN OF DOCUMENTS, USBank-WD Rule 5005-2.

S

SCHEDULES.
Addition of creditors.
  Notice, USBank-WD Rule 2002-1.
Electronic filing, USBank-WD Rule 1002-2.
Notice of deficient filing, USBank-WD Rule 1007-1.
Service on certain government agencies.
  Chapter 11 petition, USBank-WD Rule 1007-1.
Supplemental schedule.
  Notice of additional creditors, USBank-WD Rule 2002-1.

SECURITY INTEREST IN DEBTOR'S PROPERTY.
Attorneys and other professionals, USBank-WD Rule 2016-1.

SERVICE.
Addition of creditors to schedules.
  Notice to creditors, USBank-WD Rule 2002-1.
Bankruptcy administrator.
  Documents required to be served on, USBank-WD Rule 9035-1.
  Filings served on, USBank-WD Rule 9013-1.
  Service on required, USBank-WD Rule 9035-1.
Certificate of discharge, USBank-WD Rule 4004-1.
Certificate of service, USBank-WD Rule 2002-1.
  Orders, USBank-WD Rule 9022-1.
Chapter 11.
  Fee application and notice of hearing, USBank-WD Rule 2002-1.
  Papers required to be served, USBank-WD Rule 2002-1.
  Petitions, schedules, statements and schedule deficiencies.
    Particular government agencies, USBank-WD Rule 1007-1.
Chapter 13.
  Plan, USBank-WD Rule 2002-1.
Discovery materials, USBank-WD Rule 7026-1.
Electronic filing, USBank-WD Rule 5005-1.
Method, USBank-WD Rule 2002-1.
Motions in contested matters, USBank-WD Rule 9014-1.

SERVICE —Cont'd
Orders, certificate, USBank-WD Rule 9022-1.
Trustee and attorney for debtor in possession.
  Filings in all proceedings and cases served on, USBank-WD Rule 9013-1.

SETTLEMENTS.
Adversary proceeding, USBank-WD Rule 9019-1.
Uncontested settlements, approval.
  Reassignment not required in cases requiring disqualification, USBank-WD Rule 9028-1.

SIGNATURE OF ATTORNEY.
Electronic filing to constitute, USBank-WD Rules 1002-2, 5005-1.

SOCIAL SECURITY NUMBER.
Personal identifiers, redaction, USBank-WD Rule 1002-1.

SOLE PROPRIETORSHIPS.
Representation by lawyer.
  Exemption from requirement, USBank-WD Rule 2090-1.

SPECIAL ADMISSION IN DISTRICT.
Attorneys, USBank-WD Rule 2090-2.

STATEMENTS.
Compliance with debtor's statement of intention.
  Evidence of, USBank-WD Rule 1007-3.
Electronic filing, USBank-WD Rule 1002-2.
Notice of deficient filing, USBank-WD Rule 1007-1.
Service on certain government agencies.
  Chapter 11 petition, USBank-WD Rule 1007-1.

STAYS.
Automatic stay.
  Motions for relief from stay, USBank-WD Rule 4001-1.

T

TENDER OF JUDGMENT OR ORDER, USBank-WD Rule 9021-1.

TIME.
Abstention, motions, filing, USBank-WD Rule 5011-1.
Attorneys and other professionals.
  Application for appointment, filing, USBank-WD Rule 2016-1.
Briefs in adversary proceedings or contested matters, USBank-WD Rule 9013-2.

TIME —Cont'd
Deposition taken pursuant to Fed. R. Civ. P. 30.
  Limitation on duration, USBank-WD Rule 7030-1.
Examination, USBank-WD Rule 2004-1.
Exemption election.
  Amending or objecting, USBank-WD Rule 4003-1.
Extension of time to respond to complaint, USBank-WD Rule 9006-1.
Motions in adversary proceeding, response, USBank-WD Rule 7007-1.
Notice for hearing on contested matters.
  Shortening time for giving, USBank-WD Rule 9006-1.
Pretrial conference, USBank-WD Rule 7016-1.
Response to motion.
  Contested matters, USBank-WD Rule 9014-1.

TRANSFER OF VENUE WITHIN DISTRICT, USBank-WD Rule 1014-1.

TRIAL PROCEDURE, USBank-WD Rule 7016-2.

TRUST ACCOUNT.
Attorneys and other professionals.
  Retainers, chapter 11 case, USBank-WD Rule 2016-1.

TRUSTEE SEARCH FEE.
Chapter 13, USBank-WD Rule 2016-2.

TWO-SIDED DOCUMENTS, USBank-WD Rule 5005-2.

U

UNLIQUIDATED CLAIMS.
Notice, USBank-WD Rule 3001-1.

V

VENUE.
Transfer within district, USBank-WD Rule 1014-1.

W

WAIVER.
Electronic filing requirements, USBank-WD Rule 1002-2.

WITNESSES.
Calling and examining witness not listed in pretrial order, USBank-WD Rule 7016-2.
Release from subpoena without notice, USBank-WD Rule 7016-2.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

With amendments received through April 15, 2005.

Rule
1. Scope.
2. The Petition.
3. Filing the Petition; Inmate Filing.
4. Preliminary Review; Serving the Petition and Order.
5. The Answer and the Reply.
6. Discovery.
7. Expanding the Record.
8. Evidentiary hearing.

Rule
9. Second or Successive Petitions.
10. Powers of a Magistrate Judge.
11. Applicability of the Federal Rules of Civil Procedure.

Appendix of Forms

Index follows Rules.

Rule 1. Scope.

(a) *Cases Involving a Petition under 28 U.S.C. § 2254.* These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state court judgment would violate the Constitution, laws, or treaties of the United States.

(b) *Other cases.* The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

Legal Periodicals. — For a note discussing the development of habeas corpus relief, the application of the doctrines of exhaustion, comity and federalism, and O'Sullivan v. Boerckel, see 78 N.C.L. Rev. 1604 (2000).

CASE NOTES

Constitutionality. — The § 2254(d)(1) standard of review does not violate the due process clause or result in an unconstitutional suspension of the writ Fisher v. Lee, 215 F.3d 438, 2000 U.S. App. LEXIS 14167 (4th Cir. 2000), cert. denied, 531 U.S. 1095, 121 S. Ct. 822, 148 L. Ed. 2d 706 (2001).

U.S. Supreme Court Review Under and Application of § 2254. — The U.S. Supreme Court has determined that the following basic premise shall inform its interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law. As to the second prong of this interpretation, the court said that this statute (the federal version) directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389, 2000 U.S. LEXIS 2837 (2000).

Denial of Habeas Relief Held Proper. — The United States Court of Appeals for the Fourth Circuit was required to deny the defendant relief under 28 U.S.C. § 2254 where the Virginia Supreme Court's ruling that the defendant was not entitled to a jury instruction on parole ineligibility under Virginia's three-strikes law was neither contrary to, or an unreasonable application of, clearly established federal law. Ramdass v. Angelone, 530 U.S. 156, 120 S. Ct. 2113, 147 L. Ed. 2d 125, 2000 U.S. LEXIS 3965 (2000).

Defendant who claimed that his counsel was ineffective for failing to put forth available evidence that would support the mitigating circumstance that he aided in the apprehension of another capital felon, as recognized by § 15A-2000(f)(8), was not entitled to habeas corpus relief, because the state MAR court's denial of defendant's ineffectiveness of counsel claim was not contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Bacon v. Lee, 225 F.3d 470, 2000 U.S. App. LEXIS 22231 (4th Cir. 2000), cert. denied, 532 U.S. 950, 121 S. Ct.

1420, 149 L. Ed. 2d 360 (2001).

Petitioner's Allegation of Error Did Not Raise a Constitutional Issue. — This rule requires that an application for writ of habeas corpus shall only be entertained on the grounds that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States". Where petitioner's allegation of error in questioning the jury on views regarding life sentence and the possibility of parole did not raise a constitutional issue, his petition was denied. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

Applied in Moore v. Brown, 2000 U.S. App. LEXIS 11963 (4th Cir. May 30, 2000), reported in table case format at 215 F.3d 1320 (4th Cir. 2000).

Cited in McCarver v. Lee, 221 F.3d 583, 2000 U.S. App. LEXIS 12222 (4th Cir. 2000), cert. denied, 531 U.S. 1089, 121 S. Ct. 809, 148 L. Ed. 2d 694 (2001); Adkins v. North Carolina Att'y Gen., 2000 U.S. App. LEXIS 14442 (4th Cir. June 22, 2000), reported in table case format at 217 F.3d 837 (4th Cir. 2000).

Rule 2. The Petition.

(a) *Current Custody; Naming the Respondent.* If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.

(b) *Future Custody; Naming the Respondents and Specifying the Judgment.* If the petitioner is not yet in custody — but may be subject to future custody — under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.

(c) *Form.* The petition must:

(1) specify all the grounds for relief available to the petitioner;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.

(d) *Standard Form.* The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

(e) *Separate Petitions for Judgments of Separate Courts.* A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

CASE NOTES

Petitioner Failed to Forecast Evidence of Material Issues of Disputed Facts. — Petitioner's motion for an evidentiary hearing was denied where he failed to forecast evidence of material issues of disputed fact regarding ineffective assistance of counsel for: (1) failing to present a diminished capacity defense, (2) failing to request an instruction regarding nonstatutory mitigating circumstances, and (3) failing to present evidence on petitioner's's mental age and retardation. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

Rule 3. Filing the Petition; Inmate Filing.

(a) *Where to File; Copies; Filing Fee.* An original and two copies of the petition must be filed with the clerk and must be accompanied by:

(1) the applicable filing fee, or

(2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

(b) *Filing.* The clerk must file the petition and enter it on the docket.

(c) *Time to File.* The time for filing a petition is governed by 28 U.S.C. § 2244(d).

(d) *Inmate Filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

CASE NOTES

Defendant's federal habeas petition was timely filed because the limitations period did not expire until April 24, 1997, and she still had one day to spare when she filed her MAR on April 23, 1997, at which time the statute was tolled until the state court denied certiorari on September 8, 1997; consequently, when the defendant filed her federal habeas petition the next day (her one spare day), her petition was timely. Hernandez v. Caldwell, 225 F.3d 435, 2000 U.S. App. LEXIS 21956 (4th Cir. N.C. 2000).

Rule 4. Preliminary Review; Serving the Petition and Order.

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Rule 5. The Answer and the Reply.

(a) *When Required.* The respondent is not required to answer the petition unless a judge so orders.

(b) *Contents: Addressing the Allegations; Stating a Bar.* The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) *Contents: Transcripts.* The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) *Contents: Briefs on Appeal and Opinions.* The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) *Reply.* The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery.

(a) *Leave of Court Required.* A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) *Requesting Discovery.* A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) *Deposition Expenses.* If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

CASE NOTES

Discovery, Generally. — As is now expressly provided in the rules governing habeas corpus cases, the district judge (or a magistrate to whom the case may be referred) may employ a variety of measures in an effort to avoid the need for an evidentiary hearing. Under Rule 6, a party may request and the judge may direct that discovery take place, and there may be instances in which discovery would be appropriate (prior to an evidentiary hearing) and would show such a hearing to be unnecessary. Under Rule 7, the judge can direct expansion of the record to include any appropriate materials that enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

Rule 7. Expanding the Record.

(a) *In General.* If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) *Types of Materials.* The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) *Review by the Opposing Party.* The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

CASE NOTES

Applied in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

Rule 8. Evidentiary hearing.

(a) *Determining Whether to Hold a Hearing.* If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(b) *Reference to a Magistrate Judge.* A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) *Appointing Counsel; Time of Hearing.* If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

CASE NOTES

Applied in Williams v. Currie, 103 F. Supp. 2d 858, 2000 U.S. Dist. LEXIS 9888 (M.D.N.C. 2000).

Cited in Frye v. Lee, 89 F. Supp. 2d 693, 2000 U.S. Dist. LEXIS 2915 (W.D.N.C. 2000).

Rule 9. Second or Successive Petitions.

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

CASE NOTES

The abuse of the writ doctrine which mandates dismissal of claims presented in habeas petitions if the claims were raised, or could have been raised, in an earlier petition. The doctrine's rationale is rooted in the limited resources available in the federal judicial system. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

Abuse of the writ is not confined to instances where litigants deliberately abandon claims; it also applies to instances where litigants, through inexcusable neglect, fail to raise available claims. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

The standard for excusing a failure to raise an available claim in the abuse of writ context is substantially the same as that required in procedural default cases, namely a showing of cause and prejudice. In the abuse of the writ context, for cause to exist, the external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

The cause and prejudice standard in the abuse of the writ context need not be met in cases where a fundamental miscarriage of justice would otherwise occur. But this occurs only in a very narrow realm of cases where a constitutional violation may have resulted in the conviction of an innocent person. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

The abuse of the writ doctrine has nothing to do with the doctrine of waiver. Unlike waiver, abuse of the writ focuses not on a party's state of mind, but rather on a petitioner's objective conduct, and addresses not whether conduct is knowing and voluntary, but rather the interests of judicial economy and justice for all by limiting petitioners, in certain circumstances, to one bite of the habeas apple. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

Third petition for a writ of habeas corpus which raised the claims that petitioner was incompetent to stand trial and that he received ineffective assistance of counsel owing to his counsel's failure to raise the incompetency issue did not meet the cause and prejudice standard required under this rule, where petitioner had full knowledge of the facts central to each of these claims at the time that he filed his second petition for a writ of habeas corpus, and where he produced no evidence that any objective factors prevented him from raising in his second petition either of these claims presented. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

Applied in Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981).

Rule 10. Powers of a Magistrate Judge.

A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636.

Rule 11. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

APPENDIX OF FORMS

(Amended effective December 1, 2004)

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for __________________
   Address
   City, State Zip Code

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
Petitioner (include the name under which you were convicted) v.	Respondent (authorized person having custody of petitioner)
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: ______

______

______

(b) Criminal docket or case number (if you know): ______

2. (a) Date of the judgment of conviction (if you know): ______

(b) Date of sentencing: ______

3. Length of sentence: ______

4. In this case, were you convicted on more than one count or of more than one crime? Yes ☐ No ☐

5. Identify all crimes of which you were convicted and sentenced in this case: ______

______

______

______

______

6. (a) What was your plea? (Check one)

(1) Not guilty ☐ (3) Nolo contendere (no contest) ☐

(2) Guilty ☐ (4) Insanity plea ☐

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? ______________________

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☐

9. If you did appeal, answer the following:

(a) Name of court: ______________________

(b) Docket or case number (if you know): ______________________

(c) Result: ______________________

(d) Date of result (if you know): ______________________

(e) Citation to the case (if you know): ______________________

(f) Grounds raised: ______________________

(g) Did you seek further review by a higher state court? Yes ☐ No ☐

If yes, answer the following:

(1) Name of court: ______________________

(2) Docket or case number (if you know): ______________________

(3) Result: ______________________

(4) Date of result (if you know): ______________________

(5) Citation to the case (if you know): ______________________

(6) Grounds raised: ______________________

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If yes, answer the following:

(1) Docket or case number (if you know): ____________________

(2) Result: ____________________

____

(3) Date of result (if you know): ____________________

(4) Citation to the case (if you know): ____________________

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☐ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: ____________________

(2) Docket or case number (if you know): ____________________

(3) Date of filing (if you know): ____________________

(4) Nature of the proceeding: ____________________

(5) Grounds raised: ____________________

____

____

____

____

____

____

____

____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result: ____________________

(8) Date of result (if you know): ____________________

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: ____________________

(2) Docket or case number (if you know): ____________________

(3) Date of filing (if you know): ____________________

(4) Nature of the proceeding: ____________________

(5) Grounds raised: ____________________

____

____

____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: ____________________

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ____________________

(b) If you did not exhaust your state remedies on Ground One, explain why: ____________________

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ____________________

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: ____________________

Name and location of the court where the motion or petition was filed: ____________________

Docket or case number (if you know): ____________________

Date of the court's decision: ____________________

Result (attach a copy of the court's opinion or order, if available): ________________

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: ________________

Docket or case number (if you know): ________________

Date of the court's decision: ________________

Result (attach a copy of the court's opinion or order, if available): ________________

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: ________________

GROUND TWO: ________________

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ________________

(b) If you did not exhaust your state remedies on Ground Two, explain why: ____________________

____

____

____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ____________________

____

____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: ____________________

Name and location of the court where the motion or petition was filed: ____________________

____

Docket or case number (if you know): ____________________

Date of the court's decision: ____________________

Result (attach a copy of the court's opinion or order, if available): ____________________

____

____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: ____________________

____

Docket or case number (if you know): ____________________

Date of the court's decision: ____________________

Result (attach a copy of the court's opinion or order, if available): ____________________

____

____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: ______________________________

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: ______________________________

GROUND THREE: ______________________________

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ______________________________

(b) If you did not exhaust your state remedies on Ground Three, explain why: ______________________________

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ______________________________

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: ______________________________

Name and location of the court where the motion or petition was filed: ______________________________

Docket or case number (if you know): ____________________

Date of the court's decision: ____________________

Result (attach a copy of the court's opinion or order, if available): ____________________

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: ____________________

Docket or case number (if you know): ____________________

Date of the court's decision: ____________________

Result (attach a copy of the court's opinion or order, if available): ____________________

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: ____________________

GROUND FOUR: ____________________

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ____________________

____

____

(b) If you did not exhaust your state remedies on Ground Four, explain why: ____________________

____

____

____

____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ____________________

____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: ____

Name and location of the court where the motion or petition was filed: ____________________

____

Docket or case number (if you know): ____________________________________

Date of the court's decision: ____

Result (attach a copy of the court's opinion or order, if available): ____________________

____

____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: ____________________________

____

Docket or case number (if you know): ____________________________________

Date of the court's decision: ____

Result (attach a copy of the court's opinion or order, if available): ____________________

____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☐ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. ______

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: ______

(b) At arraignment and plea: ______

(c) At trial: ______

(d) At sentencing: ______

(e) On appeal: ______

(f) In any post-conviction proceeding: ______

(g) On appeal from any ruling against you in a post-conviction proceeding: ______

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: ______

(b) Give the date the other sentence was imposed: ______

(c) Give the length of the other sentence: ______

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

> (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: ______________________

____

____

or any other relief to which petitioner may be entitled.

____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on ______________________

______________________________ (month, date, year).

Executed (signed) on ____________________ (date).

____

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. ____

____

____

* * * * *

Index to Rules Governing Section 2254 Cases in the United States District Courts

A

ANSWER, Sec2254 Rule 5.

APPOINTMENT OF COUNSEL, Sec2254 Rule 8.

D

DEPOSITION EXPENSES, Sec2254 Rule 6.

DISCOVERY, Sec2254 Rule 6.

E

EVIDENTIARY HEARING, Sec2254 Rule 8.

F

FEDERAL RULES OF CIVIL PROCEDURE.
Applicability, Sec2254 Rule 11.

FORMS, Sec2254 Appx.

H

HEARINGS.
Evidentiary hearing, Sec2254 Rule 8.

M

MAGISTRATE JUDGE.
Powers, Sec2254 Rule 10.
Reference to, Sec2254 Rule 8.

P

PETITION, Sec2254 Rule 2.
Answer, Sec2254 Rule 5.
Filing, Sec2254 Rule 3.
Preliminary consideration by judge, Sec2254 Rule 4.
Reply, Sec2254 Rule 5.
Second or successive petition, Sec2254 Rule 9.

R

RECORD.
Expansion of record, Sec2254 Rule 7.

S

SCOPE OF RULES, Sec2254 Rule 1.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

With amendments received through April 15, 2005.

Rule
1. Scope.
2. The Motion.
3. Filing the Motion; Inmate Filing.
4. Preliminary Review.
5. The Answer and the Reply.
6. Discovery.
7. Expanding the Record.
8. Evidentiary Hearing.
9. Second or Successive Motions.

Rule
10. Powers of a Magistrate Judge.
11. Time to Appeal.
12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Appendix of Forms

Index follows Rules.

Rule 1. Scope.

These rules govern a motion filed in a United States district court under 28 U.S.C. § 2255 by:

(a) a person in custody under a judgment of that court who seeks a determination that:

(1) the judgment violates the Constitution or laws of the United States;

(2) the court lacked jurisdiction to enter the judgment;

(3) the sentence exceeded the maximum allowed by law; or

(4) the judgment or sentence is otherwise subject to collateral review; and

(b) a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that:

(1) future custody under a judgment of the district court would violate the Constitution or laws of the United States;

(2) the district court lacked jurisdiction to enter the judgment;

(3) the district court's sentence exceeded the maximum allowed by law; or

(4) the district court's judgment or sentence is otherwise subject to collateral review.

CASE NOTES

Second Motion. — Habeas corpus petition styled as a § 2241 motion would be dismissed as being an uncertified, and therefore unauthorized, second § 2255 motion. Lowery v. United States, 47 F. Supp. 2d 645, 1999 U.S. Dist. LEXIS 6892 (W.D.N.C. 1999), aff'd, 181 F3d 93 (4th Cir. 1999), cert. denied, 528 U.S. 982, 120 S. Ct. 440, 145 L. Ed. 2d 344 (1999).

Applied in Bradley v. United States, 51 F. Supp. 2d 696 (W.D.N.C. 1999); United States v. Crawford, 2000 U.S. App. LEXIS 8231 (4th Cir. Apr. 26, 2000), reported in table case format at 213 F.3d 633 (4th Cir. 2000); United States v. Miller, 2000 U.S. App. LEXIS 11011 (4th Cir. May 18, 2000), reported in table case format at 215 F.3d 1322 (4th Cir. 2000).

Cited in United States v. Brewer, 2000 U.S. App. LEXIS 19048 (4th Cir. Aug. 9, 2000), reported in table case format at 229 F.3d 1144 (4th Cir. 2000).

Rule 2. The Motion.

(a) *Applying for Relief.* The application must be in the form of a motion to vacate, set aside, or correct the sentence.

(b) *Form.* The motion must:

(1) specify all the grounds for relief available to the moving party;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant.

(c) *Standard Form.* The motion must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to moving parties without charge.

(d) *Separate Motions for Separate Judgments.* A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

CASE NOTES

When Applicable. — The defendant had to raise his ineffective assistance of counsel claims by way of a motion under this section where his claim of ineffective assistance, based on an alleged promise of a lesser sentence, did not plainly appear on the face of the record. United States v. Debty, 2000 U.S. App. LEXIS 12446 (4th Cir. June 6, 2000), reported in table case format at 217 F.3d 841 (4th Cir. 2000).

Rule 3. Filing the Motion; Inmate Filing.

(a) *Where to File; Copies.* An original and two copies of the motion must be filed with the clerk.

(b) *Filing and service.* The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then deliver or serve a copy of the motion on the United States attorney in that district, together with a notice of its filing.

(c) *Time to File.* The time for filing a motion is governed by 28 U.S.C. § 2255 para. 6.

(d) *Inmate Filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4. Preliminary Review.

(a) *Referral to a Judge.* The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.

(b) *Initial Consideration by the Judge.* The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

CASE NOTES

Ineffective Assistance of Counsel. — The pro se defendant who did not label either of his filings as a § 2255 motions stated cognizable claims of ineffective assistance of counsel under this section and was therefore entitled to have his motion construed pursuant to this section. United States v. Curry, 2000 U.S. App. LEXIS 8744 (4th Cir. May 2, 2000), reported in table case format at 213 F.3d 633 (4th Cir. 2000).

Where it did not conclusively appear from the record on appeal that the defendant received ineffective assistance of counsel, this claim was more properly raised in a § 2255 motion. United States v. Quick, 2000 U.S. App. LEXIS 12140 (4th Cir. June 2, 2000), reported in table case format at 215 F.3d 1322 (4th Cir. 2000).

Rule 5. The Answer and the Reply.

(a) *When Required.* The respondent is not required to answer the motion unless a judge so orders.

(b) *Contents.* The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.

(c) *Records of Prior Proceedings.* If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.

(d) *Reply.* The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery.

(a) *Leave of Court Required.* A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) *Requesting Discovery.* A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) *Deposition Expenses.* If the government is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

Rule 7. Expanding the Record.

(a) *In General.* If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.

(b) *Types of Materials.* The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

(c) *Review by the Opposing Party.* The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary Hearing.

(a) *Determining Whether to Hold a Hearing.* If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(b) *Reference to a Magistrate Judge.* A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed finding of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) *Appointing Counsel; Time of Hearing.* If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

(d) *Producing a Statement.* Federal Rule of Criminal Procedure 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.

CASE NOTES

The court granted a certificate of appealability, — vacated the district court's order and remanded for further proceedings in regard to the defendant's attorney's alleged failure to note an appeal where the record contained conflicting allegations about whether the defendant asked his attorney to file an appeal. United States v. Strickland, 2000 U.S. App. LEXIS 15086 (4th Cir. June 28, 2000), reported in table case format at 217 F.3d 842 (4th Cir. 2000).

Rule 9. Second or Successive Motions.

Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 U.S.C. § 2255, para. 8.

Rule 10. Powers of a Magistrate Judge.

A magistrate judge may perform the duties of a district judge under these rules, as authorized by 28 U.S.C. § 636.

Rule 11. Time to Appeal.

Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

CASE NOTES

Conviction Finalized on Date of Mandate. — For purposes of this section, the conviction of a federal prisoner whose conviction is affirmed by United States Court of Appeals for the Fourth Circuit and who does not file a petition for certiorari becomes final on the date that this court's mandate issues in his direct appeal. United States v. Torres, 211 F.3d 836, 2000 U.S. App. LEXIS 8650 (4th Cir. 2000).

Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

CASE NOTES

Procedure for Amending Motions. — The rules governing § 2255 motions do not specify a procedure for amending motions, therefore, courts have typically applied Federal Rule of Civil Procedure 15 to the amendment of a § 2255 motion. United States v. Pittman, 209 F.3d 314, 2000 U.S. App. LEXIS 4854 (4th Cir. 2000).

APPENDIX OF FORMS

(Amended effective December 1, 2004.)

Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.

2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.

7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for ____________
   Address
   City, State Zip Code

9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
UNITED STATES OF AMERICA v.	Movant (include name under which convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: ____

   (b) Criminal docket or case number (if you know): ____

2. (a) Date of the judgment of conviction (if you know): ____

   (b) Date of sentencing: ____

3. Length of sentence: ____

4. Nature of crime (all counts): ____

5. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? ____

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☐

8. Did you appeal from the judgment of conviction? Yes ☐ No ☐

9. If you did appeal, answer the following:

(a) Name of court: ______

(b) Docket or case number (if you know): ______

(c) Result: ______

(d) Date of result (if you know): ______

(e) Citation to the case (if you know): ______

(f) Grounds raised: ______

______

______

______

______

______

______

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): ______

(2) Result: ______

______

(3) Date of result (if you know): ______

(4) Citation to the case (if you know): ______

(5) Grounds raised: ______

______

______

______

______

______

______

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: ______

(2) Docket or case number (if you know): ______

(3) Date of filing (if you know): ______

(4) Nature of the proceeding: ______

(5) Grounds raised: ______

____

____

____

____

____

____

____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: ____

(8) Date of result (if you know): ______________________________

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: ____________________________________

(2) Docket or case number (if you know): ________________________

(3) Date of filing (if you know): ______________________________

(4) Nature of the proceeding: _______________________________

(5) Grounds raised: ____________________________________

____

____

____

____

____

____

____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: ____

(8) Date of result (if you know): ______________________________

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

____

____

____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: ______________________________

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ______________

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ______________

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: ______________

Name and location of the court where the motion or petition was filed: ______________

Docket or case number (if you know): ______________

Date of the court's decision: ______________

Result (attach a copy of the court's opinion or order, if available): ______________

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:______________________________

____

Docket or case number (if you know):______________________________________

Date of the court's decision:____

Result (attach a copy of the court's opinion or order, if available):____________________

____

____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: ____

____

____

____

____

GROUND TWO: ____

____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): __________

____

____

____

____

____

____

____

____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ________________________

____

____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:____

Name and location of the court where the motion or petition was filed:____________________

____

Docket or case number (if you know):___________________________________

Date of the court's decision:____

Result (attach a copy of the court's opinion or order, if available):____________________

____

____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:____________________________

____

Docket or case number (if you know):___________________________________

Date of the court's decision:____

Result (attach a copy of the court's opinion or order, if available):____________________

____

____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: ____

____

____

____

____

GROUND THREE: ____

____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ____________

____

____

____

____

____

____

____

____

____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: ____________________

____

____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:____________________

Name and location of the court where the motion or petition was filed:____________________

____

Docket or case number (if you know):____________________

Date of the court's decision:____________________

Result (attach a copy of the court's opinion or order, if available):____________________

____

____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:____________________

____

Docket or case number (if you know):____________________

Date of the court's decision:____________________

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):____________________

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:____________________

Docket or case number (if you know):____________________

Date of the court's decision:____________________

Result (attach a copy of the court's opinion or order, if available):____________________

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: ____________________

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: ____________________

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. ____________________

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: ______

(b) At arraignment and plea: ______

(c) At trial: ______

(d) At sentencing: ______

(e) On appeal: ______

(f) In any post-conviction proceeding: ______

(g) On appeal from any ruling against you in a post-conviction proceeding: ______

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: ______

(b) Give the date the other sentence was imposed: ______

(c) Give the length of the other sentence: ______

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: ______________________________

____

____

or any other relief to which movant may be entitled.

____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on ______________________________ ______________________________ (month, date, year).

Executed (signed) on ______________________ (date).

____

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. ____

____

____

* * * * *

Index to Rules Governing Section 2255 Proceedings for the United States District Courts

A

ANSWER, Sec2255 Rule 5.

APPEALS.
Time for, Sec2255 Rule 11.

APPOINTING COUNSEL, Sec2255 Rule 8.

D

DEPOSITION EXPENSES, Sec2255 Rule 6.

DISCOVERY, Sec2255 Rule 6.

E

EVIDENTIARY HEARING, Sec2255 Rule 8.

F

FEDERAL RULES OF CRIMINAL AND CIVIL PROCEDURE.
Applicability, Sec2255 Rule 12.

FORMS, Sec2255 Appx.

H

HEARINGS.
Evidentiary hearing, Sec2255 Rule 8.

I

INMATE FILING, Sec2255 Rule 3.

M

MAGISTRATE JUDGE.
Powers, Sec2255 Rule 10.
Reference to, Sec2255 Rule 8.

MOTION, Sec2255 Rule 2.
Answer, Sec2255 Rule 5.
Filing, Sec2255 Rule 3.
Preliminary review, Sec2255 Rule 4.
Reply, Sec2255 Rule 5.
Second or successive motion, Sec2255 Rule 9.

R

RECORD.
Expansion of record, Sec2255 Rule 7.

S

SCOPE OF RULES, Sec2255 Rule 1.

RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

ABROGATED.

Editor's note. — The Rules of Procedure for the Trial of Misdemeanors before United States Magistrates were abrogated, effective December 1, 1990, and were replaced by Rule 58 of the Federal Rules of Criminal Procedure. The Report of the Judicial Conference Committee on Rules of Practice and Procedure provided in part: "Proposed new Rule 58 would replace the 'Rules of Procedure for the Trial of Misdemeanors before United States Magistrates' with a single rule of criminal procedure. Although the proposed rule would make a number of technical changes, no substantive change to the current procedures for the trial of misdemeanors is intended."

REMOVAL OF CASES

(Removal from state courts to District Courts of the United States.
Title 28, U.S. Code, Chapter 89, §§ 1441-1452, and Rule 81(c) of
Federal Rules of Civil Procedure.)

Title 28

Chapter 89.
District Courts; Removal of Cases From State Courts

Section

1441. Actions removable generally.
1442. Federal officers sued or prosecuted.
1442a. Members of armed forces sued or prosecuted.
1443. Civil rights cases.
1444. Foreclosure action against United States.
1445. Nonremovable actions.
1446. Procedure for removal.
1447. Procedure after removal generally.
1448. Process after removal.
1449. State court record supplied.
1450. Attachment or sequestration; Securities.
1451. Definitions.
1452. Removal of claims related to bankruptcy cases.

Federal Rules of Civil Procedure

Rule

81(c). Applicability in general; Removed actions.

Index follows Rules.

TITLE 28

CHAPTER 89.
DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim. (June 25, 1948, ch. 646, § 1, 62 Stat. 937; Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub. L. 99-336, § 3(a), 100 Stat. 637; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(a), 102 Stat. 4669; Dec. 1, 1990, Pub. L. 101-650, Title III, § 312, 104 Stat. 5114; Dec. 9, 1991, Pub. L. 102-198, § 4, 105 Stat. 1623.)

§ 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1442a. Members of armed forces sued or prosecuted.

A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause. (Added Aug. 10, 1956, ch. 1041, § 19 (a), 70A Stat. 626.)

§ 1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1444. Foreclosure action against United States.

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. (June 25, 1948, ch. 646, § 1, 62 Stat. 938; May 24, 1949, ch. 139, § 82, 63 Stat. 101.)

§ 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; July 25, 1958, Pub. L. 85-554, § 5, 72 Stat. 415; Oct. 17, 1978, Pub. L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub. L. 95-486, § 9(b), 92 Stat. 1634; Sept. 13, 1994, Pub. L. 103-322, Title IV, § 40302(e)(5), 108 Stat. 1942.)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; September 29, 1965, Pub. L. 89-215, 79 Stat. 887; July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(b), 102 Stat. 4669; Dec. 9, 1991, Pub. L. 102-198, § 10(a), 105 Stat. 1626.)

§ 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court. (June 25, 1948, ch. 646, § 1, 61 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102; July 2, 1964, Pub. L. 88-352, Title IX, § 901, 78 Stat. 266; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(c), 102 Stat. 4670; Dec. 9, 1991, Pub. L. 102-198, § 10(b), 105 Stat. 1626.)

§ 1448. Process after removal.

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

§ 1449. State court record supplied.

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940; May 24, 1949, ch. 139, § 85, 63 Stat. 102.)

§ 1450. Attachment or sequestration; Securities.

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

§ 1451. Definitions.

For purposes of this chapter—

(1) The term “State court” includes the Superior Court of the District of Columbia.

(2) The term “State” includes the District of Columbia. (July 29, 1970, Pub. L. 91-358, Title I, § 172(d)(1), 84 Stat. 591.)

§ 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit’s police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. (Added Pub. L. 98-353, Title I, § 103(a), July 10, 1984, 98 Stat. 335, and amended Pub. L. 101-650, Title III, § 309(c), Dec. 1, 1990, 104 Stat. 5113.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 81(c). Applicability in general; Removed actions.

(c) *Removed actions.*

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party’s demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury. (Amended March 2, 1987, effective August 1, 1987.)

Index to Removal of Cases

A

APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.
Generally in removed actions, RemovalCases Rule 81(c).

ARMED FORCES.
Members of armed forces sued or prosecuted.
Removal of causes generally, RemovalCases §1442a.

ATTACHMENT.
Securities.
Removal of causes generally, RemovalCases §1450.

B

BANKRUPTCY.
Removal of claims relating to, RemovalCases §1452.

BONDS, SURETY.
Procedure for removal.
Petition for removal of civil action or proceeding, RemovalCases §1446.

C

CIVIL OFFICER OF THE UNITED STATES.
Federal officers sued or prosecuted.
Removal of causes generally, RemovalCases §1442.

CIVIL RIGHTS.
Removal of causes generally, RemovalCases §1443.

CONGRESS.
Officers of either house of congress.
Federal officers sued or prosecuted.
Removal of causes generally, RemovalCases §1442.

CONSTITUTION OF THE UNITED STATES.
Claim or right arising under the constitution.
Actions removable generally, RemovalCases §1441.

F

FEDERAL OFFICERS.
Sued or prosecuted.
Removal of causes generally, RemovalCases §1442.

FEDERAL RULES OF CIVIL PROCEDURE.
Applicability in general, RemovalCases Rule 81(c).

FORECLOSURE.
Action against United States.
Removal of causes generally, RemovalCases §1444.

FOREIGN STATE.
Civil action brought in state court against foreign state.
Actions removable generally, RemovalCases §1441.

M

MILITARY AFFAIRS.
Members of armed forces sued or prosecuted.
Removal of causes generally, RemovalCases §1442a.

N

NONREMOVABLE ACTIONS.
Generally, RemovalCases §1445.

O

OFFICERS OF COURTS OF THE UNITED STATES.
Federal officers sued or prosecuted.
Removal of causes generally, RemovalCases §1442.

ORDER OF REMAND.
Procedure after removal generally, RemovalCases §1447.

ORIGINAL JURISDICTION OF DISTRICT COURTS.
Actions removable generally, RemovalCases §1441.

P

PARTIES.
Process after removal.
Issuance of necessary orders and process, RemovalCases §1447.

PROCEDURE FOR REMOVAL.
Bonds, surety.
Petition for removal of civil action or proceeding, RemovalCases §1446.
Generally, RemovalCases §1446.
Petition.
Filing of petition, RemovalCases §1446.

PROCESS AFTER REMOVAL.
Completing process, RemovalCases §1448.
Copies of records and proceedings.
Requirement that petitioner file copies, RemovalCases §1447.
Generally, RemovalCases §1447.
New process issued, RemovalCases §1448.
Order of remand, RemovalCases §1447.
Parties.
Issuance of necessary orders and process, RemovalCases §1447.

R

RECORDS.
State court.
Supplying state court record, RemovalCases §1449.

S

SECURITIES.
Attachment.
Removal of causes generally, RemovalCases §1450.
Sequestration.
Removal of causes generally, RemovalCases §1450.

SEQUESTRATION.
Securities.
Removal of causes generally, RemovalCases §1450.

STATE.
Defined, RemovalCases §1451.

STATE COURT.
Defined, RemovalCases §1451.
Records.
Supplying state court record, RemovalCases §1449.

T

TREATIES.
Claim or right arising under treaties of the United States.
Actions removable generally, RemovalCases §1441.

U

UNITED STATES.
Foreclosure action against United States.
Removal of causes generally, RemovalCases §1444.

W

WORKMEN'S COMPENSATION.
Civil action in state court arising under workmen's compensation laws.
Nonremovable actions, RemovalCases §1445.

AUTHENTICATION OF RECORDS

(Title 28, U.S. Code, §§ 1738-1741, and Rule 44 of
Federal Rules of Civil Procedure.)

Title 28

Chapter 115.
Evidence; Documentary

Section
1738. State and territorial statutes and judicial proceedings; Full faith and credit.
1738A. Full faith and credit given to child custody determinations.
1739. State and territorial nonjudicial records; full faith and credit.
Section
1740. Copies of consular papers.
1741. Foreign official documents.

Federal Rules of Civil Procedure

Rule
44. Proof of official record.

Index follows Rules.

TITLE 28

CHAPTER 115.
EVIDENCE; DOCUMENTARY

§ 1738. State and territorial statutes and judicial proceedings; Full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term —

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the

State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if —

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the Child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if —

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination. (Dec. 28, 1980, Pub. L. 96-611, § 8(a), 94 Stat. 3569.)

§ 1739. State and territorial nonjudicial records; full faith and credit.

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken. (June 25, 1948, c. 646, § 1, 62 Stat. 947.)

§ 1740. Copies of consular papers.

Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1741. Foreign official documents.

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure. (June 25, 1948, ch. 646, § 1, 62 Stat. 948; May 24, 1949, ch. 139, § 92 (b), 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 5 (a), 78 Stat. 996.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 44. Proof of official record.

(a) *Authentication.*

(1) *Domestic.* An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) *Lack of record.*

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) *Other proof.*

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Index to Authentication of Records

C

CHILD CUSTODY.
Full faith and credit given to child custody determinations, AuthenticationRec §1738A.

CONSULAR PAPERS.
Copies.
Admissibility of authenticated copies of consular papers, AuthenticationRec §1740.

F

FOREIGN COUNTRIES.
Official records or documents.
Manner of authenticating, AuthenticationRec §1741.

FULL FAITH AND CREDIT.
Child custody determinations, AuthenticationRec §1738A.
State and territorial nonjudicial records, AuthenticationRec §1739.
State and territorial statutes and judicial proceedings, AuthenticationRec §1738.

O

OFFICIAL RECORDS.
Proof of official record.
Authentication, AuthenticationRec Rule 44.

OFFICIAL RECORDS —Cont'd
Proof of official record —Cont'd
Lack of record, AuthenticationRec Rule 44.
Other proof, AuthenticationRec Rule 44.

S

STATE, TERRITORY OR POSSESSION OF THE UNITED STATES.
Acts of legislature.
Manner of authenticating, AuthenticationRec §1738.
Full faith and credit.
Nonjudicial records, AuthenticationRec §1739.
Records and judicial proceedings, AuthenticationRec §1738.
Nonjudicial records.
Full faith and credit, AuthenticationRec §1739.
Records and judicial proceedings.
Full faith and credit, AuthenticationRec §1738.
Nonjudicial records, AuthenticationRec §1739.
Proof or admission in other courts, AuthenticationRec §1738.
Statutes.
Manner of authenticating, AuthenticationRec §1738.

EXTRADITION

(The following publication, "State of North Carolina Extradition Manual," was published by the Institute of Government, the University of North Carolina at Chapel Hill, in 1987.)

STATE OF NORTH CAROLINA EXTRADITION MANUAL

Article I. Extradition Generally

Article II. Fugitive from North Carolina Found in Another State

Part 1. Crimes Subject to Extradition

Part 3. Duties of the Law Enforcement Officer

Part 4. Duties of the District Attorney

Part 5. Duties of the Clerk of Court

Part 6. Duties of the Agent Sent to Bring the Fugitive Back

Part 7. Checklist of Documents Needed for an Extradition Request

Part 8. When the Fugitive Has Escaped from Custody or Violated Probation or Parole

Part 9. Extradition of Military Personnel

Part 10. Other Special Cases

Article III. Fugitive from Another State Found in North Carolina

Part 1. Duties of the Arresting Officer

Section

1. Before an arrest is made.
2. If the arrest is to be made without a warrant, follow these steps.
3. What happens when a fugitive from another state is found in North Carolina.
4. If a warrant is to be obtained before you make the arrest, follow these steps instead.
5. If the fugitive has not yet been charged in the other state.

Part 2. Duties of the Magistrate

1. If the officer comes to you before arresting the fugitive.
2. If the officer brings in the fugitive after arresting him without a warrant.
3. If the officer arrested the fugitive on the basis of a warrant and is now bringing him before you.
4. If the fugitive has been arrested on a governor's warrant.
5. When the fugitive has not yet been charged with a crime in the other state.

Part 3. Duties of the Clerk of Court

1. When the fugitive is first arrested.
2. If the fugitive waives extradition in district court, take these steps.
3. If the fugitive refuses to waive extradition, follow these steps instead.

Part 4. Duties of the District Attorney

1. When the fugitive is first arrested.
2. When the fugitive appears in district court at the end of 30 days.
3. When a governor's warrant is issued.
4. When the fugitive applies for the writ of habeas corpus.
5. If the fugitive is also charged with a crime in North Carolina.

Part 5. Duties of the District Court Judge

1. When the fugitive is first arrested.
2. The first appearance before a district court judge.
3. When the fugitive returns to court after 30 days.
4. When a governor's warrant has been issued.
5. If the fugitive wishes to waive extradition.

Part 6. Duties of the Superior Court Judge

1. When the fugitive is first arrested.
2. When the fugitive applies for a writ of habeas corpus.
3. If the fugitive wishes to waive extradition.

Article IV. Some Legal Issues in Extradition

Article V. Interstate Agreement on Detainers

Article VI. Return of Juveniles

Forms

Index follows Rules.

ARTICLE I. EXTRADITION GENERALLY

Extradition is the procedure by which a person who committed a crime in one state (or escaped from prison or violated probation or parole) and fled to another state is returned to the first state. This introductory section of the Extradition Manual seeks to give the reader an overview of the extradition process. For those with a limited role, such as the arresting officer or the magistrate, this general description should help them understand how their actions fit in the overall process. More specific instructions for the different stages in the extradition process appear in other sections of the manual.

To begin, consider the case of a person who committed a crime — say, armed robbery — in another state, Ohio, and fled to North Carolina. Probably he is already formally charged in Ohio, either by indictment or by the issuance of an arrest warrant there. When his presence in North Carolina is discovered, he may be arrested by a North Carolina officer, either with or without an arrest warrant from a North Carolina magistrate.

An arrest without a warrant, which is the less common practice, may be made only if the crime committed in Ohio is punishable there by more than one year's imprisonment. After arresting without a warrant, the officer must take the defendant before a North Carolina magistrate without unnecessary delay for issuance of a magistrate's order (see AOC-CR-909M in this manual's Forms section), just as he would do if he were arresting for a crime committed in this state. The magistrate determines whether the person is charged in Ohio with armed robbery, whether armed robbery is punishable by more than a year's imprisonment in Ohio, and whether the person fled from Ohio. The magistrate is not determining whether there is probable cause to believe the person committed the armed robbery — only whether he is so charged in Ohio. If the magistrate finds that such is the case, he puts the defendant under bail as he would someone charged with a North Carolina crime, but bail may not be allowed if the crime is punishable by either death or life imprisonment.

More likely, the officer will go to a magistrate to obtain a North Carolina arrest warrant, called a fugitive warrant (see AOC-CR-901M in this manual's Forms section), before making the arrest. In that case, it is not necessary that the crime be punishable by more than one year's imprisonment; a warrant may be issued if the defendant has been charged with any crime in another state. Once the fugitive warrant is issued, the officer is to make the arrest and take the defendant before the magistrate without unnecessary delay for the setting of bail, just as he would for a North Carolina crime.

Usually, the basis for determining that the defendant has been charged with a crime in another state is a National Crime Information Center (NCIC) message on the Police Information Network (PIN) terminal. Such a message by itself is a sufficient basis for the magistrate to find that the fugitive is charged in the other state. Although a message is not supposed to appear in the NCIC files unless the warrant is still outstanding and the other state intends to extradite, the officer may want to confirm the NCIC report with someone in the other state before making an arrest.

Sometimes the officer's information that a person is a fugitive may come from another source, such as a telephone call, telegram, or letter from an officer in another state. Such information may be used to determine whether the defendant is charged in the other state. In cases like these, and in cases in which an NCIC message is used, the other state should be asked to send a copy of the warrant or indictment as soon as possible so that it can be attached to the North Carolina warrant.

Another possibility, though unusual, is that the person has not yet been formally charged in the other state. For example, a person may have robbed a convenience store in Virginia late at night and fled to North Carolina but no warrant was issued because no judicial official was on duty in Virginia. The statutes allow North Carolina officers to arrest fugitives in such cases, but only after a North Carolina warrant has been issued; and that warrant may be issued only after the magistrate has made the same kind of finding of probable cause he would have to make if the crime had occurred in North Carolina. That is, the magistrate must find probable cause that the defendant committed the crime in Virginia. The most likely basis for that probable cause will be information relayed by Virginia officers through North Carolina officers. Once the warrant has been issued, the officer proceeds the same as in other fugitive cases mentioned above.

It may also be that the fugitive has already been convicted in the other state and has escaped or has fled in violation of the conditions of his probation or parole. In such cases the magistrate simply determines that the fugitive was convicted and fled. The procedures are otherwise the same as for the person who has not yet been tried in the other state.

Once arrested, the fugitive is held until formal extradition procedures can take place. If he wishes to do so, he may waive extradition before a clerk of court or a judge and be immediately released to the state from which he fled. Many fugitives choose to do this, knowing that they will be extradited and not wishing to spend the time required for formal extradition. The waiver must be in writing (see AOC-CR-912M in this manual's Forms section).

If the fugitive does not waive extradition, the state from which he fled then must formally request the Governor of North Carolina to extradite. The request will come from the governor of the other state, on the basis of information supplied by the prosecutor in the county where the crime was committed. The extradition request to North Carolina includes a copy of the warrant or indictment against the fugitive, plus other papers establishing all the requirements of the formal extradition process. These papers are sent by the Governor's Extradition Secretary to the North Carolina Attorney General's office, which determines whether they are legally sufficient to justify extradition through issuance of a Governor's Warrant. The only questions the Governor of North Carolina asks in deciding whether to extradite are whether the fugitive is actually charged with a crime in another state and whether the person arrested in North Carolina is the fugitive. The Governor's office does not attempt to determine whether there was probable cause for the charge; that is considered a matter between the other state and the fugitive — just like other defenses he might raise, such as self-defense or alibi. The magistrate and the district court judge should notify the fugitive that he may question the legal sufficiency of the papers submitted by the other state to the Governor's office. The fugitive does this by sending a written request to the Governor's office outlining the basis of his challenge. If the Governor determines that the fugitive should be heard on this matter, he will direct that the Attorney General's office hold a hearing.

If the Governor's office is satisfied, either with or without a hearing, that the other state has met the requirements of extradition, a Governor's Warrant is issued. This paper authorizes the taking of the fugitive into custody — in fact, he may already be in custody if he was not allowed bail or could not make bail — to be turned over to an agent of the other state. If he was released on bail, he is to be picked up and his bail revoked pursuant to the Governor's Warrant. Before he is turned over, the fugitive must be taken before a judge to be informed that he has the right to challenge the legality of his arrest through habeas corpus proceedings and to have counsel appointed for that purpose if he cannot afford a lawyer. The habeas corpus proceeding is held in North Carolina; the only grounds for challenging the arrest under the Governor's Warrant are that (1) the person has not been charged with a crime in the other state, or (2) he is not the person being sought. If the fugitive does not try to obtain a writ of habeas corpus or if he tries and fails, he is turned over to the agents from the other state. (The Governor may recall the Governor's Warrant at his discretion, and he occasionally does so when new facts arise after the Warrant was issued. He then may reissue the Warrant if circumstances so indicate.)

If a person who committed a crime in North Carolina flees to another state and is found there, essentially the same procedure takes place. A North Carolina fugitive may be extradited from another state if he committed any crime in this state, whether a felony or a misdemeanor. But the State pays the expenses of extradition only if the crime is a felony, escape (felony or misdemeanor), or a violation of probation or parole (felony or misdemeanor). The county pays for all other misdemeanors, and some other states are reluctant to extradite for minor crimes.

Once the fugitive is arrested in the other state, the North Carolina district attorney of the county where the fugitive is charged is notified and must put together the documents that the North Carolina Governor's office will need in requesting extradition (assuming that the fugitive does not waive extradition). These documents include copies of the arrest warrant with supporting affidavit or indictment, a statement that the extradition is not sought to enforce a private claim, certain further information about the circumstances of the crime, and certifications that the documents are all true copies. Some states require further information, such as photographs, fingerprints, or a physical description. The Governor's Extradition Secretary reviews the materials to be sure they comply with the requirements of the other state and then formally requests extradition from that state. Once extradition is granted, the Governor commissions one or more North Carolina officers named by the district attorney of the judicial district from which the fugitive fled to bring him back.

The procedures for extradition are essentially the same in all the states. Nearly all states, including North Carolina, have passed the Uniform Criminal Extradition Act, and the others have statutes similar to the uniform act. But extradition practice may vary somewhat from state to state. For example, many states will not extradite for misdemeanors. The North Carolina Governor's office knows the peculiar requirements of other states and tries to review all documents to be certain they will satisfy the recipient state.

ARTICLE II. FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE

PART 1. CRIMES SUBJECT TO EXTRADITION

Any person who is charged with a crime in North Carolina and flees to another state may be extradited to North Carolina to stand trial. (Also subject to extradition are those persons who have been *convicted* in North Carolina and have escaped or have violated the conditions of probation or parole). But G.S. 15A-744 provides that the State of North Carolina is to pay the expenses of extradition only when the fugitive is charged with a felony or has violated the conditions of probation or parole (whether felony or misdemeanor). (The State will also pay the expenses of extraditing a person who has escaped, whether the escape is a felony or misdemeanor.) Thus a fugitive charged with a misdemeanor may be extradited, but in most cases the costs of that procedure (the greatest expense is sending an agent to bring the fugitive back) must be paid by the county where the crime was committed. For that reason extradition should never be initiated against someone charged with a misdemeanor unless there is some assurance that the county commissioners will pay the costs.

The National Association of Extradition Officials recommends the policies set out below on extradition for certain offenses. The law allows extradition for each of the offenses mentioned, but the Governor's office agrees with the recommended policies and expects all law enforcement officers and district attorneys to follow them.

Nonsupport. For abandonment and nonsupport, bastardy, and all similar offenses, action should first be taken under Chapter 52A of the General Statutes, the Uniform Reciprocal Enforcement of Support Act (URESA). Only if that procedure has failed should extradition be requested. If the URESA procedure has not been used, the extradition request should include an affidavit from the district attorney or the appropriate law enforcement officer explaining fully the reason for not using URESA.

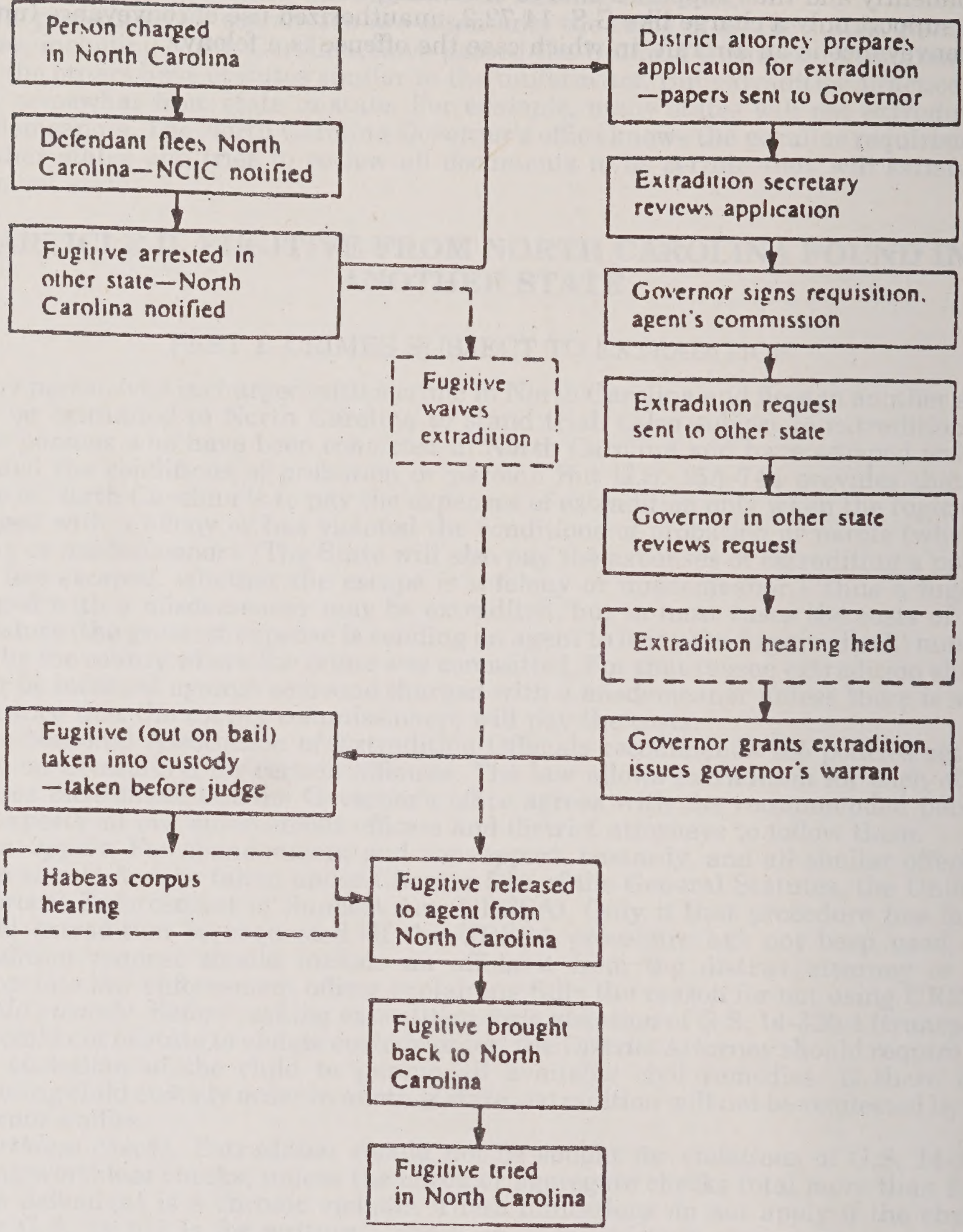
Child custody. Before seeking extradition for a violation of G.S. 14-320.1 (transporting a child out of state to violate custody order) the District Attorney should require the legal custodian of the child to pursue all available civil remedies. If there is a competing child custody order in another state, extradition will not be requested by the Governor's office.

Worthless checks. Extradition should not be sought for violations of G.S. 14-107, writing worthless checks, unless the check or aggregate checks total more than $100 or the defendant is a chronic violator. These limitations do not apply if the charge under G.S. 14-107 is for writing a check on a nonexistent account or on a closed account. Nor is there any limit on extradition for forgery and similar offenses.

Removing mortgaged property. Only in exceptional circumstances should extradition be sought for violations of G.S. 14-114 (fraudulent disposal of personal property on which there is a security interest), G.S. 14-115 (secreting property to hinder enforcement of lien or security interest), or similar statutes. The amount of money involved in such a case does not alter the policy. Generally these problems should be handled as civil matters, especially if the defendant has made regular payments on the merchandise and now owes only a small balance. But if the defendant purchased a vehicle or other merchandise and immediately left North Carolina, making no payments whatsoever, there would seem to be an intent to defraud and extradition may be sought.

Rental property. If a person fails to return rented property, such as an automobile, and the car has been found, there would appear to be no intent to steal and this matter should be handled civilly rather than through extradition. But if the person immediately leaves North Carolina for parts unknown with rented property, larceny is probably the proper charge and extradition is appropriate. Generally, extradition should be sought if the facts show an intent to deprive the owner of the property permanently and thus support a charge of larceny; but it should not be sought if the facts support only a charge like G.S. 14-72.2, unauthorized use of conveyance (unless the conveyance is an aircraft, in which case the offense is a felony).

PART 2. FLOW CHART OF PROCEEDINGS


Person charged in North Carolina
Defendant flees North Carolina—NCIC notified
Fugitive arrested in other state—North Carolina notified
District attorney prepares application for extradition—papers sent to Governor
Extradition secretary reviews application
Governor signs requisition, agent's commission
Fugitive waives extradition
Extradition request sent to other state
Governor in other state reviews request
Extradition hearing held
Fugitive (out on bail) taken into custody—taken before judge
Governor grants extradition, issues governor's warrant
Habeas corpus hearing
Fugitive released to agent from North Carolina
Fugitive brought back to North Carolina
Fugitive tried in North Carolina

PART 3. DUTIES OF THE LAW ENFORCEMENT OFFICER

A. *Review the evidence in the case.* When notified that the fugitive has been taken into custody in the other state and refuses to waive extradition, you as the officer should first review the evidence in the case to be certain that extradition is appropriate and that a prosecution might succeed. Review the section of this manual entitled Crimes Subject to Extradition. If the crime is appropriate for extradition, consider whether the witnesses need to be interviewed again. Determine whether the witnesses are likely to change their testimony, whether any of them has already received restitution, whether they are willing to testify in court, and whether they can identify the fugitive by a photograph or other means. If witnesses or officers have submitted affidavits in the case, review these and determine whether they support or contradict the other information in the case. Also review all investigative reports.

B. *Obtain a warrant if necessary.* If, for some reason, the fugitive has not yet been charged in an arrest warrant or an indictment, relate the facts in the case to a magistrate so that an arrest warrant may be issued (unless you know that the district attorney would prefer to submit a bill of indictment). Five copies of the warrant will be needed eventually, so ask the magistrate for five copies, each one signed separately. If a warrant or indictment has already been issued (which is usually the case), have a copy available for reference when you talk with the district attorney. If the charging document is a warrant rather than an indictment, it must be accompanied by an affidavit (usually by the investigating officer or victim) that states the basis for issuing the warrant. This affidavit must be sworn to before a magistrate or judge and should have the same date as the warrant (or earlier). Some states will not extradite if the date of the affidavit (for example, January 25, 1987) is later than the date that the arrest warrant was issued (for example, January 20, 1987). Therefore, when a warrant was issued without an accompanying affidavit (oral sworn testimony is sufficient to support an arrest warrant in North Carolina), a new arrest warrant must be issued when the affidavit is prepared so that the dates of the arrest warrant and the affidavit will be the same.

C. *Check the fugitive's criminal record.* Check the fugitive's criminal record and have a copy of it with you when you talk with the district attorney.

D. *Meet with the district attorney.* Bring to this meeting with the district attorney or assistant district attorney all the information and documents discussed above. Be candid about any problems you foresee with witnesses or with the methods of investigation in the case and any other factor that might affect the outcome of the case. At this meeting the district attorney should decide whether to proceed with extradition. Usually an assistant district attorney will then take responsibility for preparing the proper papers, but he may well ask your help. If he does, review the section of this manual entitled Checklist of Documents Needed for an Extradition Request.

PART 4. DUTIES OF THE DISTRICT ATTORNEY

A. *Decide whether to seek extradition.* After a law enforcement officer has been notified that a fugitive from North Carolina is in custody in another state and refuses to waive extradition, he should come to you with the relevant information (see the section of this manual on Duties of the Law Enforcement Officer). You must decide whether extradition should be sought. First, review the section of this manual entitled Crimes Subject to Extradition. If you are satisfied that extradition is appropriate for the kind of offense with which the fugitive has been charged, next consider the following factors:

—The seriousness of the offense.

—The evidence available to prove the crime.

—The challenges that might be mounted against the evidence or the methods of investigation.

—The defendant's character, including prior convictions.

—The probability that the defendant will commit similar crimes elsewhere.

—The probable length of time the defendant will be imprisoned if he is returned to North Carolina and convicted and the effect of that imprisonment on his conduct after he is released.

—The probability that the governor of the other state will grant extradition.

—The cost of having the defendant returned to North Carolina.

—The effect of not extraditing on others in the community who might consider committing similar crimes.

B. *Prepare the proper papers for extradition.* A separate section of this manual lists the documents that must be submitted to the Extradition Secretary in the Governor's office. An assistant district attorney or administrative assistant may prepare those documents, and a law enforcement officer may assist. The application for requisition may be signed by the district attorney or an assistant. If the fugitive has not yet been charged in North Carolina in an arrest warrant or indictment, the next step is to have such process issued. Although an arrest warrant is sufficient, usually the proceedings in the other state go faster when an indictment is used. For that reason an indictment should be sought if possible. If an arrest warrant is used, it must be accompanied by an affidavit (usually by the investigating officer or the victim) that states the grounds for charging the defendant. This affidavit must be sworn to before a magistrate or judge and should have the same date as the warrant (or earlier). Some states will not extradite if the date of the affidavit (for example, January 25, 1987) is later than the date of the arrest warrant (for example, January 20, 1987). Therefore, when a warrant was issued without an accompanying affidavit (oral sworn testimony is sufficient to support an arrest warrant in North Carolina), a new arrest warrant must be issued when the affidavit is prepared so that the dates of the arrest warrant and the affidavit will be the same.

C. *Select the agents to go to the other state.* The application for requisition is to include the names of the agents who will go to the other state to return the fugitive. It is best to have the investigating officers or other officers who are familiar with the case named as agents. It is required that an *individual* be named as an agent, and that person must have the option of naming someone else. For example, the appointment might read: "Sheriff W.C. Fain of Sampson County and/or his agent." The Governor's Extradition Office (and many states) requires that a female agent be named when the fugitive to be returned is a woman. Agents are expected to be ready at any time to travel to the other state when extradition has been granted by the other state or when a hearing is to be held there. The State does not pay travel expenses for a hearing unless the fugitive is returned on that trip.

PART 5. DUTIES OF THE CLERK OF COURT

The clerk of court has only a limited role in bringing a fugitive back to North Carolina. When the district attorney makes his request for extradition to the Governor of North Carolina (who will in turn make the same request to the governor of the state where the fugitive now is), he includes various documents, including a copy of the arrest warrant or indictment. Each document must be certified by the official who issued it or by the keeper of the original, the clerk of court. Also, the clerk must certify that the various other officials who certify the documents — the district attorney, magistrate, or judge — are indeed the officials they claim to be. In turn, a judge must certify that the clerk is indeed the clerk. A summary of the documents and certifications needed for the extradition request is included in the section of this manual entitled Checklist of Documents Needed for an Extradition Request. Otherwise, the clerk has no duties in connection with extradition of a North Carolina fugitive from another state.

PART 6. DUTIES OF THE AGENT SENT TO BRING THE FUGITIVE BACK

When the district attorney applies to the Governor of North Carolina to seek the extradition of a fugitive who is in another state, he names the law enforcement officers to be designated the Governor's agents for bringing the fugitive back. An officer who has been designated an agent should not go to the other state until he has been notified that the governor of that state has approved extradition and the authorities there are ready to hand over the fugitive. Also, when more than one agent is to make the trip, the North Carolina Extradition Secretary should be notified before they leave. Expenses will not be paid for any trip made before that notification (except possibly when the officer must attend a hearing before extradition is ordered).

Your commission as an agent of the Governor of North Carolina will be sent to the other state with the Governor's request for extradition and will be waiting for you there. When you return the fugitive to the North Carolina county where he is to be tried, the sheriff should complete the part of the commission form indicating that he has received the prisoner. You must complete the return portion of the commission and submit it to the Governor's office. If for some reason the fugitive could not be brought back, that fact must be stated on the return portion of the commission and an explanation given.

If the fugitive decided to waive extradition, the officer who brought the fugitive back must send a copy of that waiver to the Governor's office.

A copy of the form used for reimbursement of expenses appears in this manual's Forms section.

PART 7. CHECKLIST OF DOCUMENTS NEEDED FOR AN EXTRADITION REQUEST

Listed below are all the documents that might be needed when a request for extradition is sent to the Governor's Extradition Secretary. Usually an assistant district attorney is responsible for gathering the documents, though in some districts he may have substantial assistance from an administrative assistant, a law enforcement officer, or someone else. The list states when a document must be certified or signed by a particular person. Whoever gathers the documents should collect *five* complete sets, four to go to the Extradition Secretary and one to be retained in the district attorney's files.

When there is more than one charge, the person who prepares the request should base the request on the strongest charge. Once the fugitive is returned, he may be charged with any number of offenses. The fact that charges were not included in the request for extradition does not mean that they are waived.

Arrest warrant. Copies of the arrest warrant are needed if the fugitive has not yet been indicted. If he has been indicted, the arrest warrant is not needed; copies of the indictment will be used instead. The warrant or indictment should be reviewed to see that it properly charges the offense and cites the statute violated. Use of an indictment simplifies the process. An order for arrest is not sufficient by itself.

Affidavit supporting the warrant. When the charging document is an arrest warrant, it must be supported by an affidavit. The most likely person to write the affidavit is the investigating officer or the victim. The affidavit must state enough facts to establish probable cause for the issuance of the warrant. Also, to avoid questions in the other state concerning the authority of the official to issue the warrant, the affidavit must be sworn to before a magistrate or judge rather than a clerk. To show that the affidavit was the basis for issuing the warrant, the affidavit must have the same date as the warrant. Some states will not extradite if the date of the affidavit (for example, January 25, 1987) shows that it was issued after the date that arrest warrant was issued (for example, January 20, 1987). Therefore, when a warrant was issued without an accompanying affidavit (oral sworn testimony is sufficient to support an arrest warrant in North Carolina), a new arrest warrant must be issued so that the dates of the arrest warrant and the affidavit will be the same.

An affidavit is clearly not necessary when the charging document is an indictment, though a few other states prefer to have an affidavit then also.

Certification of documents. If a warrant and affidavit are submitted, they must be accompanied by a certification of the magistrate or judge who issued the warrant or took the affidavit. A clerk of court may certify copies of documents when he is the keeper of the original. Each copy must be certified.

Certifications of office. When a judge or magistrate certifies a document, the clerk of court must certify that person's official character. Then a district court or superior court judge must certify the official character of the clerk. And in turn the clerk must certify the official character of the judge who certified the clerk.

The indictment. If the fugitive has been indicted, the indictment should be submitted rather than the arrest warrant. The district attorney should make certain that the indictment properly charges the offense and has been signed by the foreman. He should also check to see that it cites the statute violated. The authenticity of each copy must be certified by the clerk of court, the official character of the clerk certified by the judge, and the official character of the judge certified by the clerk.

Application for a requisition. This form, included in this manual's Forms section, must be filled out in full. Note that it includes the following information:

—The fugitive's full name, properly spelled.

—A statement that in the district attorney's opinion the ends of public justice require that the fugitive be brought to North Carolina for trial.

—A statement that the district attorney believes that he has sufficient information to convict the fugitive.

—The names and addresses of the agents who are to bring the fugitive back to North Carolina from the other state and a statement that the persons recommended as agents are proper persons and have no private interest in the arrest or conviction of the fugitive.

—A statement whether there has been any earlier application for requisition of the same person for the same transaction, including the date of such request, and a statement of the reason for the present request if there was an earlier one.

—If the fugitive is under arrest in the other state, a statement that he is under arrest, the nature of the proceedings, and the place (with complete address) where he is in custody, if known. If the fugitive is out on bail, the date of his hearing should be stated. If the fugitive's home or business address is known, that should also be stated. The source of this information should be given.

—A statement that the application is not made for the purpose of enforcing the collection of a debt or for any private purpose whatever, and that if the requisition is granted, the criminal proceeding will not be used for any such purposes.

—A statement of the crime charged and the approximate time, date, places, and circumstances of its occurrence. This statement should include a citation to the statute violated.

—A statement that the person was in North Carolina when the crime was committed and has since fled. Or if the person committed an act in another state that intentionally resulted in the crime in North Carolina, that fact must be stated.

—If the crime did not occur recently, an explanation for the delay in making application.

The requisition form provides blanks for all this information or notes the need to include the information.

Certification of the district attorney. Again, the clerk must certify the official character of the district attorney who submits the application, and in turn the clerk must be certified by a judge, who must then be certified by the clerk. Note that only one such certification of official character per official is required, no matter how many documents that official has signed.

Special affidavits. In any case involving fraud, false pretense, embezzlement, or forgery, there must also be an affidavit of the principal complaining witness or informant that (a) the application is made in good faith for the sole purpose of criminal punishment, and (b) he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any other private purpose, either directly or indirectly. If such an affidavit is not included, a good explanation for its absence must be given.

Photograph and fingerprints of the fugitive. Many states now require some identification of the fugitive. Therefore, a requisition request should be accompanied by fingerprints, a photograph, and/or a physical description. Although a photograph is not required, it can be very helpful in identification and should be included whenever possible. It should be accompanied by an affidavit to the effect that the person shown is the person charged with the crime. Nor are fingerprints required, but they should be provided for identification when available.

The statute. Copies of the statute the fugitive is charged with violating should be included.

PART 8. WHEN THE FUGITIVE HAS ESCAPED FROM CUSTODY OR VIOLATED PROBATION OR PAROLE

Extradition procedures are slightly different when the fugitive from North Carolina has already been convicted in this state and has escaped from custody or has left the state in violation of parole or probation conditions. A separate form (see this manual's Forms section) is used for requisition in these cases. The application is to be made by the district attorney or the sheriff if the person was in jail awaiting transfer to the Department of Correction or if he was out of jail pending appeal. If the person escaped from the Department of Correction's custody, the application is to be made by the Secretary of Correction or a properly designated official of the Department. For a fugitive who left the state in violation of probation conditions, the application may be made by the district attorney of the district where the person was serving probation (or it might be prepared for the district attorney's signature by the Division of Probation and Parole). If the person was on parole, the request may be made by either the district attorney or the Parole Commission. The application for requisition is to be accompanied by the following documents:

—The indictment (or the arrest warrant, if the person was tried on a warrant).

—The judgment of conviction and sentence on which the person was being held when he escaped.

—An affidavit of the officer from whose custody the person escaped, showing that an escape occurred and the circumstances of it.

—The record of escape, which includes the transcript and fingerprints.

Five copies of each document should be prepared; four are sent to the Governor's Extradition Secretary, and one is retained by the official who made the application. The clerk of court who holds the original must certify to the authenticity of the indictment (or warrant) and the judgment of conviction and sentence. The clerk must also certify the official character of the person who made the affidavit that describes the fugitive's escape. The official character of the clerk must be certified by a judge and vice versa.

PART 9. EXTRADITION OF MILITARY PERSONNEL

If extradition is requested for someone who is on active duty with the Air Force, Army, Marine Corps, or Navy, the application must be accompanied by an agreement by the appropriate authorities that:

—The fugitive's commanding officer will be informed of the outcome of any trial; and

—If the military authorities desire his return, the fugitive will, if acquitted or when his sentence is completed, be returned to the military authorities at the place where he was taken into custody or taken to the nearest receiving ship, station, or barracks at the expense of the authority that seeks the requisition.

If the crime is a felony and the requisition is made through the Governor's office, this agreement will be prepared by the Governor's office and the State will pay the expenses. If the crime is a misdemeanor, so that the expenses of extradition are to be borne by the county, then the district attorney or other official who applies for the requisition must prepare and execute the agreement. The agreement may be in the form of a letter to the Secretary of the appropriate branch of the service, setting out the required promises. An example of such an agreement appears on the next page.

PART 10. OTHER SPECIAL CASES

Fugitives out of the United States. In cases of international extradition, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Secretary of State in Washington.

Fugitives in United States possessions. If the fugitive is in a United States territory the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it directly to the territorial governor.

Fugitives in the District of Columbia. If the fugitive is in the District of Columbia, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Chief Judge of the Superior Court of the District of Columbia. The District of Columbia has several special requirements for extradition. One requirement is that the fugitive must be identified by photograph or other description or by sending a witness who can identify him. The District of Columbia is also very strict in requiring a timely application; the application should not be delayed.

Renewal of the application. When an application must be renewed — for example, when the fugitive could not be found in the state from which requisition was first sought — new or recertified copies of the papers required for extradition must be furnished.

PART 11. AGREEMENT BETWEEN GOVERNOR OR DISTRICT ATTORNEY AND THE ARMED FORCES

____
(date)

TO WHOM IT MAY CONCERN:

In consideration of the delivery of ______________________________
(name of fugitive, grade, service number, and branch
____________________ to ____________________ at ____________________, for trial
of armed forces) (county) (city and state)

upon the charge of ______________________________
(list charge or charges)
____

I hereby agree, pursuant to the authority vested in me as ____________________
(Governor or District Attorney)
____________________, that the commanding officer in charge of the ____________________
(branch of service,
______________________________,
location of base or station, city and state)

and the Secretary of the ____________________ will be informed of the
(branch of service)

outcome of the trial and that said ____________________ will be returned to
(name of fugitive)

the ____________________ authorities at the place of delivery named above or
(name of branch of service)

to such other place as may be designated by the ____________________
(name of branch of service)

or issued transportation to the nearest receiving ____________________
(ship, station, or base)

without expense to the United States or to the person delivered, immediately upon the completion of the trial if the person is acquitted or immediately upon satisfying the sentence of the court if he is convicted and a sentence imposed, or upon other disposition of his case, provided that the ____________________ authorities shall then desire his return.
(name of branch of service)

____
(signature and typed name of Governor or District Attorney)

ARTICLE III. FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA

PART 1. DUTIES OF THE ARRESTING OFFICER

Section 1. Before an arrest is made.

A. *Determine whether the person is a fugitive.* The first thing the officer needs to know is whether the suspect is charged with a crime in another state (by warrant or indictment), or has escaped from imprisonment there (following a conviction), or has violated probation or parole by leaving that state. An officer usually learns that someone is a fugitive by receiving an NCIC message on the PIN terminal, less often by telephone, letter, or telegram from an officer in the other state. The PIN message by itself is sufficient to obtain a North Carolina arrest warrant for the fugitive, but the information should be verified by phone or otherwise if possible. As mentioned below, a copy of the other state's warrant or indictment should be obtained as soon as possible and attached to the North Carolina warrant.

B. *Determine whether to arrest with or without a North Carolina warrant.* If the fugitive has been formally charged with a crime in the other state and the crime is punishable in that state by death or imprisonment for more than one year, you may arrest him without a North Carolina warrant. Otherwise, an arrest may not be made until a North Carolina magistrate has issued a warrant. It is always preferable to obtain a warrant first if time allows.

Section 2. If the arrest is to be made without a warrant, follow these steps.

C. *Arrest the fugitive.* Follow the same procedure you use when arresting for a North Carolina crime. Tell the fugitive why he has been arrested.

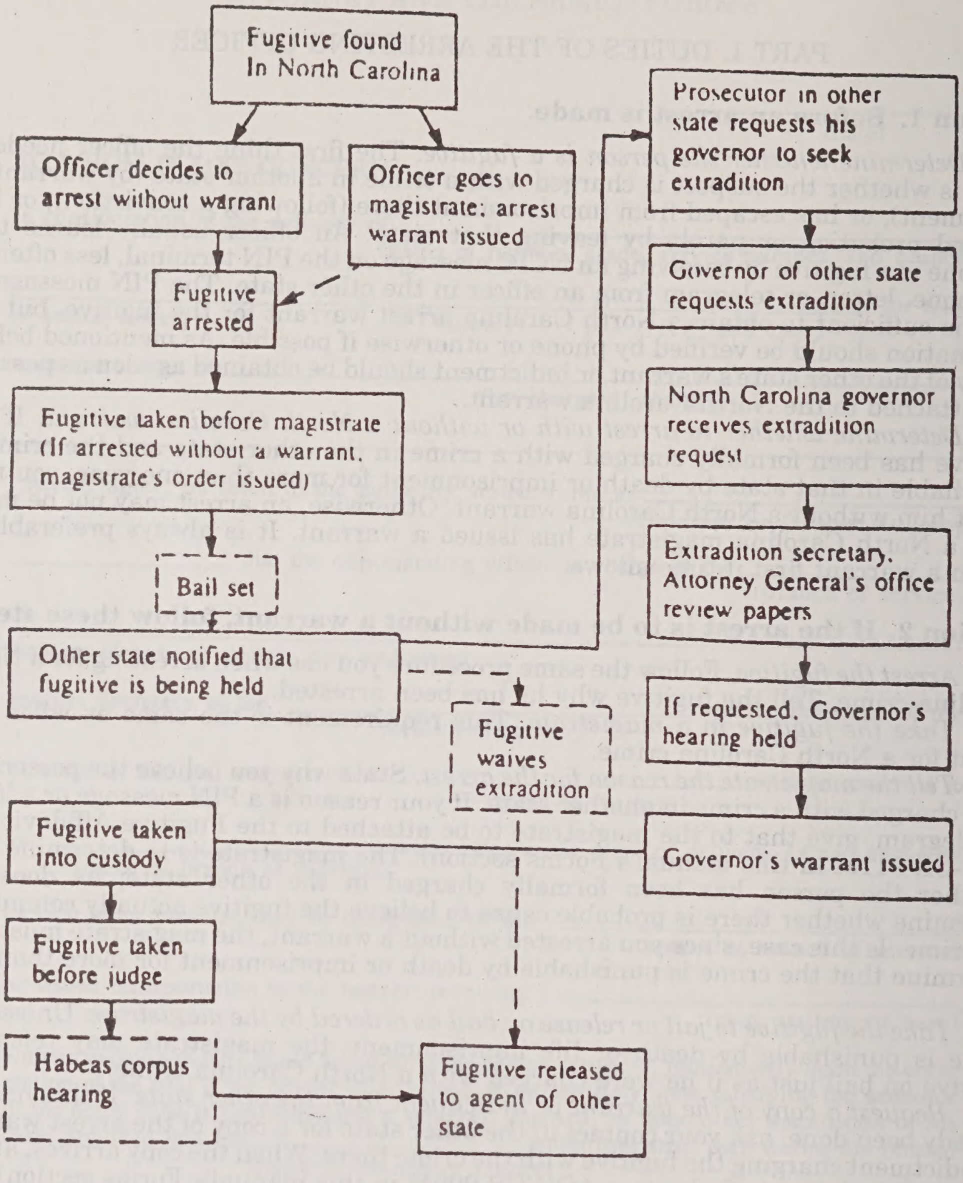
D. *Take the fugitive to a magistrate.* This requirement is the same as when you arrest for a North Carolina crime.

E. *Tell the magistrate the reason for the arrest.* State why you believe the person has been charged with a crime in another state. If your reason is a PIN message or a letter or telegram, give that to the magistrate to be attached to the Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section). The magistrate is to determine only whether the person has been formally charged in the other state; he does not determine whether there is probable cause to believe the fugitive actually committed the crime. Is this case, since you arrested without a warrant, the magistrate must also determine that the crime is punishable by death or imprisonment for more than one year.

F. *Take the fugitive to jail or release on bail as ordered by the magistrate.* Unless the crime is punishable by death or life imprisonment, the magistrate may release a fugitive on bail just as if he were charged with a North Carolina crime.

G. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, ask your contact in the other state for a copy of the arrest warrant or indictment charging the fugitive with the crime there. When the copy arrives, attach it to the Magistrate's Order (see AOC-CR-909M in this manual's Forms section).

Section 3. What happens when a fugitive from another state is found in North Carolina.


Fugitive found In North Carolina
Officer decides to arrest without warrant
Officer goes to magistrate; arrest warrant issued
Fugitive arrested
Fugitive taken before magistrate (If arrested without a warrant, magistrate's order issued)
Bail set
Other state notified that fugitive is being held
Fugitive waives extradition
Fugitive taken into custody
Fugitive taken before judge
Habeas corpus hearing
Fugitive released to agent of other state
Prosecutor in other state requests his governor to seek extradition
Governor of other state requests extradition
North Carolina governor receives extradition request
Extradition secretary, Attorney General's office review papers
If requested, Governor's hearing held
Governor's warrant issued

Section 4. If a warrant is to be obtained before you make the arrest, follow these steps instead.

C. *Go to the magistrate and complete an affidavit for an arrest warrant.* The Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section) contains instructions on what information is needed. Either you or the magistrate may fill out the form, but you must be certain it accurately reflects your information and you must sign it as the affiant.

D. *Tell the magistrate your reasons for arresting the fugitive.* If you have a PIN message, letter, telegram, or other written document showing that the fugitive has been charged with a crime in another state or has escaped from imprisonment there, show that document to the magistrate and help complete the affidavit. The magistrate is to determine only whether the fugitive has been charged with a crime in the other state or whether he has escaped from imprisonment or violated probation or parole. The magistrate is not trying to determine whether there was probable cause for the other state to make the charge. In this case it is not necessary to show what punishment the other state places on the crime.

E. *Once the warrant is issued, arrest the fugitive.* The warrant is executed the same as if the person were charged with a North Carolina crime. Tell the fugitive the reason for his arrest.

F. *Take the fugitive to a magistrate.* This is the same procedure you use when arresting with a warrant for a North Carolina crime. The magistrate is to decide whether to allow bail, except that bail is not allowed when the crime is punishable by death or life imprisonment.

G. *Take the fugitive to jail or release on bail as ordered by the magistrate.* The procedure is the same as when you arrest for a North Carolina crime.

H. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, ask your contact in the other state for a copy of the arrest warrant or indictment charging the fugitive with the crime there. When the copy arrives, attach it to the arrest warrant issued in North Carolina.

Section 5. If the fugitive has not yet been charged in the other state.

The extradition statutes also allow you to arrest someone who has committed a crime in another state even if he has not yet been formally charged there. This situation should occur only rarely. It is most likely to happen when someone commits a crime in a neighboring state and immediately flees to North Carolina and you are contacted before a judicial official has been found in that other state to issue the warrant. Before making the arrest you must obtain a warrant for arrest from a magistrate. You may use a standard North Carolina arrest warrant form for this purpose, modifying it to allege (a) the name of the crime in the other state (without giving all the elements) and (b) the statute of the other state. Because the other state has not yet issued a warrant, you must show the magistrate probable cause to believe the fugitive committed the crime in the other state, just as if you were requesting a warrant to arrest for a crime committed in North Carolina. Your probable cause will be the information you received from the officers in the other state that links the person with the crime there. Once the arrest warrant is issued, proceed just as if it were a warrant charging a North Carolina crime. Ask the other state's officers for a copy of the warrant issued there when the defendant is charged in that state. When the copy arrives, attach it to the North Carolina arrest warrant.

PART 2. DUTIES OF THE MAGISTRATE

Section 1. If the officer comes to you before arresting the fugitive.

A. *Determine whether there are grounds for an arrest.* Place the officer under oath and ask his reasons for making an arrest. The three grounds that justify an arrest are (1) the person is charged with a crime in another state and fled, (2) he was convicted of a crime in another state and has escaped from imprisonment there, and (3) he was convicted of a crime in another state and violated the conditions of his probation or parole by fleeing. The officer's information must be reliable. Usually it will consist of a PIN message, but it could be a letter or telegram or phone call from an officer in the other state, or even a copy of the warrant or indictment from the other state. You are *not* to determine whether there is probable cause to believe the person committed the crime — only whether he is charged in the other state or has escaped and whether this is the person wanted by the other state.

B. *Complete the affidavit and arrest warrant.* It is necessary to complete both the Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section) and the Warrant for Arrest for Fugitive (see AOC-CR-910M in this manual's Forms section) and be certain that they are attached. Follow the usual procedure on the number of copies to be completed, sending the original to the clerk of court's office. Attach to the original the PIN message or any other document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the arrest warrant or indictment in the other state as soon as possible and have it attached to the original copy of the warrant in the clerk's office.

Section 2. If the officer brings in the fugitive after arresting him without a warrant.

A. *Determine whether the officer had adequate grounds for the arrest.* Place the officer under oath and ask his reasons for making the arrest. An officer may arrest without a warrant only when the person has been charged with a crime in another state and that crime is punishable by death or by imprisonment for more than one year. The person might have been charged in the other state by the issuance of an arrest warrant there, by an indictment, or by information filed by a prosecutor in that state. You are to determine only whether the person has been charged in the other state, not whether there was probable cause for the charge. The officer's information that the person has been charged must be reliable. Usually it will be a PIN message, but it could be a letter, telegram, or telephone call from an officer in the other state. Sometimes the officer may even have a copy of the warrant or indictment from the other state. If his information is a PIN message, ask him whether he has phoned the other state to verify that the charge is still outstanding and they wish to extradite. This verification is not essential — the PIN message is sufficient justification for arresting the fugitive — but it is a highly recommended practice. Of course you must also determine that the person arrested is the person charged in the other state.

B. *Complete a magistrate's order.* Complete the Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section) and the Magistrate's Order for Fugitive (see AOC-CR-909M in this manual's Forms section). Follow the usual procedure on the number of copies to be completed; the original goes to the clerk's office. Attach to the original the PIN message or other written document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the other state's warrant or indictment as soon as possible and have it attached to the original copy of the magistrate's order in the clerk's office.

C. *Inform the fugitive of the charges.* Follow the same procedure you follow in any other case, informing the person of the charge against him, his right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights that appears on the reverse side of the magistrate's order form. You need not read all of that information to him, but at least tell him that he may ask the Governor's office for a hearing before the Governor grants extradition. The request must be in writing and must state the person's reasons for challenging his extradition.

D. *Determine whether to allow bail.* G.S. 15A-736 allows a fugitive to be given bail unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is a bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge may include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime, and sometimes that amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail. (*Note:* Bail is not allowed after a Governor's Warrant has been issued.)

E. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible for bail, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, such an appearance will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. Fugitives often waive formal extradition once they are told about the process and have talked to a lawyer. If the chief district judge for your district prefers not to deal with the fugitive at this point, your release is on condition that the person either (a) return for a district court appearance at a specific time within 30 days or (b) surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

Section 3. If the officer arrested the fugitive on the basis of a warrant and is now bringing him before you.

A. *Inform the fugitive of the charges against him.* The procedure is the same as if the person were charged with a North Carolina crime. He should be informed of the charge against him, the right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights that appears on the reverse side of the arrest warrant form. You need not read all of that information to the fugitive, but be sure to tell him that he may ask the Governor's office for a hearing before extradition is granted. The request must be in writing and must state the fugitive's reasons for challenging his extradition.

B. *Determine whether to allow bail.* G.S. 15A-736 allows bail for a fugitive unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge may include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime, and sometimes the amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail. (*Note:* Bail is not allowed after a Governor's Warrant has been issued.)

C. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible for bail, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, such an appearance will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. Fugitives often waive formal extradition once they are told about the process and have talked to a lawyer. If the chief district judge for your district prefers not to deal with the fugitive at this point, your release is on condition that the fugitive either return for a district court appearance at a specific time within 30 days or surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

Section 4. If the fugitive has been arrested on a governor's warrant.

A. *Inform the fugitive of the charges against him.* Tell the fugitive what crime he is charged with in the other state (he was also given this information when he was first arrested in North Carolina) and that the Governor of North Carolina has issued a warrant for him to be taken into custody and returned to the state from which he fled. Also inform the fugitive of his right to communicate with counsel and friends. The Governor's Warrant requires that he be held without bond.

B. *Commit the fugitive to jail.* Commit the fugitive to jail to await his appearance before a district court judge.

C. *Order the fugitive returned to district court at the earliest possible date.* The order of commitment should specify the time and date that the fugitive is to appear before a district court judge, which should be as early as possible. At that time he will be informed of his right to apply for habeas corpus.

Section 5. When the fugitive has not yet been charged with a crime in the other state.

The extradition statutes also allow a fugitive to be arrested in North Carolina even though he has not yet been formally charged in the other state. This situation should occur only rarely. It is most likely to happen when the person commits a crime in a neighboring state and flees to North Carolina immediately, and then law enforcement officers in North Carolina are asked to arrest him before officers in the other state have found a judicial official to issue an arrest warrant in that state. Before a North Carolina officer may make an arrest in this situation, he must obtain an arrest warrant. The procedure you follow in issuing such a warrant is the same one used when the officer wants to charge someone with a North Carolina crime. That is, the officer must be placed under oath and must state facts from which you can independently determine that there is probable cause to believe the person committed the crime in another state. You cannot just accept the word of the officers from the other state that the person committed the crime; you must be told the reasons for reaching that conclusion. (This is different from other situations involving a fugitive in which you need only establish that the person has been charged in the other state and you may not inquire as to the probable cause for that charge.) If you determine that there is probable cause, complete an arrest warrant. The standard arrest warrant form will need to be modified to indicate that the crime is one committed against the law of another state. You need not spell out the elements of the offense but can simply state the name of the crime in the other state. Use the name of the crime given by the officers from that state, which may be different from the name used in North Carolina (for example, "second degree robbery"). After the warrant is issued, the case proceeds like any other involving a fugitive.

PART 3. DUTIES OF THE CLERK OF COURT

Section 1. When the fugitive is first arrested.

A. *Assign a docket number and set a district court hearing.* When the fugitive is arrested, he will be taken to a magistrate like anyone else arrested in North Carolina and will be either committed to jail or given pretrial release. In either case, the magistrate should have scheduled the person to appear in district court as soon as possible. (Although a fugitive released on bail need not be immediately scheduled for a district court appearance — he could simply be released on bond on the condition that he return at the end of 30 days or whenever a Governor's Warrant is issued — the magistrate has been advised in this manual to set a district court appearance for the fugitive at the next session. An early appearance gives the judge an opportunity to explain the extradition process and to determine whether the fugitive needs an attorney, which may well result in an early waiver of the formal extradition procedures.) When the fugitive papers are received from the magistrate, the clerk should assign a docket number and set the case for the *first possible district court session.*

Section 2. If the fugitive waives extradition in district court, take these steps.

B. *Accept the waiver and see that the file is complete.* While he is in district court, the fugitive may decide to waive extradition. Either the judge or the clerk may take that waiver (not a magistrate). Use AOC-CR-912M (see this manual's Forms section). Whoever accepts the waiver should explain the fugitive's rights to him. The clerk is responsible for seeing that the papers are handled correctly. One copy of the waiver goes in the case file, one copy goes to the Governor's office, and one copy goes to the jail with the fugitive (to be given to the officer from the other state when he takes custody). Generally the clerk is to see that copies of all correspondence involving the fugitive are kept in the case file. The sheriff is responsible for notifying the officers in the other state that the fugitive is ready for return.

Section 3. If the fugitive refuses to waive extradition, follow these steps instead.

B. *Assign an attorney and set a new court date.* If the fugitive does not waive extradition during his first appearance in district court, the clerk should determine indigency and assign an attorney to represent him. Although the statutes do not require appointment of counsel until later in the process, matters can be expedited if the fugitive has a lawyer. The attorney should be mailed a copy of the appointment, the refusal form, the warrant, and a notice of the next court date. It is likely that at the first appearance in district court, the judge will continue the case for 30 days. The defendant will be ordered to return on a given date to see whether the Governor of North Carolina has issued a Governor's Warrant to have him returned to the other state. If the Governor's Warrant is issued before then, a fugitive who is out on bail should be returned to custody and taken immediately before a district court judge. If no Governor's Warrant is issued and the fugitive returns as scheduled in 30 days, the case can be continued and another appearance scheduled later. The statute allows the judge to continue the fugitive's bond or commitment for 60 additional days if the Governor's Warrant has not been issued by the end of the first 30-day period, but judges usually continue the case for two additional 30-day periods rather than one 60-day period. The judge will decide whether the fugitive is to be given bond during this time. The clerk's responsibility is to record the information on the commitment paper or release order. If the other state shows no urgency in carrying out formal extradition, the judge may simply release the fugitive after 60 days — not waiting the full 90 days. If the judge releases the fugitive because no Governor's Warrant has been issued, the clerk closes the case as a dismissal.

C. *Prepare copies of the governor's warrant, have the defendant served, and set the court appearance.* When a Governor's Warrant is issued, the original and one copy are sent to the clerk for the sheriff. The clerk should notify the sheriff that the warrant has been received and should make another copy for the fugitive, giving the Governor's Warrant the same docket number as the fugitive warrant used for the original arrest. In addition to the fugitive's copy, the original Governor's Warrant and one other copy are sent to the jail to be signed by the officers from the other state when they come. If the fugitive is not still in custody, the Governor's Warrant is given to an officer to bring him back into custody. The fugitive should be scheduled for the next session of district court. In district court the judge will tell the fugitive that he may apply for habeas corpus, will see that he gets a lawyer if he does not already have one, and will give him a certain amount of time (though still in custody) to decide whether to apply for habeas. The case is then continued for the period set by the district judge. If the fugitive does not apply for habeas corpus by the set time, the district judge orders him turned over to the agents from the other state. If the fugitive does apply for habeas corpus, the docket file is given to the superior court clerks and the case becomes a pending case in superior court to be set for hearing by the district attorney.

D. *Place the original governor's warrant in the file and return the copy to the governor's office.* Once the fugitive is turned over to the agents from the other state — either with or without a habeas corpus hearing in superior court — the original Governor's Warrant is returned to the Governor's office and one copy placed in the court record.

PART 4. DUTIES OF THE DISTRICT ATTORNEY

Section 1. When the fugitive is first arrested.

When first arrested, the fugitive may be given bond by a magistrate unless the crime is one punishable by death or life imprisonment. Whether the defendant is held or released on bond, the magistrate should schedule him for the next session of district court. (If the fugitive is released on bail, the immediate appearance in district court is not required by the statute — the magistrate could schedule the district court appearance 30 days later — but an immediate appearance will usually expedite matters.) At the district court appearance the judge should inform the fugitive of the charge against him, see that he has a copy of the arrest warrant or magistrate's order, review the bail, and see whether it is necessary to appoint an attorney. The fugitive may waive extradition and be turned over to an agent from the other state, or he may be continued on bonded release or in commitment for up to 30 days (from the time of the initial arrest in North Carolina) to await issuance of a Governor's Warrant.

Section 2. When the fugitive appears in district court at the end of 30 days.

If the recommended procedure has been followed, the fugitive will have already appeared before a district judge once, when first arrested, although he could have been released by a magistrate for 30 days without having seen a judge. In either case, the only purpose of this district court appearance is to determine whether the Governor of

North Carolina has issued a Governor's Warrant ordering the fugitive's return to the other state. Before the hearing, the district attorney should determine whether the Governor's Warrant has been issued. If the warrant has been issued, proceed as indicated below. If not, the fugitive may be held or released on bond for another 60 days to await issuance of the Governor's Warrant. Judges usually continue the case for 30 days at a time. Before he asks for another 30-day commitment, the district attorney should try to determine whether the other state is diligently pursuing extradition.

Section 3. When a governor's warrant is issued.

When a Governor's Warrant is issued, the fugitive is to be taken into custody (he may already be in custody if he was not given bail or could not make bail) and brought before a district court judge. The judge is to inform him of the other state's demand for his surrender, the crime he has been charged with, that he is entitled to counsel, and that he has a reasonable time, set by the judge, within which to apply for a writ of habeas corpus. The fugitive may *not* be turned over to the agent of the other state until this appearance has been held. Bail is not allowed once a Governor's Warrant has been issued.

Section 4. When the fugitive applies for the writ of habeas corpus.

The district attorney is to be notified if the fugitive applies for habeas corpus; the district attorney will represent the State of North Carolina at that hearing. As discussed in the section of this manual entitled Some Legal Issues in Extradition, the issues that may be raised at the habeas corpus hearing are limited to the following:

Whether the demand for extradition was made in the proper form. G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant, plus supporting affidavits used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or has broken the terms of his bail, probation, or parole. The indictment, information, or warrant and affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the governor.

The identity of the fugitive. The defendant has the burden of showing that he is not the fugitive being sought. Identification is facilitated when photographs or fingerprints accompany the extradition papers. Sometimes an identifying witness must be brought from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

Whether the person is a fugitive from the other state. The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, placing the burden on the defendant to show otherwise. If the charge is one that required his presence in the other state, he can meet the burden by showing that he was not there when the crime was committed. His reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present when the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

Whether the defendant has been charged with a substantial crime. The defendant may show, by introducing the relevant statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid, and the burden is on the defendant to disprove its allegations. Unless the matter is related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the North Carolina Court of Appeals. (The State may seek certiorari to review a judgment granting habeas corpus.) The superior court judge or a Court of Appeals judge may issue a stay to allow the Court of Appeals to hear the defendant's appeal.

Section 5. If the fugitive is also charged with a crime in North Carolina.

G.S. 15A-739 allows the Governor of North Carolina to delay extradition if the person being sought by the other state has been charged with a crime in North Carolina. The Governor's Extradition Secretary should be notified that a North Carolina charge is pending before she issues the Governor's Warrant.

PART 5. DUTIES OF THE DISTRICT COURT JUDGE

Section 1. When the fugitive is first arrested.

Normally a district court judge will have no involvement in the initial arrest of a fugitive. The judge could be called on to issue an arrest warrant just as a magistrate would, but that should rarely happen.

Section 2. The first appearance before a district court judge.

G.S. 15A-601, the statute requiring a first appearance before a district court judge, refers to crimes "in the original jurisdiction of the superior court." Because the fugitive is charged with a crime in another state, it is probably not required under that statute that a first appearance be held, but magistrates are advised to schedule all fugitives, whether committed or released on bail, to appear at the next session of district court. This procedure can expedite matters considerably. At the first appearance, the judge can tell the fugitive the charge against him, see that he has a copy of the arrest warrant or magistrate's order, and review the bail set by the magistrate. The fugitive may waive extradition at this appearance (see the separate section on waiver below).

At the first appearance, the judge should also tell the fugitive that he may apply in writing for a Governor's hearing before a Governor's Warrant is issued. The request must state the grounds for opposing extradition. The only issues that will be considered are (1) whether the person has been charged in the other state, (2) whether the papers are in proper form, (3) whether the person demanded is the person charged, and (4) whether the accused is a fugitive. A Governor's hearing may be granted or denied at the Governor's discretion.

If the fugitive cannot make bail or if he is denied bail, he should be committed to jail to be returned to district court on a specific date within 30 days of his arrest. At that time there will be a determination whether a Governor's Warrant has been issued. If he is released on bond after the first appearance, his release should be conditioned on a return to district court on a specific date within 30 days to determine whether the Governor's Warrant has been issued, or to return whenever the warrant is issued if it is sooner than 30 days.

Usually the first appearance is used to determine whether counsel should be appointed. Although the extradition statutes, in particular G.S. 15A-730, provide for the fugitive to be notified of the right to counsel after the Governor's Warrant has been issued (when the fugitive is returned to custody and taken before a judge to be informed of his right to apply for habeas corpus), the need for counsel should be determined at the first appearance. Doing so often helps in informing the defendant of the extradition process and in helping him decide whether to waive formal extradition.

Section 3. When the fugitive returns to court after 30 days.

Whether the fugitive is out on bond or has been committed to the jail, he is to return to district court within 30 days of his arrest in North Carolina. This appearance is used to determine whether the Governor of North Carolina has issued a Governor's Warrant ordering that the fugitive be returned to the other state. If the warrant has been issued, proceed as indicated in the next section. If the Governor's Warrant has not been issued, the fugitive may be continued on bond or committed to jail for up to 60 additional days to await issuance of the Governor's Warrant. The usual practice is to continue the case for 30 days at a time. Before an additional 30-day custody is imposed, the district attorney or a law enforcement officer should be required to determine whether the other state is diligently pursuing extradition. Of course the fugitive may use this opportunity to waive extradition and return voluntarily to the other state.

Section 4. When a governor's warrant has been issued.

Once a Governor's Warrant is issued, G.S. 15A-730 requires that the fugitive be brought before a judge before he is delivered to the agent of the other state. At the district court appearance after the arrest on a Governor's Warrant, the judge is to inform the fugitive of the other state's demand for his return, the charge against him in that state, that he has the right to demand and procure counsel, and that he may challenge the legality of his arrest by applying for a writ of habeas corpus. If the fugitive wants counsel and is indigent, the judge should appoint counsel if that has not already been done. The statute also requires that the fugitive be given a reasonable time within which to apply for habeas corpus. The time limit is to be fixed by the district court judge. The judge should order the fugitive held in the county jail (or other place of confinement) until the time expires for applying for habeas corpus; the person is then to be turned over to the agent for the other state. Once a Governor's Warrant is issued, bail is not allowed.

Section 5. If the fugitive wishes to waive extradition.

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; use AOC-CR-912M (see this manual's Forms section). Before the form is signed, the fugitive must be told that (a) he may refuse to waive extradition and may require the other state to make a formal request for extradition; and (b) if a Governor's Warrant is issued, he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be given to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

PART 6. DUTIES OF THE SUPERIOR COURT JUDGE

Section 1. When the fugitive is first arrested.

The superior court judge should have no direct involvement in the extradition case unless the fugitive applies for a writ of habeas corpus. The senior resident superior court judge is to issue a bail policy to be used by the magistrates in his district, and that policy should indicate what bond is to be required of a fugitive. The extradition statute on bail, G.S. 15A-736, allows bail unless the offense is punishable by death or life imprisonment, but only on a secured appearance bond. Once a Governor's Warrant is issued, bail is not allowed.

Section 2. When the fugitive applies for a writ of habeas corpus.

After the Governor's Warrant is issued, a fugitive may apply for a writ of habeas corpus. As discussed in greater detail in the section of this manual entitled Some Legal Issues in Extradition, the issues that may be raised at the habeas corpus hearing are limited to the following:

Whether the demand for extradition has been made in the proper form. G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant — with supporting affidavits — used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or has broken the terms of his bail, probation, or parole. The indictment, information, or warrant and supporting affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the governor.

The identity of the fugitive. The defendant has the burden of showing that he is not the fugitive being sought. Identification can be facilitated by photographs or fingerprints accompanying the extradition papers. Sometimes an identifying witness must be brought from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

Whether the person is a fugitive from the other state. The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, and the burden is on the defendant to show otherwise. If the charge is one that required his presence in the other state, he can meet that burden by showing that he was not there when the crime was committed. His reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present when the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

Whether the defendant has been charged with substantial crime. The defendant may show, by introducing the relevant statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid and the burden is on the defendant to disprove the allegations. Unless the matter is related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the North Carolina Court of Appeals. (The State may seek certiorari to review a judgment granting habeas corpus.) The superior court judge or a Court of Appeals judge may issue a stay to allow the Court of Appeals to hear the defendant's appeal.

Section 3. If the fugitive wishes to waive extradition.

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; use AOC-CR-912M (see this manual's Forms section). Before the form is signed, the fugitive must be told that (a) he may refuse to waive extradition and may require the other state to make a formal request for extradition; and (b) if a Governor's Warrant is issued, he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be given to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

Editor's note. — At this point, the Extradition Manual quotes the Uniform Criminal Extradition Act, Article 37, §§ 15A-721 to 15A-750, of G.S. Chapter 15A. The Article has been omitted here as it may be found in Volume 4 of the General Statutes of North Carolina.

ARTICLE IV. SOME LEGAL ISSUES IN EXTRADITION

1. *Is the fugitive entitled to a hearing before a Governor's Warrant can be issued?*

The general rule is that he is not. *Application of Dugger,* 17 Ariz. App. 297, 497 P.2d 413 (1972); *Horne v. Wilson,* 306 F. Supp. 753 (E.D. Tenn. 1969); *Scheinfain v. Aldredge,* 191 Ga. 479, 12 S.E.2d 868 (1941).

2. *What issues may the Governor consider in deciding whether extradition is proper in a given case?*

The United States Supreme Court has ruled that a Governor has a mandatory duty to comply with a proper demand for a fugitive, and a federal court has the authority to compel the Governor to perform this duty. *Puerto Rico v. Branstad,* 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987). A Governor may only consider the following issues when deciding whether extradition is proper: (1) whether the extradition documents on their face are in order; (2) whether the accused has been charged with a crime in the demanding state; (3) whether the accused is the person named in the request for extradition; and (4) whether the accused is a fugitive. *Michigan v. Doran,* 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978); *California v. Superior Court,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987).

3. Is the fugitive entitled to be released on bail before the Governor's Warrant is issued?

G.S. 15A-736 says that the magistrate or judge "may admit the person arrested to bail by bond" unless the person is charged with a crime punishable by death or life imprisonment under the laws of the state in which it was committed. The statute mentions only release by bail with sufficient sureties.

4. Does a person held for extradition have a right to be released on bail after a Governor's Warrant has been issued?

The majority rule is that the Uniform Extradition Law does *not* grant a right to bail to a person held for extradition after a Governor's Warrant is issued. *Emig v. Hayward,* 703 P.2d 1043 (Utah 1985); *In re Iverson,* 135 Vt. 255, 376 A.2d 23 (1977); *In re Lucas,* 136 N.J. Super. 24, 343 A.2d 845 (1975), *aff'd,* 136 N.J. Super. 460, 346 A.2d 624 (1975); *Balasco v. State,* 52 Ala. App. 99, 289 So.2d 666 (1974); *State ex rel. Howard v. St. Joseph Superior Court,* 262 Ind. 367, 316 N.E.2d 356 (1974). Most courts have also held that judges have no common law or inherent power to grant release on bail in such circumstances (see the cases cited above). *But see Carrio v. Watson,* 171 Conn. 366, 370 A.2d 950 (1976), which ruled that releasing a fugitive on bail was proper, even after a Governor's Warrant had been served on the fugitive; the opinion was based on the court's common law power to allow bail "in all cases"; and *Ex parte Quinn,* 549 S.W.2d 198 (Tex. Crim. App. 1977), granting bail on the basis of state statute giving right to bail in "any habeas corpus proceeding" except capital cases.

The Office of the Governor agrees with the National Association of Extradition Officials' resolution (1986) opposing bail in all cases when a Governor's Warrant has been issued. It takes the position that the Governor's Warrant is an executive — not judicial — warrant and bail is not allowed.

5. Is a fugitive entitled to counsel at a habeas corpus hearing to contest the legality of an extradition proceeding?

Yes, pursuant to G.S. 15A-730, any accused is entitled to have counsel present at such hearings. Most courts have held that counsel in such cases is required solely by statute and is not constitutionally required under the Sixth Amendment. *Hystad v. Rhay,* 12 Wash. App. 872, 533 P.2d 409 (1975); *Wertheimer v. State,* 294 Minn. 293, 201 N.W.2d 383 (1972); *Roberts v. Hocker,* 85 Nev. 390, 456 P.2d 425 (1969). Nevertheless, courts have held that counsel must be appointed for indigents contesting extradition proceedings at habeas corpus proceedings. *People v. Braziel,* 17 Mich. App. 411, 169 N.W.2d 513 (1969); *Ex parte Turner,* 410 S.W.2d 639 (Tex. Crim. App. 1967). In North Carolina, G.S. 7A-451(a)(5) entitles an indigent held for extradition to appointed counsel. Appointed counsel is not required at an initial arraignment on a fugitive warrant or at a hearing before the Governor. *Rutledge v. Preadmore,* 21 Mich. App. 726, 176 N.W.2d 417 (1970).

6. On what grounds may a fugitive attack a Governor's Warrant in a habeas corpus proceeding?

The United States Supreme Court has ruled that a court may only consider the following issues when deciding whether extradition is proper: (1) whether the extradition documents on their face are in order; (2) whether the accused has been charged with a crime in the demanding state; (3) whether the accused is the person named in the request for extradition; and (4) whether the accused is a fugitive. *California v. Superior Court,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987). See also *Michigan v. Doran,* 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978); *Dodd v. State,* 56 N.C. App. 214, 287 S.E.2d 435 (1982); *In re Armstrong,* 49 N.C. App. 175, 270 S.E.2d 619 (1980). The defendant's evidence must be conclusive; mere conflicting testimony as to an accused's absence from the demanding state at the time of the alleged crime will not support his release from custody at a habeas corpus proceeding. *People ex rel. Garner v. Clutts,* 20 Ill.2d 447, 170 N.E.2d 538 (1970); *State ex rel. Zack v. Kriss,* 195 Md. 559, 74 A.2d 25 (1952).

7. Must an indictment, information, or warrant from the demanding state be accompanied by affidavits or other documents showing the basis for the probable cause to arrest the fugitive?

Courts generally hold that an indictment carries with it a sufficient finding of probable cause so that an asylum state may not look behind the document to see for itself whether probable cause exists. *U.S. ex rel. Davis v. Behagen,* 436 F.2d 596 (2d Cir. 1970); *People v. Jackson,* 180 Colo. 135, 502 P.2d 1106 (1972).

If the documents sent by the demanding state do not contain an indictment, they must show that a detached and neutral judicial official in the demanding state has found probable cause in the case; if the Governor in the asylum state decides to issue a Governor's Warrant, the courts of that state may not review the documents to see whether they contain a showing of probable cause. *Michigan v. Doran,* 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978); *California v. Superior Court,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987).

8. What is the standard of proof required for a fugitive who is attacking a Governor's Warrant in a habeas corpus proceeding? Does the state have the burden of producing evidence if a defendant introduces evidence contesting his status as a fugitive?

A Governor's Warrant creates a presumption of regularity in an extradition proceeding, and a fugitive who wishes to attack the warrant must show by clear and convincing evidence that the warrant is invalid. *People ex rel. Harris v. Warden,* 42 App. Div. 2d 549, 345 N.Y.S.2d 29 (1973); *Stolz v. Miller,* 190 Colo. 43, 543 P.2d 513 (1975); *McCollough v. Darr,* 219 Kan. 477, 548 P.2d 1245 (1976). Other cases have formulated the standard of proof as requiring "conclusive" evidence, *People ex rel. Pirone v. Police Comm'r,* 15 App. Div. 2d 809, 225 N.Y.S.2d 257 (1962); or as requiring "clear and satisfactory" evidence, *State ex rel. Rhodes v. Omodt,* 300 Minn. 129, 218 N.W.2d 461 (1974). In *Dodd v. State,* 56 N.C. App. 214, 287 S.E.2d 435 (1982), the North Carolina Court of Appeals ruled that the fugitive must prove beyond a reasonable doubt that he is not the person named in the extradition papers.

States differ on whether the prosecution must present evidence to rebut an alleged fugitive's evidence. In *Rhodes,* the court ruled that the state must present "minimal" evidence rebutting an alleged fugitive's evidence that he was not in the demanding state at the time of the crime; in *Stolz,* the court ruled that a statement by an alleged fugitive does not necessarily rebut the presumption of regularity created by the Governor's Warrant.

9. General Research References

Annot., *Validity, Construction, and Application of Interstate Agreement on Detainers,* 98 A.L.R.3d 160 (1980 and Supp.).

Annot., *Necessity That Demanding State Show Probable Cause to Arrest Fugitive in Extradition Proceedings,* 90 A.L.R.3d 1085 (1979 and Supp.).

Annot., *Discharge on Habeas Corpus of One Held in Extradition Proceedings As Precluding Subsequent Extradition Proceedings,* 33 A.L.R.3d 1443 (1970 and Supp.).

Annot., *Necessity and Sufficiency of Identification of Accused As the Person Charged, to Warrant Extradition,* 93 A.L.R.2d 912 (1964 and Later Case Service).

Annot., *Court's Power and Duty, Pending Determination of Habeas Corpus Proceeding on Merits, to Admit Petitioner to Bail,* 56 A.L.R.2d 668 (1957 and Later Case Service).

Annot., *Determination, in Extradition Proceedings, or on Habeas Corpus in Such Proceedings, Whether a Crime Is Charged,* 40 A.L.R.2d 1151 (1955 and Later Case Service).

ARTICLE V. INTERSTATE AGREEMENT ON DETAINERS

Sometimes a person who is wanted for prosecution is already in prison. A prosecutor may lodge a "detainer" against the prisoner by notifying the prison authorities that the person has charges pending against him and thus prevent release of the prisoner without notice to the prosecutor. Virtually all the states, including North Carolina, have joined an Interstate Agreement on Detainers that establishes procedures for resolving pending charges against a prisoner early in his detention in another state. (The Agreement only applies to pending charges. The extradition process must be used to return a prisoner who is a probation or parole violator.) This section of the Extradition Manual briefly explains the detainer procedure.

The Interstate Agreement on Detainers appears in G.S. 15A-761. The Agreement allows both the prisoner and the prosecutor to request early resolution of charges outstanding against the prisoner. The prison officials who have custody of the prisoner are required to notify him of any detainers lodged against him. He may then request final disposition of the charges. When the prisoner makes such a request, the prison officials notify the prosecutor in the other state and offer him the opportunity to take custody of the prisoner. The prosecutor must try the case within 180 days after the prisoner is delivered. A judge may grant a delay in the trial deadline for good cause if either the prisoner or his lawyer is present.

If detainers have been lodged for other charges from the same state, the prosecutors responsible for the other charges are also notified of the prisoner's request for final disposition. His request is considered a request for disposition of all charges pending in that state. Failure to prosecute any of the charges pending against the prisoner in that state within the 180-day period, or the extended deadline, means dismissal of the charges with prejudice.

The prosecutor also can force an early trial. When a prosecutor has a charge against a prisoner in another state, he may request temporary custody for trial. The governor of the other state can refuse to grant that request, but if he agrees — or if he does not object within 30 days — the prisoner is turned over for prosecution. The trial must be held within 120 days after the prisoner is delivered — again with delays possible for good cause — or the charges must be dismissed with prejudice. All prosecutors in the state who have a detainer on the prisoner are notified that he is being returned for prosecution so that they may make their own requests for temporary custody.

After trial, the prisoner is returned to the state where he was serving his sentence. Once he completes his sentence in the state where he was originally in prison, he is given back to the other state to serve the sentence imposed there.

The Department of Correction employs an Administrator for the Interstate Agreement on Detainers. The Administrator (919-733-4926) can provide additional information about detainers and the forms to be used in the procedures described above.

ARTICLE VI. RETURN OF JUVENILES

North Carolina is a member of the Interstate Compact on Juveniles (G.S. 7A-684 through -712), which provides for the return of juveniles who have been charged with being delinquent, juvenile delinquents who have escaped from custody or absconded from probation or parole, juveniles who are runaways, and the like. The Compact Administrator, who is employed in the Division of Social Services of the Department of Human Resources (919-733-4622), can provide information about the Compact's procedures and the forms to be used to return a juvenile.

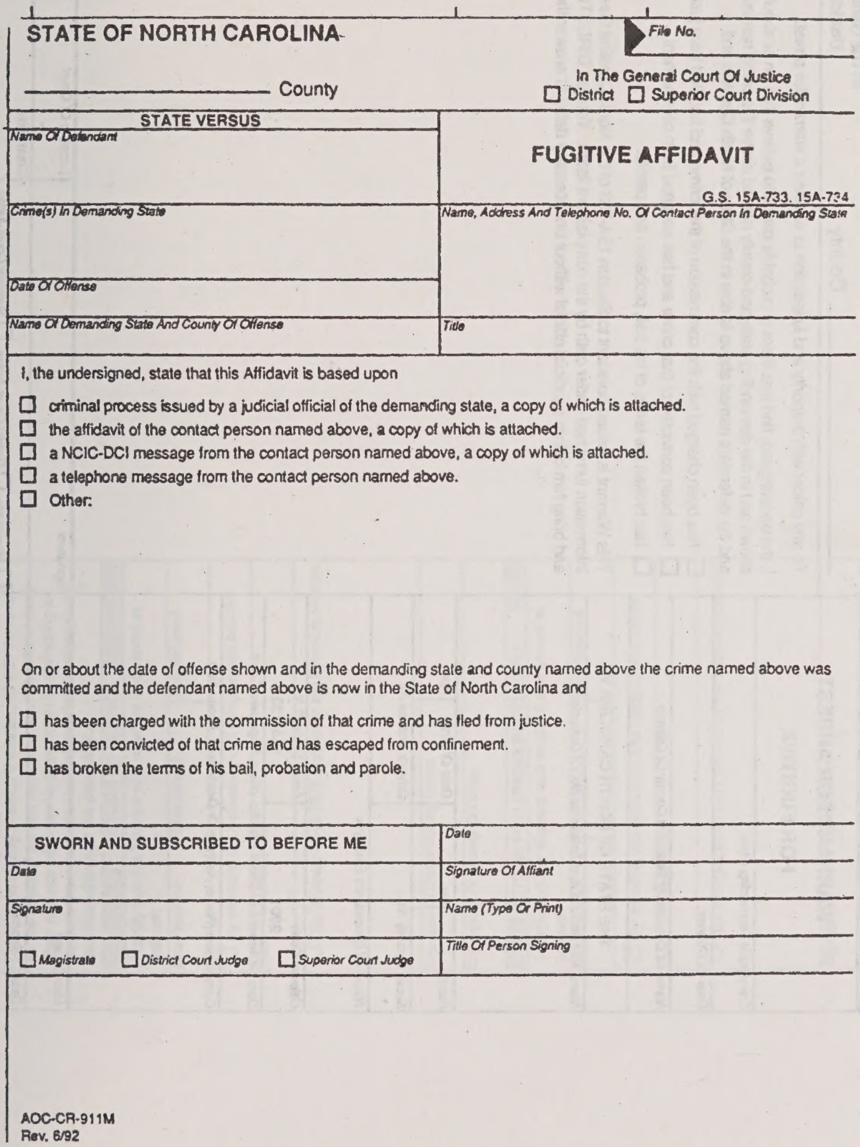
FORMS

The forms designated AOC-CR-909M through -912M and GOV. 1 through GOV. 2-F are not printed for distribution but are available from the clerk of superior court's office in each county for photocopying as necessary.

The last form, designated as Attachment No. 2, is available from the Department of Correction (919-733-3988).

Form 1.

Form 1.



STATE OF NORTH CAROLINA

______________ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

FUGITIVE AFFIDAVIT

G.S. 15A-733, 15A-734

Crime(s) In Demanding State	*Name, Address And Telephone No. Of Contact Person In Demanding State*
Date Of Offense	
Name Of Demanding State And County Of Offense	*Title*

I, the undersigned, state that this Affidavit is based upon

☐ criminal process issued by a judicial official of the demanding state, a copy of which is attached.
☐ the affidavit of the contact person named above, a copy of which is attached.
☐ a NCIC-DCI message from the contact person named above, a copy of which is attached.
☐ a telephone message from the contact person named above.
☐ Other:

On or about the date of offense shown and in the demanding state and county named above the crime named above was committed and the defendant named above is now in the State of North Carolina and

☐ has been charged with the commission of that crime and has fled from justice.
☐ has been convicted of that crime and has escaped from confinement.
☐ has broken the terms of his bail, probation and parole.

SWORN AND SUBSCRIBED TO BEFORE ME	*Date*
Date	*Signature Of Affiant*
Signature	*Name (Type Or Print)*
☐ *Magistrate* ☐ *District Court Judge* ☐ *Superior Court Judge*	*Title Of Person Signing*

AOC-CR-911M
Rev. 6/92

Form 2.

File No.

WARRANT FOR ARREST FOR FUGITIVE

STATE OF NORTH CAROLINA

_______________ County

In The General Court Of Justice
District Court Division

Crime(s) In Demanding State	
Date Of Offense	
Name Of Demanding State And County Of Offense	

THE STATE OF NORTH CAROLINA VS.

Name And Address And Telephone No. Of Defendant

Race	*Sex*	*Date Of Birth*	*Age*
Social Security No.		*Driver's License No.*	
Name Of Defendant's Employer			
Offense Code 9901		*Arrest Under G.S.* 15A-733	
Date Of Arrest And Check Digit No. (From Fingerprint Card)			
Complainant (Name, Address Or Department, Phone No.)			

To any officer with authority and jurisdiction to execute a warrant for arrest:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the demanding state and county named above the crime named above was committed and the defendant named above is now in the State of North Carolina and

☐ has been charged with the commission of that crime and has fled from justice.
☐ has been convicted of that crime and has escaped from confinement.
☐ has broken the terms of his bail, probation and parole.

This Warrant is issued pursuant to Section 15A-733 of the North Carolina General Statutes upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring him before a judicial official without unnecessary delay to answer the charge above.

Date Issued	*Signature*	*Location Of Court*	
Date Of Service	☐ *Magistrate* ☐ *District Court Judge* ☐ *Superior Court Judge*	*Court Date*	*Court Time* ☐ AM ☐ PM

AOC-CR-910M
Rev. 6/92

If this Warrant For Arrest is not served within one hundred and eighty (180) days, it must be returned to the Clerk of Court in the county in which it was issued with the reason for the failure of service noted thereon. The officer must state all steps taken by his department in attempting to execute the warrant and any information obtained about the whereabouts of the defendant.

RETURN OF SERVICE

I certify that this Warrant was received and served as follows:

Date Received	Date Served	Date Returned

☐ By arresting the defendant and bringing him before:

Name Of Judicial Official

☐ This Warrant WAS NOT served for the following reason:

Signature Of Officer Making Return

Department Or Agency Of Officer

RETURN FOLLOWING REDELIVERY

I certify that this Warrant was received and served as follows:

Date Received	Date Served	Date Returned

☐ By arresting the defendant and bringing him before:

Name Of Judicial Official

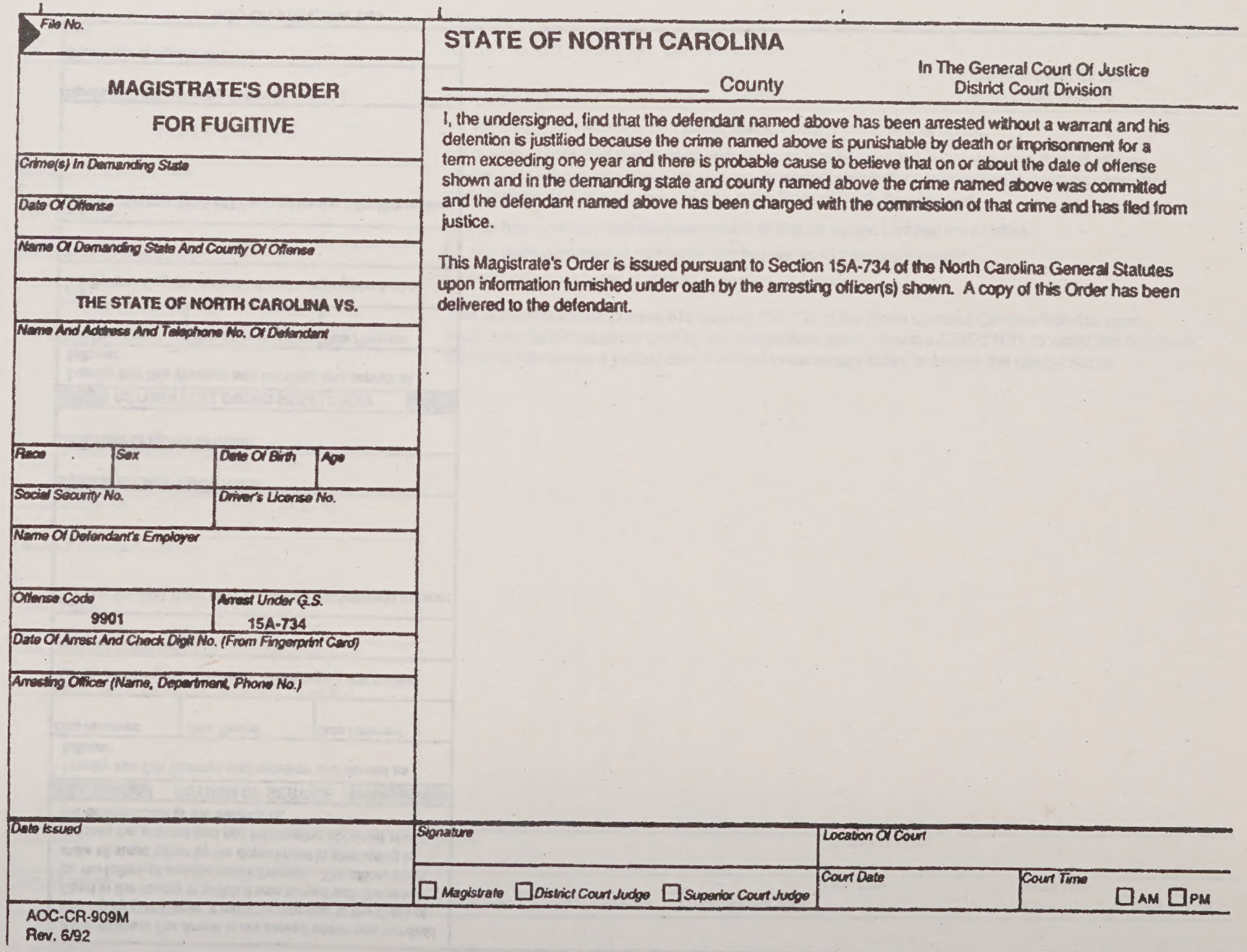
☐ This Warrant WAS NOT served for the following reason:

Signature Of Officer Making Return

Department Or Agency Of Officer

AOC-CR-910M, Side Two

Form 3.



File No.

MAGISTRATE'S ORDER

FOR FUGITIVE

STATE OF NORTH CAROLINA

_______________ County

In The General Court Of Justice
District Court Division

Crime(s) In Demanding State

Date Of Offense

Name Of Demanding State And County Of Offense

THE STATE OF NORTH CAROLINA VS.

Name And Address And Telephone No. Of Defendant

Race	*Sex*	*Date Of Birth*	*Age*
Social Security No.		*Driver's License No.*	

Name Of Defendant's Employer

Offense Code 9901	*Arrest Under G.S.* 15A-734

Date Of Arrest And Check Digit No. (From Fingerprint Card)

Arresting Officer (Name, Department, Phone No.)

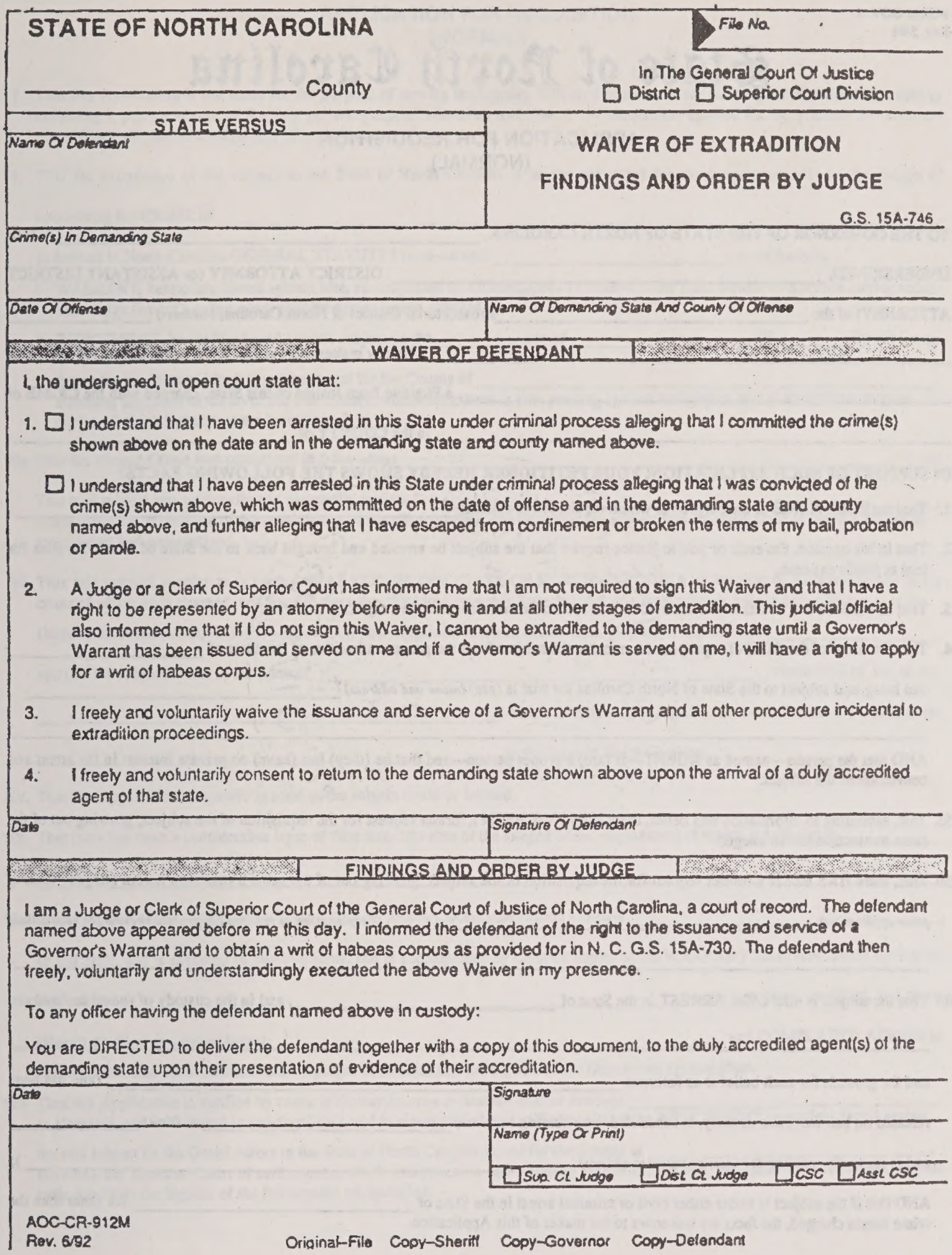
I, the undersigned, find that the defendant named above has been arrested without a warrant and his detention is justified because the crime named above is punishable by death or imprisonment for a term exceeding one year and there is probable cause to believe that on or about the date of offense shown and in the demanding state and county named above the crime named above was committed and the defendant named above has been charged with the commission of that crime and has fled from justice.

This Magistrate's Order is issued pursuant to Section 15A-734 of the North Carolina General Statutes upon information furnished under oath by the arresting officer(s) shown. A copy of this Order has been delivered to the defendant.

Date Issued	*Signature* ☐ *Magistrate* ☐ *District Court Judge* ☐ *Superior Court Judge*	*Location Of Court*	
		Court Date	*Court Time* ☐ AM ☐ PM

AOC-CR-909M
Rev. 6/92

Form 4.



STATE OF NORTH CAROLINA

File No.

__________ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

WAIVER OF EXTRADITION

FINDINGS AND ORDER BY JUDGE

G.S. 15A-746

Crime(s) In Demanding State

Date Of Offense

Name Of Demanding State And County Of Offense

WAIVER OF DEFENDANT

I, the undersigned, in open court state that:

1. ☐ I understand that I have been arrested in this State under criminal process alleging that I committed the crime(s) shown above on the date and in the demanding state and county named above.

   ☐ I understand that I have been arrested in this State under criminal process alleging that I was convicted of the crime(s) shown above, which was committed on the date of offense and in the demanding state and county named above, and further alleging that I have escaped from confinement or broken the terms of my bail, probation or parole.

2. A Judge or a Clerk of Superior Court has informed me that I am not required to sign this Waiver and that I have a right to be represented by an attorney before signing it and at all other stages of extradition. This judicial official also informed me that if I do not sign this Waiver, I cannot be extradited to the demanding state until a Governor's Warrant has been issued and served on me and if a Governor's Warrant is served on me, I will have a right to apply for a writ of habeas corpus.

3. I freely and voluntarily waive the issuance and service of a Governor's Warrant and all other procedure incidental to extradition proceedings.

4. I freely and voluntarily consent to return to the demanding state shown above upon the arrival of a duly accredited agent of that state.

Date

Signature Of Defendant

FINDINGS AND ORDER BY JUDGE

I am a Judge or Clerk of Superior Court of the General Court of Justice of North Carolina, a court of record. The defendant named above appeared before me this day. I informed the defendant of the right to the issuance and service of a Governor's Warrant and to obtain a writ of habeas corpus as provided for in N. C. G.S. 15A-730. The defendant then freely, voluntarily and understandingly executed the above Waiver in my presence.

To any officer having the defendant named above in custody:

You are DIRECTED to deliver the defendant together with a copy of this document, to the duly accredited agent(s) of the demanding state upon their presentation of evidence of their accreditation.

Date

Signature

Name (Type Or Print)

☐ *Sup. Ct. Judge* ☐ *Dist. Ct. Judge* ☐ *CSC* ☐ *Asst. CSC*

AOC-CR-912M
Rev. 6/92

Original–File Copy–Sheriff Copy–Governor Copy–Defendant

Form 5.

FORM GOV. 1
Rev. 5/91

State of North Carolina

APPLICATION FOR REQUISITION
(NORMAL)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, ____________________: THE UNDERSIGNED, ____________________, DISTRICT ATTORNEY (or ASSISTANT DISTRICT ATTORNEY) of the ____________________ Prosecutorial District of North Carolina, *(address)* ____________________ ____________________, hereby makes this verified application for the requisition of ____________________, a Fugitive from Justice of this State, charged with the CRIME of ____________________, in the COUNTY of ____________________.

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. That the FULL NAME of the person for whom requisition is asked is ____________________.

2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina for trial at public expense.

3. That he believes that he has sufficient evidence to secure the conviction of the subject.

4. That the name of the AGENT—proposed to receive the subject from the proper authorities of the State of ____________________ and bring said subject to the State of North Carolina for trial is (are) *(name and address)* ____________________ ____________________;

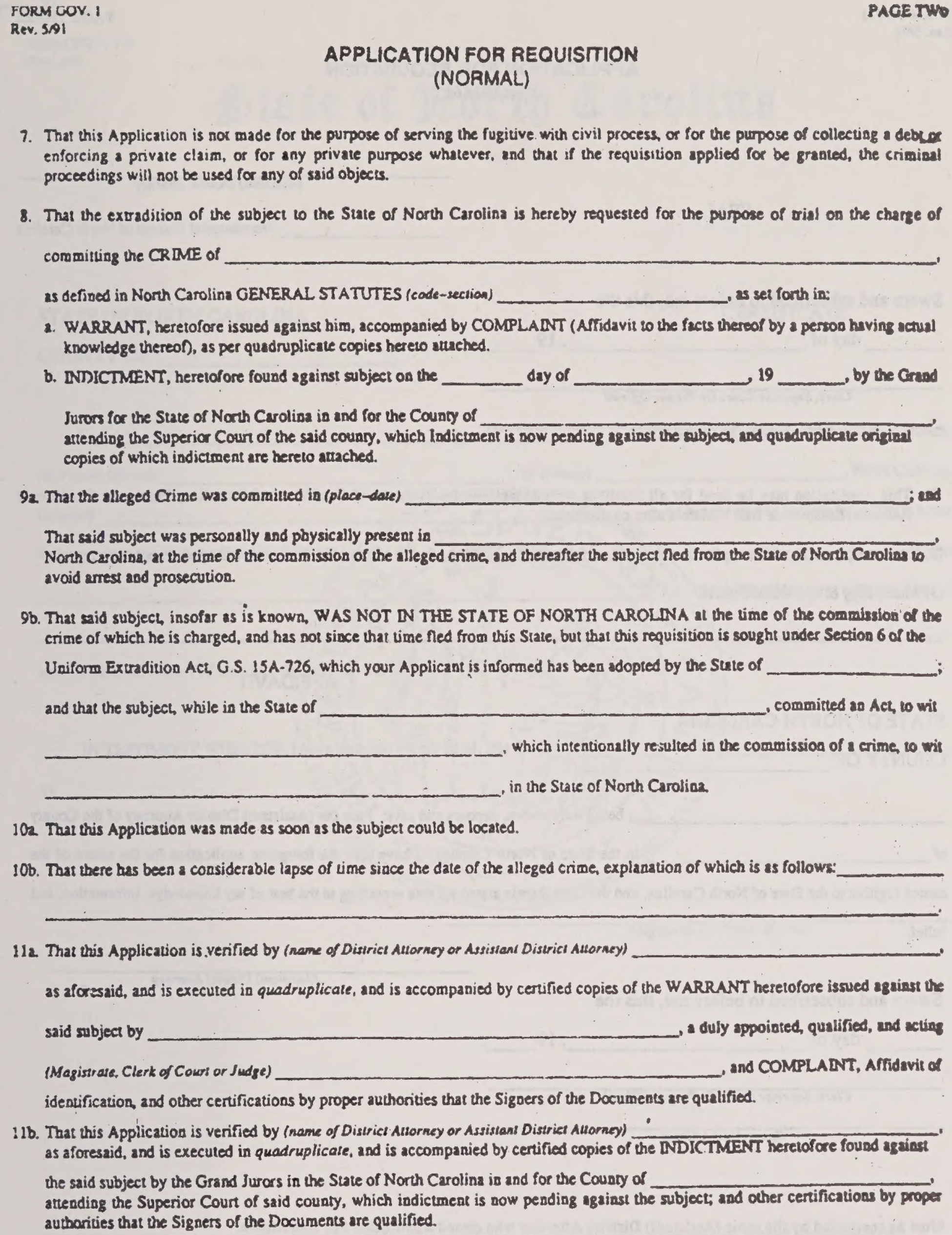
   AND that the person—named as AGENT—is (are) a proper person—and that he (they) has (have) no private interest in the arrest and conviction of the subject.

5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.

5b. That, there HAS BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged: *(date of prior application)* ____________________ *(explanation of reasons for present request for requisition)* ____________________.

6. That the subject is now under ARREST in the State of ____________________, and in the custody of *(name and address)* ____________________, and the grounds for such belief is as follows: ____________________, (and has been released on bail from this custody, is scheduled for a hearing in *(place)* ____________________ at *(time)* ____________________, and is presently residing at *(home or business address)* ____________________);

   AND that if the subject is under either civil or criminal arrest in the State of ____________________ for other than the crime herein charged, the facts are unknown to the maker of this Application.



FORM GOV. 1
Rev. 5/91

PAGE TWO

APPLICATION FOR REQUISITION
(NORMAL)

7. That this Application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings will not be used for any of said objects.

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of trial on the charge of

committing the CRIME of ____,

as defined in North Carolina GENERAL STATUTES *(code-section)* ____________________, as set forth in:

a. WARRANT, heretofore issued against him, accompanied by COMPLAINT (Affidavit to the facts thereof by a person having actual knowledge thereof), as per quadruplicate copies hereto attached.

b. INDICTMENT, heretofore found against subject on the ________ day of ________________, 19 ______, by the Grand

Jurors for the State of North Carolina in and for the County of ______________________________________,
attending the Superior Court of the said county, which Indictment is now pending against the subject, and quadruplicate original copies of which indictment are hereto attached.

9a. That the alleged Crime was committed in *(place–date)* ______________________________________; and

That said subject was personally and physically present in ______________________________________,
North Carolina, at the time of the commission of the alleged crime, and thereafter the subject fled from the State of North Carolina to avoid arrest and prosecution.

9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA at the time of the commission of the crime of which he is charged, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the

Uniform Extradition Act, G.S. 15A-726, which your Applicant is informed has been adopted by the State of ________________;

and that the subject, while in the State of ______________________________________, committed an Act, to wit

______________________________________, which intentionally resulted in the commission of a crime, to wit

______________________________________, in the State of North Carolina.

10a. That this Application was made as soon as the subject could be located.

10b. That there has been a considerable lapse of time since the date of the alleged crime, explanation of which is as follows: ____________

____.

11a. That this Application is verified by *(name of District Attorney or Assistant District Attorney)* ______________________________,

as aforesaid, and is executed in *quadruplicate*, and is accompanied by certified copies of the WARRANT heretofore issued against the

said subject by ______________________________________, a duly appointed, qualified, and acting

(Magistrate, Clerk of Court or Judge) ______________________________________, and COMPLAINT, Affidavit of

identification, and other certifications by proper authorities that the Signers of the Documents are qualified.

11b. That this Application is verified by *(name of District Attorney or Assistant District Attorney)* ______________________________,
as aforesaid, and is executed in *quadruplicate*, and is accompanied by certified copies of the INDICTMENT heretofore found against

the said subject by the Grand Jurors in the State of North Carolina in and for the County of ______________________________,
attending the Superior Court of said county, which indictment is now pending against the subject; and other certifications by proper authorities that the Signers of the Documents are qualified.

FORM GOV. 1
Rev. 5/91

PAGE THREE

APPLICATION FOR REQUISITION
(NORMAL)

____
(Assistant) District Attorney

SEAL

______________ **Prosecutorial District of North Carolina**

Sworn and subscribed to before me, this the

_______ day of ______________________, 19_____.

____
Clerk, Superior Court Or Proper Official

____
County And Address

(1) This Application may be used for all fugitives with exception of: **Violators of Conditions of Probation, Parole, or Conditional Releases; Escapees or Bail Violators after confinement.**

(2) Select the (a) or (b) which applies in your case, as follows: 5a. b.; 8a. b.; 9a. b.; 10a. b.; 11a. b. **Leave what you do not use vacant.**

(3) Attach copy of applicable Statute.

AFFIDAVIT

STATE OF NORTH CAROLINA
COUNTY OF ______________

______________________, being duly sworn, deposes and says: I am the (Assistant) District Attorney of the County of ______________________ in the State of North Carolina. I have read the foregoing application for the return of the named fugitive to the State of North Carolina, and the facts therein stated are true according to the best of my knowledge, information, and belief.

____
(Assistant) District Attorney

Sworn and subscribed to before me, this the

_______ day of ______________________, 19_____.

____
Clerk, Superior Court Or Proper Official

____
County And Address

Must be completed by the same (Assistant) District Attorney who signed Application For Requisition.

Form 6.

FORM GOV. 1-A
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA **CERTIFICATE**

COUNTY OF ____________________

I, ______________________________________, **a duly appointed, qualified and acting Magistrate,**

(or Proper Official) ______________________________, **of *(county)*** ____________________, **North Carolina,**

(address) ____, **do hereby certify that the foregoing is a true**

and correct copy of (1) the WARRANT issued by me on ____________________, **19** __________, **against**

____, **charging the said subject with the crime of**

____,

and (2) THE AFFIDAVIT on which the Warrant was issued.

IN TESTIMONY WHEREOF, I have hereunto set my hand, this the __________ **day of** ____________________,

19 __________.

MAY 20, 1775

APRIL 12, 1776

____
Magistrate Or Proper Official

Attach Copy of Warrant, with Complaint or Affidavit on which it was Issued, to each of the four (4) Sets of Application for Requisition at the end of the application by the (Assistant) District Attorney, said Copy being certified as shown above.

Form 7.

FORM GOV. 1-B
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF ____________________

I, ______________________________, Clerk of the Superior Court of ______________ County, North Carolina, a court of record, do hereby certify:

1. That ______________________________ is District Attorney (or Assistant District Attorney) of the ______________________ Prosecutorial District of North Carolina; and that the attached application for the requisition of ____ has been signed by ______________________________, District Attorney (or Assistant District Attorney) as aforesaid;

2. That ______________________________, whose genuine signature appears upon the foregoing certificate and warrant, was a duly appointed, qualified, and acting Magistrate (or Proper Official) of ______________________ County, North Carolina, at the time the said warrant was issued and the certificate executed.

3. That the attached warrant and affidavit, charging ____ with the crime of ____, is a true and correct copy of the warrant issued by the said ____, Magistrate (or Proper Official) as aforesaid, on ______________________, 19 ________, and of the affidavit on which it was issued.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of my said office, this the ______________ day of ______________________, 19 ________.

(Seal of Court)

____
Clerk Of Superior Court

______________________________County, North Carolina

Attach with Warrant Certification.

Form 8.

FORM GOV. 1-C
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF ________________

I, ______________________________, Clerk of the Superior Court of ____________________ County, North Carolina, a court of record, do hereby certify:

1. That ______________________________ is District Attorney (or Assistant District Attorney) of the ____________________ Prosecutorial District of North Carolina; and that the attached application for the requisition of ______________________________ has been signed by ______________________________, District Attorney (or Assistant District Attorney) as aforesaid;

2. That the indictment hereto attached is a true and correct copy of an indictment against ____________________ ____________________, found to be a true bill on the ________ day of ________________, 19 ________, by the grand jurors for the State of North Carolina, in and for the County of ____________________, attending the Superior Court of the said county; that the original indictment is on file in my office; and that the said indictment is now pending against the said ______________________________.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, this ______________ day of ____________________, 19 ________.

____
Clerk Of Superior Court

(Seal of Court) ______________________________ County, North Carolina

____
Address

Attach Copy of Indictment to each of the four (4) sets of Application for Requisition at the end of the application by the (Assistant) District Attorney, said copy being certified as shown above.

Form 9.

FORM GOV. 1-D
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA

COUNTY OF ____________________

CERTIFICATE

I, ______________________________, Resident (Presiding) Judge of the __________ Judicial District of North Carolina, embracing the County of ______________________, do hereby certify that ______________________ ______________________, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of ______________________ County, North Carolina, duly elected and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at ______________________, North Carolina, this the __________ day of ______________________, 19 ______.

____
Resident (Presiding) Judge

______________________ Judicial District of North Carolina

____
Address

STATE OF NORTH CAROLINA

COUNTY OF ____________________

CERTIFICATE

I, ______________________________, Clerk of the Superior Court of ______________________ County, North Carolina, do hereby certify that ______________________________, whose name is subscribed to the foregoing certificate is the Resident (Presiding) Judge of the Superior Court of the __________ Judicial District of North Carolina, embracing the County of ______________________, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at ______________________, North Carolina, this the __________ day of ______________________, 19 ______.

(Seal of Court)

____
Clerk Of Superior Court

______________________ County, North Carolina

____
Address

Attach with Warrant Certification.

Form 10.

FORM GOV. 1-E
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA
COUNTY OF ____________________

CERTIFICATE

I, ______________________________, Resident (Presiding) Judge of the __________ Judicial District of North Carolina, embracing the County of ________________________, do hereby certify that ____________________ ____________________, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of ____________________ County, North Carolina, duly elected and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at ____________________, North Carolina, this the ________ day of ____________________, 19________.

MAY 20, 1775

APRIL 1

____
Resident (Presiding) Judge

______________________________ Judicial District of North Carolina

____
Address

STATE OF NORTH CAROLINA
COUNTY OF ____________________

CERTIFICATE

I, ______________________________, Clerk of the Superior Court of ____________________ County, North Carolina, do hereby certify that ____, whose name is subscribed to the foregoing certificate is the Resident (Presiding) Judge of the Superior Court of the ____________ Judicial District of North Carolina, embracing the County of ____________________, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at ____________________, North Carolina, this the ________ day of ________________________, 19 ________.

____
Clerk Of Superior Court

(Seal of Court)

______________________________ County, North Carolina

____
Address

Attach with Indictment Certification.

Form 11.

FORM GOV. 2
Rev. 5/91

State of North Carolina

APPLICATION FOR REQUISITION
(After Conviction)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, ________________________: **THE UNDERSIGNED,** ***(Department of Correction Official, District Attorney (Assistant District Attorney))*** ________________________, ***(district and address)*** ____,

hereby makes this verified application for the requisition of ________________________, **Fugitive from Justice of this State, charged in the County of** ________________, **with the** ***(crime of escape or violation of terms of parole, conditional release, probation, bail)*** ________________________________, **as defined in North Carolina General Statutes** ________________, **and who is now in the jurisdiction of the State of** ________________________

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. **That the FULL NAME of the person for whom requisition is asked is** ________________________________.

2. **That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina at state or county expense in accordance with N. C. General Statutes 15A-744 et seq.**

3. **That he believes that he has sufficient evidence to secure (a) the conviction of the subject; OR (b) to prove that said subject has violated the conditions of** ____.

4. **That the name of the AGENT—proposed to receive the subject from the proper authorities of the State of** ________________ **and bring said subject to the State of North Carolina for (a) trial OR (b) hearing is (are)** ***(name and address)*** ________________
____;

AND that the person—named as AGENT—is (are) a proper person—and that he (they) has (have) no private interest in the arrest and disposition of said fugitive.

5a. **That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.**

5b. **That, there HAS BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged:** ***(date of prior application)*** ________________________________ ***(explanation of reasons for present request for requisition)***
____.

FORM GOV. 2
Rev. 5/91

PAGE TWO

APPLICATION FOR REQUISITION
(After Conviction)

6. That the subject is now under ARREST in the State of ______________________, and in the custody of

(name and address) ______________________,

and the grounds for such belief is as follows: ______________________,

(and has been released on bail from this custody, is scheduled for a hearing in *(place)* ______________________

at *(time)* __________, **and is presently residing at *(home or business address)*** ______________________

______________________**); AND that if the subject is under either civil or criminal arrest in the State of**

______________________ **for other than the crime herein charged, the facts are unknown to the maker of this Application.**

7. That this Application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings, or hearing, will not be used for any of said objects.

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of (a) TRIAL or (b) HEARING on

the charge of (a) *(escape)* ______________________

OR for violation of the conditions of (b) *(parole, conditional release, probation, bail)* ______________________,

as defined in North Carolina General Statutes ______________, **and as set forth in, and attached in quadruplicate hereto:**

(a) Warrant and Affidavit for Escape (District Attorney or Assistant District Attorney), dated ______________; **OR Certified Statement of Officer from whose custody Fugitive escaped (Department of Correction), dated** ______________;

(b) Probation Judgment imposed and dated ______________________;

(c) Conditional Release imposed and dated ______________________;

(d) Certificate of Parole dated ______________________;

(e) Allowance of Bail dated ______________________;

(details (escape date; revocation date)) ______________________;

AFTER HAVING BEEN CONVICTED OF THE FOLLOWING CRIME *(Show name of crime; N.C.G.S. citation; date; place; judgment; sentence)*:

____

____

____

____

____

____

____

FORM GOV. 2
Rev. 5/91

PAGE THREE

APPLICATION FOR REQUISITION
(After Conviction)

9a. That said subject was personally and physically present in *(county or city)* ______________________________, North Carolina, at the time of the commission of the alleged crime or violation; and thereafter, the subject fled from the State of North Carolina to avoid arrest and prosecution.

9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA, at the time of the alleged VIOLATION, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G.S. 15A-726, which your Applicant is informed has been adopted by the State of ______________________________; and that the subject, while in the State of ______________________________, committed an Act, to wit: ______________________________

______________________________, which intentionally resulted in the violation of

______________________________ in the State of North Carolina.

10a. That this Application was made as soon as the subject could be located.

10b. That there has been a considerable lapse of time since the date of the alleged crime or charge, explanation of which is as follows:

____

____

______________________________.

11. That this Application is verified, as aforesaid; is executed in quadruplicate; and is accompanied by the following certified documents:

(a) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence upon which subject was being held at time of escape or violation of conditions of bail. In addition, District Attorney or Assistant District Attorney: Warrant and Affidavit for Escape; Department of Correction: Statement of Officer from whose custody fugitive escaped, and other records, if available, certified to by the Division of Prisons of the Department of Correction. (Fingerprint, FBI Transcript) – **Escapees; Bail Violators.**

(b) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence; (certified to by Clerk of Court). (And other records, certified to by the Division of Prisons of the Department of Correction, such as: Fingerprints, FBI Transcript; and Other Records, certified to by the Parole Commission, such as: (a) Certificate of Parole and Revocation of Parole; (b) Certificate of Conditional Release and Revocation of Conditional Release.) – **Violators of Parole and Conditional Release.**

(c) Warrant and Affidavit or Indictment; Organization of Court; Probation Judgment; Probation Violation Report and Order for Arrest. – **Violators of Probation.**

SEAL

____
Name And Title Of Proper Official

Sworn and subscribed to before me, this the

________ day of ______________________________, 19______.

____
Clerk, Superior Court Or Proper Official

____
County And Address

FORM GOV. 2
Rev. 5/91

PAGE FOUR

APPLICATION FOR REQUISITION
(After Conviction)

(1) This Application may be used for: Escapees from the Division of Prisons of the Department of Correction, G. S. 148-45; Escapees, County and Municipal, G. S. 14-256; Violators of conditions of: Probation, G. S. 15A-1343; Parole, G.S. 15A-1374; or violation of conditions of bail, all of which have been committed after conviction or confinement.

(2) Select the appropriate subsection which applies in Sections 3, 4, 5, 8, 9, 10, and 11.

(3) Attach copy of applicable Statute for Escape or Violation.

AFFIDAVIT

STATE OF NORTH CAROLINA

COUNTY OF ____________________

____, **being duly sworn, deposes and says: I am**

(proper title) ______________________. **I have read the foregoing application for the return of the named fugitive to the State of North Carolina, and the facts therein stated are true according to the best of my knowledge, information, and belief.**

____
Name And Title Of Proper Official

Sworn and subscribed to before me, this the

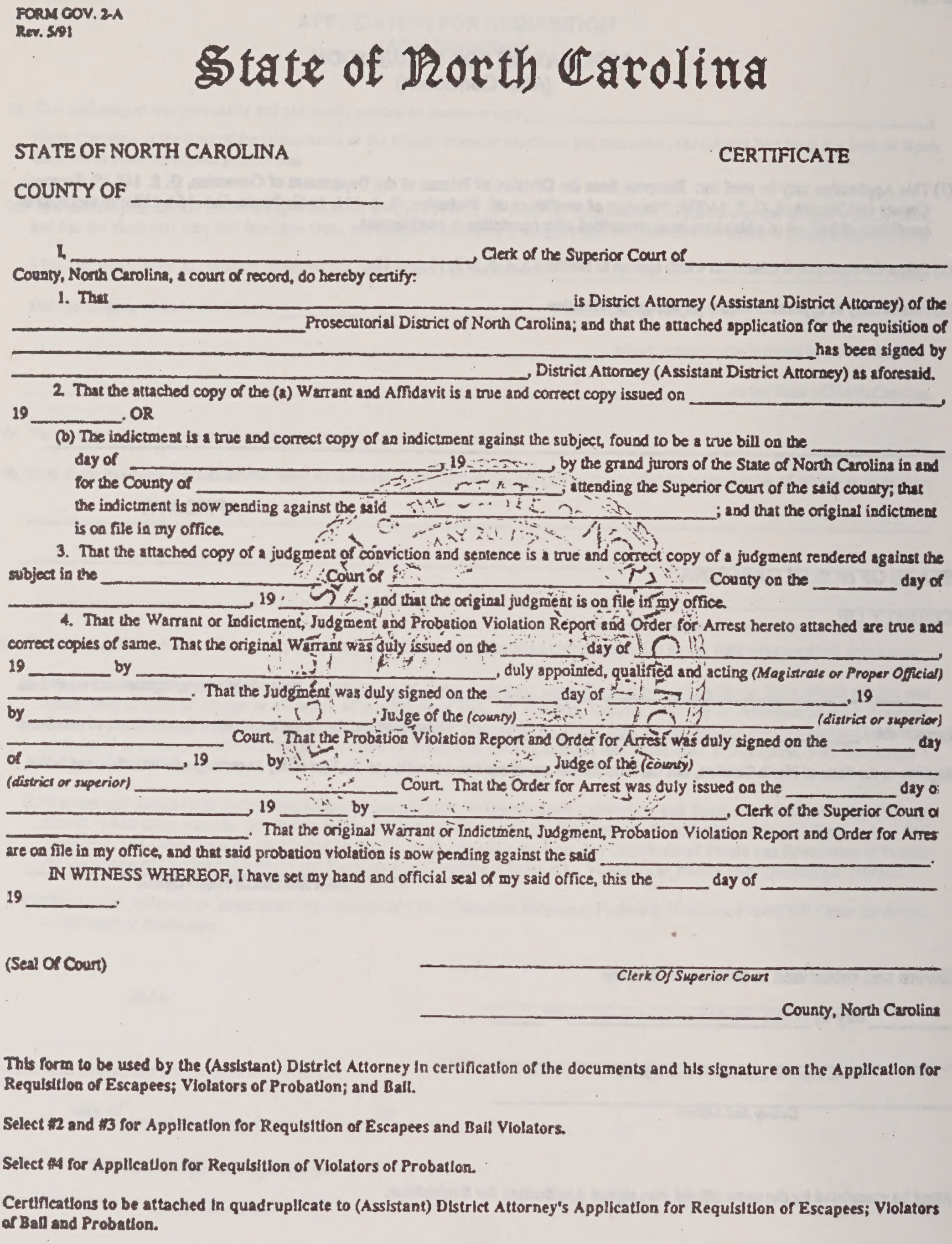
________ **day of** ____________________, **19**_____.

____
Clerk, Superior Court Or Proper Official

____
County And Address

Must be completed by the same official who signed Application for Requisition.

Form 12.



FORM GOV. 2-A
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF ____________________

I, ______________________________, Clerk of the Superior Court of ____________________ County, North Carolina, a court of record, do hereby certify:

1. That ______________________________ is District Attorney (Assistant District Attorney) of the ____________________ Prosecutorial District of North Carolina; and that the attached application for the requisition of ______________________________ has been signed by ______________________________, District Attorney (Assistant District Attorney) as aforesaid.

2. That the attached copy of the (a) Warrant and Affidavit is a true and correct copy issued on ____________________, 19 __________. OR

(b) The indictment is a true and correct copy of an indictment against the subject, found to be a true bill on the __________ day of ____________________, 19 __________, by the grand jurors of the State of North Carolina in and for the County of ____________________, attending the Superior Court of the said county; that the indictment is now pending against the said ____________________; and that the original indictment is on file in my office.

3. That the attached copy of a judgment of conviction and sentence is a true and correct copy of a judgment rendered against the subject in the ____________________ Court of ____________________ County on the __________ day of ____________________, 19 __________; and that the original judgment is on file in my office.

4. That the Warrant or Indictment, Judgment and Probation Violation Report and Order for Arrest hereto attached are true and correct copies of same. That the original Warrant was duly issued on the __________ day of ____________________, 19 __________ by ____________________, duly appointed, qualified and acting *(Magistrate or Proper Official)* ____________________. That the Judgment was duly signed on the __________ day of ____________________, 19 __________ by ____________________, Judge of the *(county)* ____________________ *(district or superior)* ____________________ Court. That the Probation Violation Report and Order for Arrest was duly signed on the __________ day of ____________________, 19 __________ by ____________________, Judge of the *(county)* ____________________ *(district or superior)* ____________________ Court. That the Order for Arrest was duly issued on the __________ day of ____________________, 19 __________ by ____________________, Clerk of the Superior Court of ____________________. That the original Warrant or Indictment, Judgment, Probation Violation Report and Order for Arrest are on file in my office, and that said probation violation is now pending against the said ____________________.

IN WITNESS WHEREOF, I have set my hand and official seal of my said office, this the __________ day of ____________________, 19 __________.

(Seal Of Court)

____
Clerk Of Superior Court

______________________________ County, North Carolina

This form to be used by the (Assistant) District Attorney in certification of the documents and his signature on the Application for Requisition of Escapees; Violators of Probation; and Bail.

Select #2 and #3 for Application for Requisition of Escapees and Bail Violators.

Select #4 for Application for Requisition of Violators of Probation.

Certifications to be attached in quadruplicate to (Assistant) District Attorney's Application for Requisition of Escapees; Violators of Bail and Probation.

Form 13.

FORM GOV. 2-B
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF ____________________

I, ______________________________, Resident (Presiding) Judge of the __________ Judicial District of North Carolina, embracing the County of ______________________________, do hereby certify that ______________________ ______________________, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of ____________________ County, North Carolina, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at ______________________________, North Carolina, this the ________ day of ______________________________, 19 __________.

MAY 20, 1775

____
Resident (Presiding) Judge

______________________________ Judicial District of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF ____________________

I, ______________________________, Clerk of the Superior Court of ____________________ County, North Carolina, do hereby certify that ______________________________, whose name is subscribed to the foregoing certificate is the Resident (Presiding) Judge of the Superior Court of the ______________ Judicial District of North Carolina, embracing the County of ______________________, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at ______________________________, North Carolina, this the ________ day of ______________________________, 19 ________.

____
Clerk Of Superior Court

(Seal of Court)

______________________________ County, North Carolina

Certifications to be attached to (Assistant) District Attorney's Application for Requisition for return of Escapees; Violators, Bail and Probation in quadruplicate.

Form 14.

FORM GOV. 2-F
Rev. 5/91

State of North Carolina

STATE OF NORTH CAROLINA **AFFIDAVIT**

COUNTY OF ____________________

This day ____, personally appeared before me, ____, Clerk of the Superior Court of ______________________________ County, North Carolina, and after first being duly sworn, stated that in the ______________________ Court for the County (City) of ______________________, in the State of North Carolina, on the ________ day of ______________________, 19 ________, the subject ____, was convicted of ____, and was sentenced to confinement in the ____, for a term of ______________________, as shown by certified copy of the indictment (or warrant) and judgment attached; that the said subject was accordingly confined in the ____ from which he escaped on the ________ day of ______________________, 19________, without having completed his sentence; and that the said subject is now in the State of ______________________ and in the custody of ____.

____
Name And Official Title Of Officer Making Affidavit

Sworn and subscribed to before me, this the

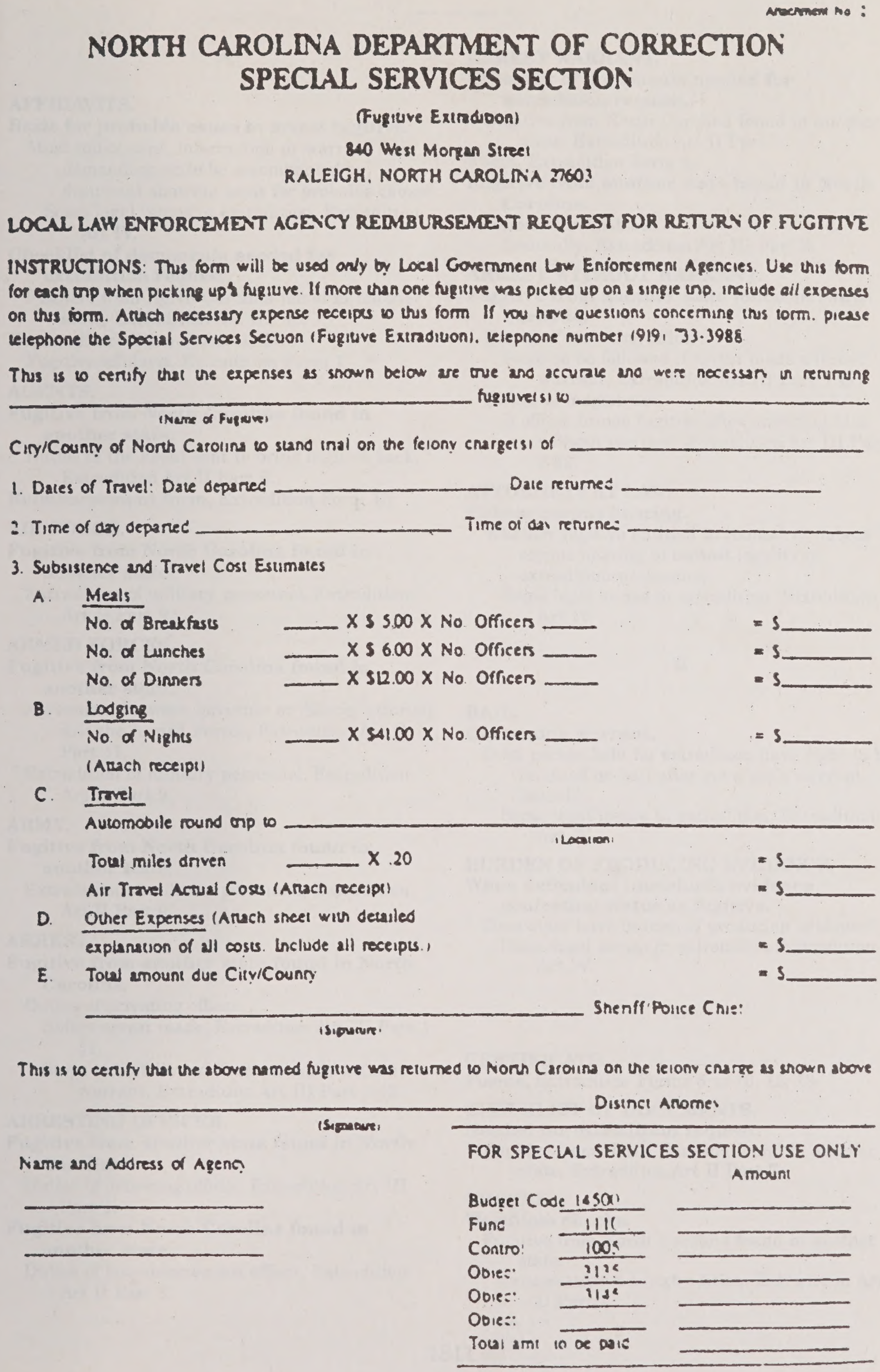
________ day of ______________________, 19_____.

____
Clerk Of Superior Court

______________________County, North Carolina

Form of affidavit to be made in quadruplicate by (Assistant) District Attorney or by officer from whose custody the prisoner escaped.

Form 15.



Attachment No.:

NORTH CAROLINA DEPARTMENT OF CORRECTION
SPECIAL SERVICES SECTION

(Fugitive Extradition)

840 West Morgan Street
RALEIGH, NORTH CAROLINA 27603

LOCAL LAW ENFORCEMENT AGENCY REIMBURSEMENT REQUEST FOR RETURN OF FUGITIVE

INSTRUCTIONS: This form will be used *only* by Local Government Law Enforcement Agencies. Use this form for each trip when picking up a fugitive. If more than one fugitive was picked up on a single trip, include *all* expenses on this form. Attach necessary expense receipts to this form. If you have questions concerning this form, please telephone the Special Services Section (Fugitive Extradition), telephone number (919) 733-3988.

This is to certify that the expenses as shown below are true and accurate and were necessary in returning ______________________ fugitive(s) to ______________________
(Name of Fugitive)

City/County of North Carolina to stand trial on the felony charge(s) of ______________________

1. Dates of Travel: Date departed ______________ Date returned ______________

2. Time of day departed ______________ Time of day returned ______________

3. Subsistence and Travel Cost Estimates

A. Meals

No. of Breakfasts ______ X $ 5.00 X No. Officers ______ = $______

No. of Lunches ______ X $ 6.00 X No. Officers ______ = $______

No. of Dinners ______ X $12.00 X No. Officers ______ = $______

B. Lodging

No. of Nights ______ X $41.00 X No. Officers ______ = $______

(Attach receipt)

C. Travel

Automobile round trip to ______________________
(Location)

Total miles driven ______ X .20 = $______

Air Travel Actual Costs (Attach receipt) = $______

D. Other Expenses (Attach sheet with detailed explanation of all costs. Include all receipts.) = $______

E. Total amount due City/County = $______

______________________ Sheriff/Police Chief
(Signature)

This is to certify that the above named fugitive was returned to North Carolina on the felony charge as shown above

______________________ District Attorney
(Signature)

Name and Address of Agency

____

____

____

FOR SPECIAL SERVICES SECTION USE ONLY

		Amount
Budget Code	14500	______
Fund	1110	______
Control	1005	______
Object	3135	______
Object	3145	______
Object	______	______
Total amt. to be paid		______

Index to Extradition Manual

A

AFFIDAVITS.
Basis for probable cause to arrest fugitive.
  Must indictment, information or warrant from demanding state be accompanied by document showing basis for probable cause?.
    Some legal issues in extradition, Extradition Art IV.
Checklist of documents needed for extradition request.
  Fugitive from North Carolina found in another state, Extradition Art II Part 7.
Forms, Extradition Forms 1, 14.
  Fugitive affidavit, Extradition Form 1.

AGENTS.
Fugitive from North Carolina found in another state.
  Duties of the agent sent to bring fugitive back, Extradition Art II Part 6.
Reimbursement form, Extradition Form 15.

AIR FORCE.
Fugitive from North Carolina found in another state.
  Extradition of military personnel, Extradition Art II Part 9.

ARMED FORCES.
Fugitive from North Carolina found in another state.
  Agreement between governor or district attorney and the Armed Forces, Extradition Art II Part 11.
  Extradition of military personnel, Extradition Art II Part 9.

ARMY.
Fugitive from North Carolina found in another state.
  Extradition of military personnel, Extradition Art II Part 9.

ARREST.
Fugitive from another state found in North Carolina.
  Duties of arresting officer.
    Before arrest made, Extradition Art III Part 1 §1.
    Steps to be followed if arrest made without warrant, Extradition Art III Part 1 §2.

ARRESTING OFFICER.
Fugitive from another state found in North Carolina.
  Duties of arresting officer, Extradition Art III Part 1.
Fugitive from North Carolina found in another state.
  Duties of law enforcement officer, Extradition Art II Part 3.

ARREST WARRANT.
Checklist of documents needed for extradition request.
  Fugitive from North Carolina found in another state, Extradition Art II Part 7.
Form, Extradition Form 2.
Fugitive from another state found in North Carolina.
  Duties of magistrate.
    Generally, Extradition Art III Part 2.

ARREST WITHOUT WARRANT.
Fugitive from another state found in North Carolina.
  Duties of arresting officer.
    Steps to be followed if arrest made without warrant, Extradition Art III Part 1 §2.
  Duties of magistrate.
    If officer brings fugitive after arresting him without warrant, Extradition Art III Part 2 §2.

ATTORNEYS AT LAW.
Habeas corpus hearing.
  Whether fugitive entitled to counsel at habeas corpus hearing to contest legality of extradition proceeding.
    Some legal issues in extradition, Extradition Art IV.

B

BAIL.
Governor's warrant.
  Does person held for extradition have right to be released on bail after governor's warrant issued?.
    Some legal issues in extradition, Extradition Art IV.

BURDEN OF PRODUCING EVIDENCE.
When defendant introduces evidence contesting status as fugitive.
  Does state have burden of producing evidence?.
    Some legal issues in extradition, Extradition Art IV.

C

CERTIFICATE.
Forms, Extradition Forms 6 to 10, 12, 13.

CHECKLIST OF DOCUMENTS.
Needed for extradition request.
  Fugitive from North Carolina found in another state, Extradition Art II Part 7.

CHECKS.
Worthless checks.
  Fugitive from North Carolina found in another state.
    Crimes subject to extradition, Extradition Art II Part 1.

CHILD CUSTODY.
Fugitive from North Carolina found in another state.
  Crimes subject to extradition, Extradition Art II Part 1.

CLERKS OF COURT.
Fugitive from another state found in North Carolina.
  Duties of the clerk of court, Extradition Art III Part 3.
Fugitive from North Carolina found in another state.
  Duties of the clerk of court, Extradition Art II Part 5.

CONTESTING STATUS AS FUGITIVE.
Does state have burden of producing evidence if defendant introduces evidence?.
  Some legal issues in extradition, Extradition Art IV.

COUNSEL.
Habeas corpus hearing.
  Whether fugitive entitled to counsel at hearing to contest legality of extradition proceeding.
    Some legal issues in extradition, Extradition Art IV.

CRIMES SUBJECT TO EXTRADITION.
Fugitive from North Carolina found in another state.
  Child custody, Extradition Art II Part 1.
  Generally, Extradition Art II Part 1.
  Nonsupport, Extradition Art II Part 1.
  Removing mortgaged property, Extradition Art II Part 1.
  Worthless checks, Extradition Art II Part 1.

D

DETAINERS.
Interstate agreement on detainers, Extradition Art V.

DISTRICT ATTORNEYS.
Fugitive from another state found in North Carolina.
  Duties of the district attorney, Extradition Art III Part 4.
Fugitive from North Carolina found in another state.
  Agreement between governor or district attorney and the Armed Forces, Extradition Art II Part 11.
  Checklist of documents needed for extradition request.
    Certification of district attorney, Extradition Art II Part 7.
  Duties of the district attorney, Extradition Art II Part 4.

DISTRICT COURT JUDGES.
Fugitive from another state found in North Carolina.
  Duties of the district court judge, Extradition Art III Part 5.

DISTRICT OF COLUMBIA.
Fugitive from North Carolina found in another state.
  Other special cases, Extradition Art II Part 10.

DOCUMENTS.
Checklist of documents needed for extradition request.
  Fugitive from North Carolina found in another state, Extradition Art II Part 7.

E

ESCAPE.
Fugitive from North Carolina found in another state.
  When fugitive is person who has escaped from custody, Extradition Art II Part 8.

EXPENSES.
Reimbursement request for return of fugitive.
  Local law enforcement agency reimbursement request.
    Form, Extradition Form 15.

F

FINGERPRINTS.
Checklist of documents needed for extradition request.
  Fugitive from North Carolina found in another state, Extradition Art II Part 7.

FORMS.
Affidavits, Extradition Forms 1, 14.
  Fugitive affidavit, Extradition Form 1.
Application for requisition (after conviction), Extradition Form 11.
Application for requisition (normal), Extradition Form 5.
Arrest warrant, Extradition Form 2.
Certificates, Extradition Forms 6 to 10, 12, 13.
Magistrates.
  Order of magistrate for fugitive, Extradition Form 3.
Reimbursement request for return of fugitive.
  Local law enforcement agency for reimbursement request, Extradition Form 15.
Waiver of extradition, Extradition Form 4.

FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA.
Arresting officer.
  Duties, Extradition Art III Part 1.
    If fugitive has not yet been charged in other state, Extradition Art III Part 1 §5.
    If warrant to be obtained before making arrest, Extradition Art III Part 1 §4.
Clerk of court.
  Duties.
    If fugitive refuses to waive extradition, Extradition Art III Part 3 §3.
    If fugitive waives extradition in district court, Extradition Art III Part 3 §2.
    When fugitive first arrested, Extradition Art III Part 3 §1.
District attorney.
  Duties.
    If fugitive also charged with crime in North Carolina, Extradition Art III Part 4 §5.
    When fugitive appears in district court at end of 30 days, Extradition Art III Part 4 §4.

FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA —Cont'd
District attorney —Cont'd
  Duties —Cont'd
    When fugitive applies for writ of habeas corpus, Extradition Art III Part 4 §6.
    When fugitive first arrested, Extradition Art III Part 4 §1.
    When governor's warrant issued, Extradition Art III Part 4 §3.
District court judge.
  Duties.
    First appearance before a district court judge, Extradition Art III Part 5 §2.
    If fugitive wishes to waive extradition, Extradition Art III Part 5 §5.
    When fugitive first arrested, Extradition Art III Part 5 §1.
    When fugitive returns to court after 30 days, Extradition Art III Part 5 §3.
    When governor's warrant issued, Extradition Art III Part 5 §4.
Flow chart of proceedings, Extradition Art III Part 1 §3.
Magistrate.
  Duties.
    If fugitive has been arrested on governor's warrant, Extradition Art III Part 2 §4.
    If officer arresting fugitive on basis of warrant and is now bringing him before you, Extradition Art III Part 2 §3.
    If officer brings in fugitive after arresting him without warrant, Extradition Art III Part 2 §2.
    If officer comes to you before arresting fugitive, Extradition Art III Part 2 §1.
    When fugitive has not yet been charged with crime in other state, Extradition Art III Part 2 §5.
Superior court judge.
  Duties.
    If fugitive wishes to waive extradition, Extradition Art III Part 6 §3.
    When fugitive applies for writ of habeas corpus, Extradition Art III Part 6 §2.
    When fugitive first arrested, Extradition Art III Part 6 §1.

FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE.
Agents.
  Duties of the agent sent to bring fugitive back, Extradition Art II Part 6.
Agreement between governor or district attorney and the Armed Forces, Extradition Art II Part 11.
Checklist of documents needed for extradition request.
  Affidavits supporting warrant, Extradition Art II Part 7.
  Application for requisition, Extradition Art II Part 7.
  Arrest warrant, Extradition Art II Part 7.
  Certification of district attorney, Extradition Art II Part 7.
  Certification of documents, Extradition Art II Part 7.
  Certifications of office, Extradition Art II Part 7.
  Fingerprints of fugitive, Extradition Art II Part 7.

FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE —Cont'd
Checklist of documents needed for extradition request —Cont'd
  Indictment, Extradition Art II Part 7.
  Photograph of fugitive, Extradition Art II Part 7.
  Special affidavits, Extradition Art II Part 7.
  Statute fugitive is charged with violating, Extradition Art II Part 7.
Clerks of court.
  Duties of the clerk of court, Extradition Art II Part 5.
Crimes subject to extradition, Extradition Art II Part 1.
District attorney.
  Checklist of documents needed for extradition request.
    Certification of district attorney, Extradition Art II Part 7.
  Decision whether extradition should be sought, Extradition Art II Part 4.
  Duties of the district attorney, Extradition Art II Part 4.
  Preparation of proper papers for extradition, Extradition Art II Part 4.
  Selection of agents to go to other state, Extradition Art II Part 4.
District of Columbia.
  Fugitives in the District of Columbia, Extradition Art II Part 10.
Escape from custody.
  When fugitive is person who has escaped from custody, Extradition Art II Part 8.
Flow chart of proceedings, Extradition Art II Part 2.
International extradition.
  Fugitives out of the United States, Extradition Art II Part 10.
Law enforcement officer.
  District attorney meeting, Extradition Art II Part 3.
  Duties of officer, Extradition Art II Part 3.
  Obtaining warrant if necessary, Extradition Art II Part 3.
  Record of fugitive to be checked, Extradition Art II Part 3.
  Review of evidence in case, Extradition Art II Part 3.
Military personnel.
  Extradition of military personnel, Extradition Art II Part 9.
Probation or parole.
  When fugitive has violated probation or parole, Extradition Art II Part 8.
Renewal of application.
  Other special cases, Extradition Art II Part 10.
Special cases.
  Other special cases, Extradition Art II Part 10.
United States possessions.
  Fugitives in United States possessions, Extradition Art II Part 10.

G

GOVERNOR.
Fugitive from North Carolina found in another state.
  Agreement between governor or district attorney and the Armed Forces, Extradition Art II Part 11.

GOVERNOR'S WARRANT.
Bail.
Does person held for extradition have right to be released on bail after governor's warrant issued?.
Some legal issues in extradition, Extradition Art IV.
Fugitive from another state found in North Carolina.
Duties of magistrate.
If fugitive has been arrested on governor's warrant, Extradition Art III Part 2 §4.
Duties of the district attorney.
When governor's warrant issued, Extradition Art III Part 4 §3.
Duties of the district court judge.
When governor's warrant issued, Extradition Art III Part 5 §4.
Habeas corpus.
Grounds on which fugitive may attack governor's warrant in habeas corpus proceeding.
Some legal issues in extradition, Extradition Art IV.
Standard of proof required for fugitive who is attacking governor's warrant in habeas corpus proceeding.
Some legal issues in extradition, Extradition Art IV.
Hearings.
Whether fugitive entitled to hearing before governor's warrant can be issued.
Some legal issues in extradition, Extradition Art IV.

H

HABEAS CORPUS.
Fugitive from another state found in North Carolina.
Duties of the district attorney, Extradition Art III Part 4 §4.
When fugitive applies for writ of habeas corpus, Extradition Art III Part 4 §4.
Duties of the superior court judge.
When fugitive applies for writ of habeas corpus, Extradition Art III Part 6 §2.
Governor's warrant.
Grounds on which fugitive may attack governor's warrant in habeas corpus proceeding.
Some legal issues in extradition, Extradition Art IV.
Right to counsel.
Whether fugitive entitled to counsel at habeas corpus hearing to contest legality of extradition proceeding.
Some legal issues in extradition, Extradition Art IV.

HEARINGS.
Governor's warrant.
Whether fugitive entitled to hearing before governor's warrant can be issued.
Some legal issues in extradition, Extradition Art IV.

I

INDICTMENT.
Checklist of documents needed for extradition request.
Fugitive from North Carolina found in another state, Extradition Art II Part 7.
Probable cause to arrest fugitive.
Must indictment from demanding state be accompanied by document showing basis for probable cause?.
Some legal issues in extradition, Extradition Art IV.

INFORMATION.
Probable cause to arrest fugitive.
Must information from demanding state be accompanied by document showing basis for probable cause?.
Some legal issues in extradition, Extradition Art IV.

INTERNATIONAL EXTRADITION.
Fugitive from North Carolina found in another state.
Fugitives out of the United States, Extradition Art II Part 10.

INTERSTATE AGREEMENT ON DETAINERS, Extradition Art V.
Procedures established, Extradition Art V.

INTRODUCTION.
General provisions relating to extradition, Extradition Art I.

ISSUES IN EXTRADITION.
Some legal issues, Extradition Art IV.

J

JUDGES.
District court judge.
Fugitive from another state found in North Carolina.
Duties of the district court judge, Extradition Art III Part 5.
Superior court judge.
Fugitive from another state found in North Carolina.
Duties of the superior court judge, Extradition Art III Part 6.

JUVENILES.
Return of juveniles, Extradition Art VI.

L

LAW ENFORCEMENT OFFICERS.
Fugitive from another state found in North Carolina.
Duties of arresting officer, Extradition Art III Part 1.
Fugitive from North Carolina found in another state.
Duties of law enforcement officer, Extradition Art II Part 3.

LEGAL ISSUES IN EXTRADITION.
Some legal issues, Extradition Art IV.

M

MAGISTRATES.
Forms.
Order of magistrate for fugitive, Extradition Form 3.
Fugitive from another state found in North Carolina.
Duties of magistrate, Extradition Art III Part 2.

MARINE CORPS.
Fugitive from North Carolina found in another state.
Extradition of military personnel, Extradition Art II Part 9.

MILITARY PERSONNEL.
Fugitive from North Carolina found in another state.
Extradition of military personnel, Extradition Art II Part 9.

MORTGAGED PROPERTY.
Removing mortgaged property.
Fugitive from North Carolina found in another state.
Crimes subject to extradition, Extradition Art II Part 1.

N

NAVY.
Fugitive from North Carolina found in another state.
Extradition of military personnel, Extradition Art II Part 9.

NONSUPPORT.
Fugitive from North Carolina found in another state.
Crimes subject to extradition, Extradition Art II Part 1.

O

ORDERS.
Magistrate's order for fugitive.
Form, Extradition Form 3.

OVERVIEW OF EXTRADITION PROCESS.
General provisions relating to extradition, Extradition Art I.

P

PHOTOGRAPHS.
Checklist of documents needed for extradition request.
Fugitive from North Carolina found in another state, Extradition Art II Part 7.

PROBABLE CAUSE.
Document showing basis for probable cause to arrest fugitive.
Must indictment, information or warrant from demanding state be accompanied by affidavits or other documents showing basis?.
Some legal issues in extradition, Extradition Art IV.

PROBATION OR PAROLE.
Fugitive from North Carolina found in another state.
When fugitive has violated probation or parole, Extradition Art II Part 8.

PROCEDURES FOR EXTRADITION.
General provisions relating to extradition, Extradition Art I.

R

RIGHT TO COUNSEL.
Habeas corpus.
Whether fugitive entitled to counsel at habeas corpus hearing to contest legality of extradition proceeding.
Some legal issues in extradition, Extradition Art IV.

S

STATUTES.
Checklist of documents needed for extradition request.
Fugitive from North Carolina found in another state.
Copy of statute fugitive is charged with violating to be included, Extradition Art II Part 7.

SUPERIOR COURT JUDGE.
Fugitive from another state found in North Carolina.
Duties of the superior court judge, Extradition Art III Part 6.

U

UNITED STATES TERRITORIAL POSSESSIONS.
Fugitive from another state found in North Carolina.
Duties of the clerk of court, Extradition Art III Part 3.
Duties of the district court judge.
If fugitive wishes to waive extradition, Extradition Art III Part 5 §5.
Duties of the superior court judge.
If fugitive wishes to waive extradition, Extradition Art III Part 6 §3.
Fugitive from North Carolina found in another state.
Other special cases, Extradition Art II Part 10.

W

WAIVER OF EXTRADITION.
Form, Extradition Form 4.

WARRANTLESS ARREST.
Fugitive from another state found in North Carolina.
Duties of arresting officer.
Steps to be followed if arrest made without warrant, Extradition Art III Part 1 §2.

WARRANTS.
Arrest warrant.
See ARREST WARRANT.

WARRANTS —Cont'd
Governor's warrant.
See GOVERNOR'S WARRANT.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 2008

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Annotated Rules of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER
Attorney General of North Carolina

State Library Of North Carolina
Raleigh, N.C.

STATE LIBRARY OF NORTH CAROLINA
3 3091 00709 2265